IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,585 & 85,801

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

Due 1-31-97

COMMENTS OF THE FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE AND REQUEST FOR EXTENSION OF TIME

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

During the full committee meeting held on January 24, 1996, the committee considered the majority recommendation of the subcommittee (attached as Exhibit A and made a part hereof by reference) and the minority subcommittee recommendation (attached as Exhibit B and made a part hereof by reference). After protracted discussion and vigorous debate of the many issues raised by the proposed amendment, the committee voted (29 to 5) to table the matter for further subcommittee and committee discussion.

The Florida Bar Criminal Procedure Rules Committee respectfully requests this honorable Court to allow further time, up to and including July 11, 1997, within which the committee may formulate its final comments on the proposed amendment to Fla.R.Crim.P. 3.220(p)(3).

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

Respectfully submitted,

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Honorable Dedee S. Costello
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FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE

SUBCOMMITTEE ACTION REPORT

TO: JUDGE DEDEE S. COSTELLD, CHAIR

FROM: ANN E. FINNELL, SUECOMMITTEE III CHAIR

DATE: December 6, 1996

Please be advised that Subcommittee III conducted *two* meetings on October 17, 1996, via conference call and on October 26, 1996, in person *to discuss* Docket #96-40-III.

Subcommittee attendance was as follows on October 17, 1996:

	Yes	No
Ann Finnell	X	
Judge Aaron Bowden	X	
Joe D'Alessandro		X
Susan Hugentugler	X	
Raymond Rafool	X	
Lewis Buzzell	X	
Judge Eaton	X	
Stephen Everhart	X	

Additional participants in the meeting included: Marshall Hall for Joe D'Alessandro and Jerry Latimer.

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

EXHIBIT A

Subcommittee attendance was as follows on October 26, 1996:

	Yes	No
Ann Finnell	X	
Judge Aaron Bowden	X	
Joe D'Alessandro		X
Susan Hugentugler	X	
Raymond Rafool		X
Lewis Buzzell	X	
Judge Eaton	X	
Stephen Everhart		X

Additional participants in *the* meeting included: Jerry Latimer.

The subcommittee drafted a proposed new Rule 3.221: Procedures Relating to the Death Penalty.

Subparagraph (a) of the proposed new rule was drafted as a result of Judge Eaton's suggestion that the Supreme Court eventually wanted some mechanism to allow trial judges the ability to prevent unwarranted death sentences from clogging the Court's docket.

A general consensus was reached that it made more sense to try to fashion a rule *to* deal with both problems contemporaneously rather than separately.

Mr. Buzzell pointed out that the procedures *set* forth in proposed subparagraph (a) could only be utilized when either the State had no aggravating circumstances or the State had only one aggravating circumstance (or two that merged into one) and the defendant had significant mitigation.

Ms. Hugentugler pointed out that in *order* for subparagraph (a) *to* be adopted by the Supreme Court, the Court would have to recede from its holding in State v. Bloom, 497 So.2d 2 (Fla. 1986), which prohibits a trial judge from making a pretrial determination that death was not an appropriate sentence and proceeding with the trial as a non-capital case.

Since Bloom, the Court in Allen v. *State, 636* So.2d 494 (Fla. 1994) held that the death penalty cannot be imposed on a person who *is* under the age *of* sixteen. Technically, if the State

were to attempt to prosecute someone under the age of sixteen as a death case, there would be no vehicle by which a trial court could direct that the case proceed as a a non-capital case.

Despite the problems attendant with the Bloom decision, a majority of the subcommittee felt it would be best to write a proposal far submission to the full committee in light of Judge Eaton's suggestion.

Additionally, a majority of the subcommittee felt that subparagraph (a) should be triggered by Defendant only, since a pretrial disclosure of mitigating circumstances could impact upon Defendant's privilege against self-incrimination.

Subparagraph (b) is substantially the proposal set forth by the Supreme Court. However, this disclosure is not made pretrial and is triggered only upon conviction. A majority of the subcommittee felt that requiring the Defendant to disclose certain mitigating factors pretrial, e.g. remorse, duress, minor participation, would violate his privilege against self-incrimination and would therefore be unconstitutional.

It should be noted that adoption of subparagraph (b) also would result in the Supreme Court having to recede from a number of prior cases in which the Court held the State is not required to disclose aggravating circumstances.

Respectfully submitted,

Chair, Subcommittee III

AEF/jw

3.221. PROCEDURES RELATING TO THE DEATH PENALTY

(a) ~~PRETRIAL EVIDENTIARY HEARING TO DETERMINE DEATH PENALTY~~ ISSUES. In a capital case, 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.

MEMORANDUM
OFFICE OF STATEWIDE PROSECUTION

DATE: December 11,1996

TO: Honorable Dedee Costello
Chair, Criminal Procedure Rules Committee

FROM: Susan Odzer Hugentugler
Member Subcommittee III

RE: Proposed New Rule 3.221
Procedures Relating to the Death Penalty

Minority Report

While meeting to discuss proposed Rule 3.220(p) relating to the disclosure of aggravating and mitigating facts, the subcommittee voted four to one to propose instead, a new rule, Rule 3.221. As the sole Subcommittee member present at the meeting to vote against this proposal, both substantively and on the grounds that the 10-day notice provision of the internal operating procedures of the Criminal Rules Committee had been violated, this minority report follows.[1]

First and foremost, the subcommittee's proposed rule would be unconstitutional. While the Court has the ultimate responsibility of sentencing, the determination of whether to seek the death penalty, pretrial, is solely within the discretionary function of the prosecution. State v. Bloom, 497 So.2d 2 (Fla. 1987); Article II, Section 3 of the Florida Constitution. Indeed, the Court held in Bloom that a pretrial procedure such as the one advanced by the proposed rule would be unconstitutional without any supporting statutory authority. Bloom, supra at 3.

