IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-100

IN RE: AMENDMENTS TO FLORIDA
RULES OF CRIMINAL PROCEDURE

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ATTORNEY GENERAL'S COMMENTS TO PROPOSED AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE

COMES NOW, the State of Florida, Office of the Attorney General, by and through undersigned counsel and files its comments to the proposed Rule 3.575 and the proposed amendment to Rule 3.710 as submitted by the Two Year Cycle Report of the Florida Bar Criminal Procedure Rules Committee, and would show:

PROPOSED RULE 3.575, MOTION TO INTERVIEW JUROR

1. The Florida Bar Criminal Procedure Rules Committee has proposed a new rule of procedure to govern post-trial requests for juror interviews in criminal cases. The Attorney General offers the following comments with regard to proposed Rule 3.575.

2. The proposed Rule, as written, adopts the current rule provided for civil cases in Florida Rules of Civil Procedure, Rule 1.431(h). However, Rule 1.431(h) does not accurately reflect the law in this area. As noted by the court in Winter Haven v. Allen, 589 So. 2d 968, 969 (Fla. 2d DCA 1991), the decision in Baptist Hospital of Miami, Inc., v. Maler, 579 So. 2d 97, 100 (Fla. 1991), "effectively amended" the civil rule by requiring any motion for juror interviews to be supported by sworn allegations which, if true, would require the court to order a new trial. Neither the current rule of civil procedure nor the proposed Rule 3.575 require sworn allegations to support a party's motion for juror interviews, but under Baptist Hospital this requirement should be included. The rule should expressly incorporate all of the requirements noted in Baptist Hospital, i.e., sworn affidavits identifying overt acts of misconduct that do not inhere in the verdict and which, if true, require the court to order a new trial. See Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001) (noting standard from Baptist Hospital).

3. Additionally, the rule should expressly provide that it is the exclusive vehicle for permission to contact jurors, and that no contact can be attempted without prior court approval. The impetus for this Rule, according to the Rules

Committee, was the decision of the Second District Court of Appeal in Defrancisco v. State, 830 So. 2d 131 (Fla. 2d DCA 2002). In Defrancisco, the court relied on the standard codified in the Florida Rules Regulating the Florida Bar, which permits juror interviews upon notice to the court if an attorney believes the verdict may be subject to legal challenge. This standard is obviously much lower than the standard this Court adopted in Baptist Hospital, and the language in any Rule 3.575 should not be in the permissive as currently proposed ("Any party who has reason to believe that the verdict may be subject to legal challenge ***may*** move the court..."); it should not suggest that the attorney has the option of proceeding under the more lenient rules of professional conduct. See Arbelaez v. State, 775 So. 2d 909 (Fla. 2000) (rejecting attempt to use professional rule as postconviction fishing expedition).[1]

4. Finally, proposed Rule 3.575, as written, provides that such motion must be filed within ten days of rendition of the

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[1]The lack of success in Arbalaez has not dissuaded capital postconviction attorneys from seeking juror interviews pursuant to the current rules of professional conduct, attempting to avoid the higher standard set forth in relevant case law. See Johnson v. State, 804 So. 2d 1218, 1225 (Fla. 2001); State v. Gary Whitton, First Circuit Case No. 90-429CCA (copy of motion attached as Ex. 1). It is routinely included as a request for relief in capital postconviction motions. This practice should be discouraged, if not expressly prohibited, by any rule adopted.

verdict, "unless good cause is shown for the failure to make the motion within that time." The State is concerned with the likely abuse of this rule in postconviction proceedings.[2]

5. In Marshall v. State, 854 So. 2d 1235 (Fla. 2003), this Court remanded a defendant's claim of juror misconduct for a limited evidentiary hearing, upon finding that a sworn affidavit described overt acts of juror misconduct which did not, as the trial judge had found, inhere in the verdict.[3] The Court recognized the need to strike a delicate balance between important competing interests when postconviction allegations of juror misconduct are presented. The current proposed rule, as written, greatly reduces the showing necessary to obtain postconviction juror interviews from the standard applied in

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[2]Under current rules, in a capital case, a defendant could allege in a postconviction motion that his trial counsel was ineffective in failing to secure access to jurors, and would be entitled to an evidentiary hearing on this issue by asserting a factual dispute. See Fla. R. Crim. P. 3.851(f)(5). Counsel may then attempt to circumvent the threshold requirements of Baptist Hospital and proposed Rule 3.575, and seek to interview jurors as a "discovery tool" in order to identify any prejudice to support the claim of ineffective assistance of counsel.

