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IN THE SUPREME COURT

OF THE STATE OF FLORIDA

CASE NOS. 85585, 85801

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

COMMENTS ON THE PROPOSED RULE

SUBMITTED BY:

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COMMENTS TO PROPOSED RULE CHANGE

RULE 3.220(h)

On September 9, 1996, this Court entered an order amending Rule 3.220(h) in several significant respects in order to address concerns about abuses in the discovery process in criminal cases.

The Court included, for comment only, a proposed rule which I suggested which was intended to be a first step towards establishing a state wide procedure to try the penalty phase of capital cases. That proposed rule was as follows:

"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 at trial."

The court requested the Criminal Procedure Rules Committee to review the proposed amendment and file comments for this Court's further consideration. The Rules Committee referred the matter to Subcommittee III, of which I am a member, and Subcommittee III proposed two separate Rules, both of which were rejected by the full committee.

My purpose in filing these comments is to urge this Court to adopt a rule or rules relating to the trial of the penalty phase of capital cases in order to (1) provide a pretrial procedure to determine the appropriateness of the death penalty in cases where there is little aggravation and vast mitigation and (2) to require a statement of the issues to be tried in the penalty phase to be filed so trial judges can rule on evidentiary issues that come up during the penalty phase hearing and make pretrial rulings on the

relevancy and admissibility of nonstatutory mitigating circumstances.

Opposition to this proposal has been strong. Able and capable advocates on the Rules Committee have urged a number of reasons why such rule or rules are inappropriate. Others resorted to reactionary tactics accusing those who favored the rule to be out to abolish capital punishment and reminding us that the legislature will review any rule which encroaches upon protected territory. Naturally, those who believe evidentiary hearings in capital cases should receive the same procedural safeguards as in less serious matters, ignored the reactionaries and proposed two separate rules for consideration of the Rules Committee.

The first of the proposed rules was authored by Subcommittee III on October 17, 1996 after a lengthy and productive discussion. **It** read as follows:

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 noncapital case. The state shall be given at least twenty days notice before hearing on the motion.

(b) DISCLOSURE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES. Upon conviction in 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.

This rule was referred back to Subcommittee III and a revised rule was submitted which read as follows:

3.221. PROCEDURES RELATING TO THE DEATH PENALTY

(a) PRETRIAL EVIDENTIARY HEARING TO DETERMINE DEATH PENALTY ISSUES. In a capital case, when there is one or fewer aggravating circumstances or two aggravating circumstances which merge into one, upon motion of the defendant, the court shall conduct a pretrial ~~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 exhibits ~~testimony~~ to establish statutory and non-statutory mitigating circumstances. Affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or Darts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions,

or by further affidavits. If 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.

I shall first discuss some of the objections made by members of the Rules Committee and meet those objections with legal authority and then discuss the proposed rules and make my recommendations.

OBJECTIONS TO THE RULE

1. The Rule is not necessary.

This Court has ruled in several cases, beginning with Sireci v. State, 399 So.2d 964 (Fla. 1981), that due process does not require the disclosure of aggravating circumstances in a capital case prior to trial. These cases present particular concern to trial judges who are used to knowing the issues to be tried in order to make rulings on such elementary things as relevancy and materiality of evidence presented during a trial. And while such a rule is not required, there is no reason to reject a rule on that basis alone.

In addition, the argument is specious. A large number of capital cases have been reversed because the evidence simply did not support the imposition of the death penalty. A recent example is Wright v. State, 688 So.2d 298 (Fla 1997). These cases have resulted in considerable waste of judicial resources and the time of counsel who must prepare for a penalty phase hearing even if the death penalty is only a remote possibility. Since most of these cases involve indigent defendants, public funds are also wasted.

Perhaps this is a nonissue. By order dated May 4, 1995, this Court requested the Rules Committee "to consider (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 upon the aggravating and mitigating factors alleged to exist in a capital case." Amendments to Florida Rule of Criminal Procedure 3.220, 654 So.2d 915 (Fla. 1995). In that same order, Justice Anstead stated "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."

