IN THE SUPREME COURT OF FLORIDA

CASE NOS. 85,585 & 85,801

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

SUPPLEMENT TO
COMMENTS OF THE FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE

John **F.** Harkness, Jr., Executive Director of The Florida Bar, and the Honorable Dedee *S.* Costello. Chair of The Florida Bar Criminal Procedure Rules Committee, respectfully submit this supplement to comments concerning the proposed amendment to Fla. R. Crim. P. 3.220(p)(3), in response to this Court's orders of September 12, 1996, September 25, 1996, and February 19, 1997. The supplement consists of the meeting minutes of The. Florida Bar Criminal Procedure Rules Committee dated June 27, 1997

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

Respectfully submitted,

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Robert A. Butterworth, Attorney General; Marry E. Moore. Deputy General Counsel, Tallahassee, Florida, and Harry Shorstein. State Attorney, Fourth Judicial Circuit, Jacksonville, Florida, on behalf of the Attorney General of the State of Florida, the State Attorneys of Florida, and the United States Attorneys for the Southern , Middle and Northern Districts of Florida; Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, Inc., Tallahassee, Florida; and Thomas L. Powell, President, Florida Association of Criminal Defense Lawyers (FACDL), Tallahassee, Florida,

for Petitioners

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

MINUTES

CRIMINAL PROCEDURE RULES COMMITTEE

MEETING OF JUNE 27, 1997
WALT DISNEY WORLD DOLPHIN HOTEL
Orlando, Florida

Chair Judge Dedee Costello called the meeting to order. The following committee members were present: Jerome Latimer, Linda Firouzabadian McCallum, David Morgan, Robert Wills, Michael Band, Gary Beatty, Katherine Vickers Blanco, Lewis Buzzell, Laurie Chane, Russell Crawford, Patrick Kevin Davey, Robert Doyel, Douglas Duncan, Oscar Eaton, Jr., David Eddy, Stephen Everhart, Kevin Emas, Denise Ferrero, Ann Finnell, Ronald Hanes, Leslie Hess, Melanie Hines, Susan Odzer Hugentugler, Nelly Khouzam, Shelley Kravitz, Abraham Laeser, Calianne Lantz, Leroy Arthur Lawrence, Randy Merrill, Douglas Midgley, Donald Murrell, Raymond Rafool, Maria Sachs, Ivy Ginsberg Shanock, William Vose, Paul Zacks, and Chester Zerlin. The following guests attended: Diana M. Tennis of the Penalty Phase Subcommittee, Phyllis Kotey and Caroline Snurkowski.

The minutes of the January 24, 1997 meeting were unanimously approved with minor spelling corrections,

I.

Chair's Report

The Chair awarded certificates of appreciation to David Morgan, Robert Wills, Linda McCallum and Jerome Latimer for their work as vice-Chairs of the Committee this past year. A certificate of appreciation was also awarded to Stephen Everhart for his service to the committee as Chair for the 1994-1995 year.

The Chair announced that she was selected to serve a second year as the Chair of the Committee and Ann Finnel, Dyril Flanagan and Abraham Laeser were appointed as the new Vice-Chairs.

II.
Special Subcommittee A Report

Docket #97-1-A:

Subcommittee Chair Ms. Hines submitted the following comments to the Proposed Rules for Court Reporter Certification and Regulation of court: Reporters and amendments to Rule 2,070 of the Florida Rules of Judicial Administration:

Rule 2.070(g)(4)

This proposed section requires recording of grand jury proceedings by a certified court reporter; it does not deem to

allow for electronic recording even though electronic recording is defined in paragraph (f) of the proposed rule.

Rule 13.130 (pages 8-9)

This provision authorizes supervision or revocation of certification for alcohol or drug abuse or physical incapacity or mental instability which "poses a serious threat of interference with the performance of duties of a Certified Court Reporter." The subcommittee believes that this standard is too high.

A motion to paes the comments on to Judge Webster gassed unanimously.

Docket #96-41-A

The subcommittee agreed to offer the following proposed New Rule:

Rule 3.025

3,025 State and Prosecuting Attorney Defined.

Whenever the terms "State", "State Attorney", "Prosecutor", "Prosecution", "Prosecuting Officer", *or* "Prosecuting Attorney" are used in these rules, they shall be construed to mean the prosecuting authority representing the State of Florida.

1997 Committee Note: This provision is new. Its purpose is to include the Statewide Prosecutor as a prosecuting authority under these rules. No .substantive changes are intended by the adoption of this rule.