[3]Although this Court only remanded the Marshall case due to sworn allegations of juror misconduct from an attorney's affidavit, the defendant in that case had also presented sworn affidavits from jurors, demonstrating that capital postconviction defense attorneys can and do contact jurors independently, without any notice to the court or the State. This practice is not authorized by this Court's rules and should not be permitted.

Marshall, to the detriment of the state's interests in preserving the finality of judgments and protecting the sanctity of the jury deliberations.

6. In order to respect the balance of interests addressed in Marshall, any rule should expressly prohibit the filing of a motion to interview juror after a defendant's conviction and sentence have been finalized on appeal, with the recognition that a postconviction claim of juror misconduct should be governed by the current rules of procedure governing discovery and litigation of postconviction issues. If newly discovered evidence supports a claim of juror misconduct so fundamental and prejudicial as to vitiate the entire proceedings, any witness claiming to have information regarding an identified juror can be presented as a court witness at an evidentiary hearing. This limitation would prevent the potential abuse of this motion as a fishing expedition, preserve the sanctity of juror deliberations, protect the juror from unnecessary harassment, and respect the finality of judgments while balancing a defendant's right to litigate any reasonably serious allegations of juror misconduct.[4]

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[4]See Cave v. State, 476 So. 2d 180, 187 (Fla. 1985), noting that "[t]he privacy and sanctity of jury deliberations are critical to the right of a jury trial," and quoting Cummings v. Sine, 404 So. 2d 147, 148 (Fla. 2d DCA 1981) ("Where the record does not reveal any misconduct or irregularity on the part of

RULE 3.710, PRESENTENCE REPORT

1. The State's comments with regard to the proposed amendment to Rule 3.710, seeking to incorporate this Court's decision in Muhammad v. State, 782 So. 2d 343 (Fla. 2001), relate to the requirement that the report be comprehensive and "should include information such as previous mental health problems (including hospitalizations), school records, and relevant family background."

2. This provision requires the disclosure of personal information about the defendant which is confidential under state and federal law. The release of personal records such as school and medical records without the consent of the defendant implicates privacy protections provided by state and federal statutory and even constitutional provisions. See 20 U.S.C. § 1232g(b)(1) (Family Education Rights and Privacy Act [the Buckley Amendment]); Gonzaga University v. Doe, 536 U.S. 273 (2002); Whalen v. Roe, 429 U.S. 589 (1977).

3. In light of the reasonable likelihood that a defendant desiring to waive the right to present mitigation evidence may

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any juror, the case was fairly and impartially tried and each juror is polled and announces the verdict to be his or hers, it is improper to allow jurors to be interviewed").

not consent to the release of relevant personal records, the language in the proposed amendment to Rule 3.710 should not suggest that a PSI which does not include these records is inadequate.[5] The State recommends clarifying that such records "should" be included in the presentence report, "where reasonably available," in order to insure compliance with state and federal law.

4. Additionally, this Court may wish to take this opportunity to reconsider the propriety of requiring a presentence investigation in all capital cases. See Nelson v. State, 748 So. 2d 237, 246 (Fla. 1999) (Pariente, J., concurring specially); In re Florida Rules of Criminal Procedure, Rule 3.710, 362 So. 2d 655 (Fla. 1978).

Respectfully submitted,

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[5]The proposed committee note is even stronger, stating that the PSI "must" include those matters specifically listed in Muhammad.

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the below listed parties on this ——— day of April, 2004:

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