2. The proposed **rule usurps the functions of the executive department.**

As previously stated, the Sireci case **held** that due process does not require the disclosure of aggravating and mitigating circumstances. Subsequently, this Court decided State v. Bloom, 497 So.2d 2 (Fla. 1986).

In Bloom, **the** State of Florida petitioned this Court for a writ of prohibition prohibiting Judge Bloom from determining prior to trial the appropriateness of the death penalty in a first degree murder case. Justice Overton authored the opinion and stated "[w]e grant the petition for prohibition and hold that a circuit judge lacks authority to decide pre-trial whether the death penalty will be imposed in a first degree murder case. That is the holding in **the** case that deals with the issue submitted for decision. The Court went on to state, "[i]f we allowed the circuit judge to make pretrial determination of the death penalty's applicability, we would be notifying the death penalty's statutory scheme. Section 921.141(1), Florida Statutes (1985) mandates that the decision to impose the death penalty must be made in a separate proceeding after an adjudication of guilt. A pre-trial penalty determination

by the trial judge would effectively create a statutorily unauthorized trifurcated death sentence procedure. Further, to approve the circuit judge's pre-trial determination, we would have to modify Sireci ....." Id. at p. 3.

In law school we were all taught that there are two parts to an appellate decision, the "ratio decendii," or the rule of the case and "obiter dicta," which is the rest of it. The former is precedent and needs to be followed, while the latter does not. This is the rule in Florida. This Court has held that obiter dicta "is at most persuasive and cannot function as ground-breaking precedent" and where a statement of an appellate court in its opinion is "not essential to the decision of that court" it "is without force as precedent." Continental Assurance Co. v. Carroll, 485 So.2d 406 (Fla. 1986). See also, State ex rel. Biscayne Kennel Club v. Board of Business Regulation of Dept. of Business, 276 So.2d 823 (Fla. 1973).

The statement quoted above is not essential to the decision in the case and is obiter dicta.

In addition, this Court has already cast doubt on Bloom by ignoring it and authorizing the pretrial determination of the availability of the death penalty in cases where its imposition is constitutionally prohibited such as when the defendant is under sixteen years of age, Allen v. State, 636 So.2d. 494 (Fla. 1994), where an equally guilty codefendant receives a lesser sentence, Scott v. Dugger, 604 So.2d. 465 (Fla. 1992), and where a defendant is a principal and does not possess the requisite level of intent

or participation, Jackson v. State, 575 So.2d. 181 (Fla. 1991). In such cases, trial judges do not allow the state to "death qualify" the jury and the death penalty is not an issue at trial.

Moreover, the Court in failed to recognize that Rule 3.190(c)(4) had been in place for nearly two decades before Bloom was decided and that rule specifically authorizes a pretrial procedure to determine if there is sufficient evidence to prosecute at all. The 1967 Committee Note to the rule announces that it was intended to "permit a pretrial determination of the law of the case where that facts are not in dispute."

Finally, Bloom fails to recognize that sentencing is exclusively the province of the judiciary and not the executive branch. See State v. Benitez, 395 So.2d. 514 (Fla. 1981); Hildwin v. Dagger, 654 So.2d. 107 (Fla. 1995), (Anstead, J., specially concurring); Ruth v. State, 574 So.2d. 225 (Fla. 2d DCA 1991). The ultimate weight to be given to aggravating and mitigating circumstances rests with the circuit judges in the State of Florida and not the 20 State Attorneys. Since that responsibility is solely judicial, it is not a usurpation of the State Attorney's function to decide it in appropriate cases prior to trial. Indeed, Rule 3.171 which governs plea bargaining begins by recognizing that the "[u]ltimate responsibility for sentence determination rests with the trial judge."

3. The proposed **rule violates the doctrine of stare decisis.**

This objection concerns the continued viability of Sireci and Bloom.

The holding in Sireci need not be disturbed by adopting the proposed rule. Both this Court and the United States Supreme Court have agreed that due process does not require pretrial disclosure of aggravating circumstances. These holdings do not preclude a rule of procedure which requires such disclosure.