The motion to approve this new rule passed unanimously by a vote *of* 30-0.

III.
Subcommittee V Report

Docket #97-2-V Amendments to Rule *3.692* regarding Sealing and Expunging Criminal History Records.

Subcommittee Chair Mr. Zacks reported on a proposal originating from John Booth of the Florida Department; of Law Enforcement to amend Rule *3.692* and the forms contained in Rule 3.989 concerning petitions to seal or expunge. In light of the Supreme Court's recent decision in State v D H W , 686 So. 2d 1331 (Fla. 1996) which explained that the requirement to secure a certificate of eligibility *from* FDLE prior to filing a petition to seal non-judicial criminal history *records* is constitutional and the general confusion by practitioners governing the procedures for sealing and expunging records, amendments to these rules were warranted.

Accordingly, the subcommittee proposed amending Rule *3,692* by: 1) adding the requirement that a petition to seal or expunge non-judicial criminal history records mum be accompanied by a

certificate of eligibility issued to the petitioner by the Department of Law Enforcement; and 2) deleting the thirty day waiting period *before* the court can grant ths petition to seal *or* expunge.

Amendments to the forms, affidavits, orders, and petitions in Rule 3.989 were proposed to reflect a change in the law that prohibits sealing or expunging *records of* an individual who has been adjudicated delinquent *for* committing a felony or misdemeanors specified in s. 943.051(3)(b) and other minor changes.

A motion to adopt all rules and forms as progosed by the subcommittee wao approved 32-0.

Docket #97-4-5 Rule 3.851 Collateral Relief After Death Sentence

The following proposed amendment to Rule 3.851 was passed unanimously:

Rule 3.851 Collateral Relief After death Sentence Has Been Imposed And Affirmed on Direct Appeal

(a) Scope. This rule shall apply to all motions and petitions for any type of post-conviction or collateral relief brought by prisoners in state custody who have been sentenced *to* death and whose conviction and death sentence have been affirmed on direct appeal.

IV.
Subcommittee III report

Pocket #97-3-III Rule 3.220(h) regarding attorneys issuing subpoenas

Subcommittee Chair Ms. Finnell submitted a proposal in response to a letter from Chief Justice Kogan to amend Rule 3.220(h). The amendment would authorize attorneys to issue their own subpoenas in conformance with a recent rule change made under the Rules of Civil Procedure. The proposed amendment also specifically included language that thie provision shall not apply to subpoena duces tecum. Tho following discussion ensued.

Mr. Midgley stated we should not necessarily follow the Rules of Civil Procedure regarding the prohibition on attorneys issuing subpoena duces tecum.

Mr. Laeser raised the issue of whether a person who is subpoenaed under the rule by an attorney rather than a subpoena issued by the clerk under Florida Statute section 914 is no longer entitled to immunity.

Mr. Crawford suggested Rule 3.220 incorporated section 914 for depositions scheduled by the prosecutor.

Mr. Beatty stated that subpoenas issued under section 27.04 and section 914.04 have statutorily created immunity. If subpoenas are issued by attorneys pursuant to rule 3.220 instead of the clerk the statutory immunity *may* be removed.

Mr. Buzzell responded that under rule 3.220 subpoenas *are* issued only *for* the *purpose* of attending depositions. He does not see how this rule implicates section 914 or 27.04.

Mr. Laeser responded that currently subpoenas have the potential to immunize the person. If an assistant state attorney can issue a subpoena under rule 3.220 instead, what happens to the potential immunity for the witness? The issue was not resolved.

The discussion then turned to the reason *for* excluding subpoena duces tecum for deposition. A committee member stated the reason was because a subpoena duces tecum must be approved by the court: before it can be issued.

Mr. Murrell indicated why should we gut a higher burden in criminal cases?

Mr. Rafool stated that we ought to have the ability to have a ten day notice like in a civil cam.

The committee agreed to vote on the two proposed changes separately. The motion to adopt the amendment stating that "This provision does not apply to subpoena duces tecum" was defeated by a vote of 14-13,

Mr. Midgley moved to delete the provision that this shall not apply to subpoena duces tecum and vote on the change authorizing attorneys to issue subpoenas for deposition.

The motion was defeated by a vote of 14-17,

A motion to amend rule 3.220(h) with the following language passed by a vote of 21-10:

Excerpt as provided herein, the procedure for taking the deposition, including the scope *of* the examination, and the issuance of a subpoena (except a subpoena duces tecum) for deposition by an attorney of record in the action shall be the same as that provided in the Florida Rules of Civil Procedure.