There are however, other problems with the proposed rule. It forces the state to prematurely disclose and be bound by aggravating circumstances before they are fully developed at trial Consequently, a trial judge would be forced to rule without having the benefit of a jury's advice and without an in-depth knowledge of all the circumstances of the case. 3n an effort to overcome this, essentially two trials will be held. Witnesses would be subjected to yet another round of questioning and another round of inconvenience. Undoubtedly, the proposed pretrial procedure will further stretch and waste the courts' resources resulting in more clogged dockets.

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[1]This minority report only addresses the proposal of the subcommittee. It does not concern the Chair's original submission to the subcommittee, proposed Rule 3.220(p).

EXHIBIT B

The permitted use of affidavits, not subject to cross examination, to establish tho aggravators or mitigators would ba inadequate. A trial judge, when evaluating the possibility of the ultimate penalty, should be able to and hear the witnesses to determine credibility. Likewise, both the state and the defendant should be able to cross examine witnesses against them.

And what about appellate remedies? For a ruling adverse to the State, it appears that the state would have to petition the district court of appeal for a writ of common law certiorari. Besides the fact that petitions for writs of certiorari arc not commonly granted as it is often difficult to meet the higher standard of proving a miscarriage of justice and a departure from the essential requirements *of* the law, where would one be filed? Would a district court of appeal, not familiar with death penalty issues, decide the issue rather than the Supreme Court of Florida? On the flip side, what *if* a trial court ruled, pro-trial, that death could be an appropriate sanction? Would a defendant then have grounds to disqualify the fudge? Thie procedure would effectively promote forum shopping.

These are but a few of the most obvious problems with the subcommittee's proposal. The bottom line is that the procedure promoted would be useless. When the State decides to proceed to trial with the death penalty at issue, it does so In good faith because it has been held that If a trial court finds in a post-trial inquiry that there was no basis or the State's pursuit of the death penalty was not in good faith, a new trial can be ordered if jurors were excluded during the trial solely far their views on the death penalty. ,568 So.2d 965 (Fla. 1st DCA 1990); Reed v. State, 496 So. 2d 213 (Fla. 1st DCA 1986). If life is an appropriate penalty, it is presumed that a trial judge, required to independently weigh the evidence, will impose life regardless of the recommendation.

/nph

SID J. WHITE, CLERK
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Post Office Box 1089
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2/19/97 filed 1/28/97

RE: AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(h) and FLORIDA RULE OF JUVENILE PROCEDURE 9.060(d) - CASE NO. 85,585

AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.220(h) - CASE NO. 85,801

I have this date **received the below-listed pleadings** or documents:

REQUEST FOR EXTENSION OF TIME

Request for extension of time filed in the above cause is granted and The Florida Bar Criminal Procedure Rules Committee is allowed to and including July 11, 1997, within which to file final comments in the above **cases.**

Please make reference to the case **number** in **all** correspondence **and pleadings.**

Most cordially,

Clerk, Supreme **Court**

ALL PLEADINGS SIGNED BY AN ATTORNEY MUST INCLUDE THE ATTORNEY'S FLORIDA BAR NUMBER

SJW/kbb
cc: Hon. Dedee S. Coltello
Mr. John F. Harkness, Jr.
Hon. O. H. Eaton, Jr.
Hon. Harry L. Shorstein
Hon. Richard Tombrink, Jr.
Hon. Bernie McCabe
Hon. **Michael** J. Satz
Hon. Jerry Hill
Hon. Robert A. Butterworth
Mr. Marty E. Moore
Mr. Arthur I. Jacobs
Mr. Steven M. Greenberg
Mr. Robert H. Schultz
Ms. Elizabeth L. Hapner
Mr. Thomas L. Powell
Mr. Randall C. Grantham
Mr. William C. Vose
Mr. Albert J. Datz
Mr. Ward L. Metzger
Mr. Maury Kolchakian
Ms. Nancy Daniels
Ms. Carolyn M. Snurkowski
Mr. Douglas E. Crow
Mr. C. Richard Parker
Mr. Benedict P. Kuehne
Mr. Kraig A. Conn
Mr. Michael R. Band

(CONTINUED)
CASE NOS. 85,535 and 85,801

Mr. Steven H. Parton
Mr. Barry Krischer
Mr. Herbert W. A. Thiele
Mr. Michael R. Ramage
Mr. Howard L. Dimmig, II
Mr. Jim McCune
Ms. Katherine Fernandez Rundle
Mr. Bennett H. Brummer
Mr. Henry M. **Coxe,** III
Mr. Louis *O.* Frost, Jr.
Ms. Melanie Ann Hines
Mr. Thomas C. Gano
Mr. Ira D. Karmelin
Mr. M. Ross Schulmister
Mr. James L. Eisenberg
Mr. Robert A. Urban
Mr. John E. Tuthill