The Bloom case contains language which is either procedurally erroneous or dicta and should be "receded from" whether or not the proposed rule is ultimately adopted.

The doctrine of stare decisis, it is said, "is, or course, critical for our legal system, promoting as it does stability and uniformity in the law. However, it is not an absolute and we must on occasion discard prior decision when, for example, traditional legal principles fail to do justice in light of modern reality. In these situations, the judiciary of necessity must move cautiously, and not discard in a cavalier fashion prior decisions and thereby disrupt the expectations and legal relationships upon which society had previously relied. There are other occasions when a court should 'bit the bullet,' such as in the case of an earlier erroneous judicial decision. In this situation, the only legally correct and ethically honorable solution is for the Court to admit its error and proceed to rectify it. Perpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the Court. This is true whether the prior decision deal with a common law rule, a question of statutory construction or an issue of constitutional interpretation." Smith v. Department of Ins., 507

So.2d 1080 (Fla. 1987)(Ehrlich, J., concurring in part and dissenting in part).

This Court does not hesitate to correct erroneous rulings. For instance, the illogical holding that attempted felony murder is a crime was corrected in an opinion written by Justice Harding who stated, "[a]lthough receding from a decision is not something we undertake lightly, we find that twenty-twenty hindsight has shown difficulties with applying Amlotte that twenty-twenty foresight could not predict. Based upon these difficulties, we are convinced that we must recede from Amlotte." Grey v. State, 654 So.2d 552 (Fla. 1995).

Additionally, the doctrine of stare decisis is not followed as closely in matters of procedure. Nearly fifty years ago this Court recognized this rule when it stated,

> It is not incumbent upon the court to apply legal principles deduced from decisions relating to procedure when the reasons for application fail. When reasons for the law fail, the law should fall, particularly so when the law was supplied by the decisions of the court and relate to procedure and not to substantive rights. Courts are not required to await legislative action to change their rulings on matters of procedure. The rule of reason is supposed to be applied.

Cottrell v. Amerkan, 160 Fla. 390, 35 So.2d 383 (Fla. 1948).

Recently, this Court went so far as to rewrite a procedural rule after a decision construing it reached an undesirable result. In Conev v. State, 653 So.2d 1009 (Fla. 1995), cert.den. 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), the Court held that the definition of "presence" as used in Rule 3.180 meant that a defendant had a right

to be physically present at the immediate site where jury challenges were exercised. The Court has subsequently declined to apply that ruling to other cases on appeal and has rewritten the rule to read "[a] defendant is physically present for the purposes of this rule if the defendant is physically in attendance for the courtroom proceeding, and has a meaningful opportunity to be heard through counsel on the issues being discussed.

Any or all of the reasons set forth above are sufficient to justify receding from the erroneous language in the Bloom case.

4. Defendants will seek leave to add mitigating circumstances and there are no effective sanctions to preclude this prejudice to the state.

In approaching this problem it is necessary to look at the proposed rule to see how it will operate.

It is of critical importance to note that only the defendant can invoke the rule before trial of the guilt phase. Thus, it is the defendant's decision to make pretrial disclosure of mitigating circumstances which may otherwise be privileged (such as presenting remorse as a mitigator, thereby implying guilt) in return for an opportunity to obtain a pretrial ruling on the death penalty. Putting a defendant to a difficult choice is not necessarily forbidden by the fifth amendment. State v. Benitez, supra, n.17. Since the hearing must be scheduled pretrial with at least twenty days notice to the State, there should be little concern about amendments. If the defendant should attempt to amend at the last minute the State would have a valid objection of lack of proper

notice. If the State should attempt to amend at the last minute the hearing could be rescheduled if the amendment prejudices the defendant. If this issue is a real concern, a committee note could be added to the rule or a provision governing amendments could be added.