A motion to send this rule change to the Florida Supreme Court as an Emergency Rule amendment passed by a vote of 30-2.

Docket #96-40-III Evidentiary Hearing before guilt phase to determine death penalty issues and disclosure of aggravators and mitigators before penalty phase.

Subcommittee Chair Ms. Finnell summarized the subcommittee's report and proposed rule noting that subparagraph (a) of the rule benefits the defense while subparagraph (b) benefits the State. She also suggested that this rule would be used in an infrequent number of cases. At the prosecutors' urging the proposal was changed to authorize the hearing to consider affidavits, depositions and/or exhibits rather than taking live testimony in an effort to expedite the hearing.

Ma. Finnell then pointed out some problems with the proposal in subparagraph (a) in light of the Bloom case which held that the trial court does not have the power to decide the issue pretrial because it is a matter of prosecutorial discretion and otherwise violates the doctrine of separation of powers. However, since the Supreme Court referred this matter to the committee, the court could adopt this rule, and effectively overrule Bloom. *To* a limited extent the rule emasculates the prosecution. On the other hand subparagraph (b) is solely for the benefit of the state since the defense usually can tell what the state's aggravating factors will be whereas the State will not necessarily be aware of the mitigating factors, particularly the non-statutory mitigating factors.

Ms. Finnell moved to vote on the proposal as a whole which was seconded. Ms. Finnell accepted a friendly amendment to delete from the title of the rule the word "Evidentiary" since it was deleted from the rest of the proposal. The following discussion ensued.

Mr. Zacks felt the committee should not consider the existence of the Bloom case a minor point or technicality. He did not see how this committee could overrule a suprema court case by submitting a rule and under these circumstances whether the rule was pro-prosecution or pro-defense he would never vote in favor of this rule.

Mr. Midgley responded that we are not suggesting to submit a rule that overrules a Supreme Court decision. We *are* merely proposing to the Court that they adopt a rule which if they agree *to* would change a decision that they previously rendered. We could send a comment up with any proposal that we are mindful of the Bloom case and the effect this rule would have on that decision.

Professor Latimer remarked that the Bloom decision was based on the factual circumstances in that case, At the time it was decided there was no rule *of* criminal procedure or standard and the judge determined the appropriateness *of* the death penalty in that case. Bloom doee net *foreclose* this action, Based on the Supreme Court's request, it appears that the Supreme Court wants a rule to

provide standards.

Mr. Wills stated that 1) the Supreme Court asked us to consider this issue; 2) as a Chief Assistant Public Defender from a larger circuit in South Florida this rule would save a large amount of money and time. It would save money *for* the needless ease preparation costa with expert witnesses in cases that everyone would agree are not death cases but simply because there is not this procedure they are treated as death cases; it would save court time and money because of the death qualification process and the time in jury selection. He applauds those circuits in which the State Attorney8 have set up review committees in-house where they will hear these matters and where mitigating circumstances can be presented to them and the review committee will determine to waive the death penalty. The 17th Circuit does not have a review committee. This is an issue from a money standpoint.

Mr. Laeser thinks *we're* making mistakes in several areas. 1) Bloom is a litigated case that went up to the supreme court and stare decisis still applies in Florida. We can't fashion a rule otherwise. 2) In essence, the State is being required to waive a jury for purposes of this evidentiary hearing. The judge will make a pretrial evaluation and a ruling of the quality and the quantity of the evidence. 3) He can envision the defense in some cases to move to recuse the judge because he has already decided that the case may warrant the death penalty. 4) Another issue is does the State have a right to appeal; be doesn't: *see* any remedy. Can the State file a motion for rehearing with one additional affidavit? 5) Ultimately, this will not save court time and money. 6) He does dot think this motion will be used infrequently but: will *be* filed in every case. 7) On the issue of affidavits, what is personal knowledge? 8) On the issue of notice the defense knows what the aggravators are in the case but the state, does not know the mitigators yet there *are* no sanctions if the defense fails to disclose them. There is no method for creating a sanction and the evidence will be heard by the sentencing jury. 9) The fact that the proposal eliminates the evidentiary part of the hearing is problematic. While it avoids the State from dragging in victims and witnesses into court it creates another problem because under this rule depositions (which cannot be used as substantive evidence pursuant to rule 3.220(d)) can be used as substantive evidence for this purpose. 10) Finally, this rule is being fashioned for a problem that rarely exists and where it does exist the trial court should sanction the particular prosecutor involved.;

Judge Eaton pointed out that the Supreme Court in an opinion issued May 4, 1995 at 654 So, 2d 915 (Fla. 1995) asked the committee to consider the suggestions of Judge Eaton concerning the need for (1) a ruler 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 in an option based on the aggravating and mitigating factors alleged to *exist* in a capital case.