The second part of the rule requires disclosure of aggravating and mitigating circumstances after the guilt phase of the trial. There is no reason why traditional Richardson inquiries should not govern amendments at that point in the proceedings. Some of the comments filed with the Supreme Court show displeasure with the Richardson approach predicting that trial judges will allow defendants to amend and deny amendments by the State. However, there is no limit to the circumstances which may arise in a criminal trial and the Richardson approach allows the trial judge enough flexibility to fairly deal with amendments.

5. **The state will have no recourse by way of appeal if the trial judge determines the death penalty to be inappropriate or, alternatively, petitions for review in this Court will further delay capital cases and increase this Court's caseload.**

This argument should be rejected out of hand. The state has no right to appeal a decision to impose a life sentence after a penalty phase trial and should have no right to a review of a decision to impose such a sentence pre-trial. Further, this Court knows how to quickly dispose of Petitions for Review and if a trial judge abuses his or her discretion to such an extent as to justify

this Court accepting a decision for review, the State has everything to gain.

6. This **motion will be filed in every case and will result in a mini-trial which will waste time and resources. Failure to file such a motion will be used to claim ineffective assistance of counsel in 3.850 proceedings.**

These two arguments are related. If the rule provides for a record determination of the existence of aggravating and mitigating factors instead of an evidentiary hearing, much of the argument goes away. A hearing in the nature of a summary judgment does not take more than an hour or so and that is time well spent if it eliminates days and days of investigation and discovery preparing for a penalty phase hearing. The second part of the argument is true. Defendants sentenced to death will no doubt complain about ineffective assistance of counsel. However, the Strickland standard governs these complaints and this Court can quickly discourage these claims when there is no basis for them.

RECOMMENDATIONS

There is a need for improvement in the procedure used determine the penalty in capital cases. Pre-penalty phase disclosure of aggravating and mitigating circumstances is a requirement that is long over due. Additionally, a procedure is necessary to weed out the questionable cases so that the death penalty will be imposed only in the most aggravated and least mitigated cases.

The second rule proposed by Subcommittee III contained language which the subcommittee hoped would attract votes by limiting the circumstances under which the trial judge could consider the death penalty issue. It also eliminated the provision which allowed an evidentiary hearing. The latter amendment appears to be wise.

Defense attorney members of the subcommittee insisted that mitigating circumstances not be disclosed untila guilty verdict is rendered. Their reasoning included the fact that certain mitigators assume or admit guilt and pretrial disclosure of such mitigators may lead prosecutors to additional incriminating evidence. That provision was included in both rules submitted by the subcommittee. I am more concerned that mitigating circumstances be disclosed prior to the penalty phase than the timing of the disclosure.

Accordingly, I propose that this Court consider the following rule:

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~~ exhibits to establish statutory aggravating circumstances and statutory and non-statutory mitigating circumstances. Affidavits shall be made on personal

knowledse, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. **Sworn** or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, or by further affidavits. If the court finds from the evidence presented that the mitigating circumstances substantially outweigh the aggravating circumstances, or, if the court finds that the death penalty is not a possible penalty as a matter of law, an order shall be entered setting forth such findings and the death penalty shall not be an issue at trial, ~~and the~~ The case shall then proceed as a noncapital case. The state shall be given at least twenty days notice before hearing on the motion.

(b) DISCLOSURE OF AGGRAVATING AND MITIGATING CIRCUMSTANCES. Upon conviction in 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.

CONCLUSION

In conclusion, let me stress that the proposed rule is not a rule designed to give an advantage or disadvantage to any party. It is a rule that is needed to avoid unnecessary expenditure of judicial resources, pretrial preparation and public funds. In Besaraba v. State, 656 So.2d 441 (Fla. 1995), this Court reversed a death sentence which might not have been imposed had the proposed

rule been available. In that case the Court reviewed Songer V. State and announced, "[l]ong ago we stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders." The Court found the mitigation in Besaraba to be "vast." Cases like Besaraba need not be resolved in Tallahassee. The decision to impose or not impose the death penalty in questionable cases can and should be resolved by the assigned trial judge just as other issues are decided pretrial.

DATED July 9, 1997.

Respectfully Submitted,

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