Ms. Finnell stated that the subcommittee attempted to limit the types *of* cases that this rule would effect by saying where the defense feels there is only one aggravating factor hopefully that would screen out over 90% *of* the cases. If the State files an affidavit with sufficient evidence to show two or more aggravating factors and the judge agrees, the hearing stops there. The language requiring that affidavits shall be made on personal knowledge is taken from the rules of civil procedure. Regarding subsection (b) there is no question that any competent defense attorney would know what the state's aggravators are; on the other hand, currently the Stats and the Court is completely in the dark about the non-statutory mitigating factors. This rule would give them an idea of: the defense's mitigating factors and will assist prosecutors in being able to put on rebuttal evidence, Finally, since the Supreme Court told us they want us to address these, two issues as a rule, isn't it better that we writs a rule than allowing them to?

Professor Latimer responded to Mr. Laeser's comments. (1) He appreciates his comments; Regarding the substantive use *of* depositions, he thinks this does change the existing Law. The problem can be solved by deleting the language "shall set forth such facts as would be admissible in evidence." (2) The "substantially outweigh" standard is the most common burden in weighing evidence. The language comes from 90.403. The standard is written to benefit the State and is a judicially recognized concept:.

Mr. Beatty does not think thia will save money because the more procedural steps you gut in a death penalty proceeding it expands exponentially the costs in litigating a death penalty case. If a defense attorney does not file this motion, then for sure this wall be raised as a ground in a post-conviction relief motion. The same is true if the hearing is held and the judge finds this is a death penalty *case.* Recusal motions will be litigated because if one is not filed, this will be an issue for post-conviction relief. Mr. Beatty analogized this proposal to procedural proposals suggested by the Capital Collateral Representative who requested additional procedures suggesting that in the long run it would save money but ultimately it is costing the State more money.

Ms. Blanco atated she opposed the rule *for* the following reasons: (1) it violates the doctrine of separation of powers as set forth in Bloom; (2) she does not believe it is cost or time saving; (3) she opposes the use of affidavits; (4) Bloom is the Jaw; (5) it is o.k. to cell the supreme Court that this is a bad idea and to submit a reasoned comment; (6) she questions the need for a statewide rule since it appears to be a problem in only certain jurisdictions.

Judge Doyel stated he was voting against the rule because: (1) the suggestion to adopt a rule like a civil rule of summary judgment misses the point- this is not an issue of no substantial material issue of fact; instead the rule instructs the judge to weigh before trial the evidence concerning sentencing; (2) the rule would amend the death penalty statute by establishing a rule Chat says when there is only one aggravating factor, the death penalty is not warranted; and (3) the rule eliminates the public's opportunity- the jury should play a role in whether the death penalty should be imposed.

Mr. Buzzell was on the subcommittee and voted for the rule *for* purposes of discussion. He recognizes the concern about Bloom. he expressed concern about *the* way this committee operates and considers issues just because a Supreme Court justice puts something in a footnote. No matter what this Committee does, interest groups will run to the Legislature. He does not think this is appropriate for this Committee to pass this rule.

Professor Everhart responded to Judge Doyel's comments by referring to Judge Sorondo's memorandum and agreeing that the rule sets up a procedure very different from a (c)(4) motion. He intends to vote against the rule.

Mr. Rafool noted that when the Supreme Court approves these rules they will essentially change anything prior that is in conflict.

Ms. Hugentugler stated that Bloom is clear. These are statutes which govern the death penalty that will be affected by thie proposal, We should be able to tell the Supreme Court that Bloom is the law and if they want to change the procedure, let them do it.

The Chair called the question, A committee member moved to approve the proposed Rule 3.221(a) and (b). The motion failed by a vote of 4-30.

The Chair asked for suggestions to send in our response to the Supreme Court. The committee agreed to send a comment that the proposal failed along with the written proposal, Judge Sorondo's letter, the vote and the minutes from the January meeting.

Mr. Beatty suggested that the Court could suggest to the Florida Prosecuting Attorneys Association that it look at this issue and regulate themselves as they have done with standards for prosecuting habitual felony offenders.

The meeting was adjourned.