

Supreme Court of Florida

No. SC16-1453

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE.

[September 15, 2016]
CORRECTED OPINION

PER CURIAM.

In response to recent legislation, The Florida Bar's Criminal Procedure Rules Committee (Committee) has filed an out-of-cycle, fast-track report proposing amendments to the Florida Rules of Criminal Procedure. See Fla. R. Jud. Admin. 2.140(e). We have jurisdiction. See art. V, § 2(a), Fla. Const.

The Committee proposes new rule 3.181 (Notice to Seek Death Penalty) and amendments to existing rules 3.202 (Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial: Notice and Examination by State Expert); 3.220 (Discovery); and 3.780 (Sentencing Hearing for Capital Cases). The Board of Governors of The Florida Bar unanimously approved the amendments.

New rule 3.181 and the amendments to rules 3.202(a) (Notice of Intent to Seek Death Penalty) and 3.780(a) (Evidence) implement chapter 2016-13, section 2, Laws of Florida.¹ Chapter 2016-13, section 2, amended section 782.04, Florida Statutes (2015), to provide notice requirements the State must follow when seeking the death penalty. Consistent with the statutory requirements, new rule 3.181 requires the prosecutor to give the defendant notice of intent to seek the death penalty and to file the notice with the court within 45 days after arraignment. The notice must contain a list of the aggravating factors the prosecutor intends to prove. The Committee proposes removing language from existing rule 3.202(a) in order to avoid possible conflict with the statute and new rule, and adding a reference to new rule 3.181 to rule 3.780(a).

According to the report, the amendments to rule 3.220(h)(4) (Depositions of Sensitive Witnesses) are in response to chapter 2016-199, section 1, Laws of Florida,² and include changing the maximum age of sensitive witnesses whose depositions must be videotaped, unless otherwise ordered by the court, from 16 to 18. See ch. 2016-199, § 1, Laws of Fla. (amending section 92.53, Fla. Stat. (2015)). The Committee also proposes adding witnesses with an intellectual

1. Chapter 2016-13, Laws of Florida, became effective March 7, 2016. See ch. 2016-13, § 7, Laws of Fla.

2. Chapter 2016-199, Laws of Florida, became effective July 1, 2016. See ch. 2016-199, § 6, Laws of Fla.

disability to the category of sensitive witnesses covered by the rule. See § 92.53, Fla. Stat. (2016).

After considering the Committee's proposals and the relevant legislation, we amend the Florida Rules of Criminal Procedure as proposed and reflected in the appendix to this opinion. New language is indicated by underscoring; deletions are indicated by struck-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 immediately upon the release of this opinion. Because the amendments were not published for comment prior to their adoption, interested persons shall have sixty days from the date of this opinion in which to file comments with the Court.³

3. All comments must be filed with the Court on or before November 14, 2016, with a certificate of service verifying that a copy has been served on the Committee Chair, Mr. H. Scott Fingerhut, 500 S. Dixie Hwy., Suite 301, Coral Gables, Florida 33146-2768, hsfpa@aol.com, hsf@hscottfingerhut.com, fingerhut@fiu.edu, and on the Bar Staff Liaison to the Committee, Heather Telfer, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, htelfer@flabar.org, as well as a separate request for oral argument if the person filing the comment wishes to participate in oral argument, which may be scheduled in this case. The Committee Chair has until December 5, 2016, to file a response to any comments filed with the Court. If filed by an attorney in good standing with The Florida Bar, the comment must be electronically filed via the Florida Courts E-Filing Portal in accordance with In re Electronic Filing in the Supreme Court of Florida via the Florida Courts E-Filing Portal, Fla. Admin. Order No. AOSC13-7 (Feb. 18, 2013). If filed by a nonlawyer or a lawyer not licensed to practice in Florida, the comment must be electronically filed via e-mail in accordance with In re Mandatory Submission of Electronic Copies of Documents, Fla. Admin. Order No. AOSC04-84 (Sept. 13, 2004). Electronically filed documents must be submitted in

It is so ordered.

LABARGA, C.J., and PARIENTE, LEWIS, QUINCE, CANADY, POLSTON,
and PERRY, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE
EFFECTIVE DATE OF THESE AMENDMENTS.

Original Proceeding – Florida Rules of Criminal Procedure

H. Scott Fingerhut, Chair, Criminal Procedure Rules Committee, H. Scott
Fingerhut, P.A., Coral Gables, Florida; John F. Harkness, Jr., Executive Director,
and Heather Savage Telfer, Bar Staff Liaison, The Florida Bar, Tallahassee,
Florida,

for Petitioner

Microsoft Word 97 or higher. Any person unable to submit a comment
electronically must mail or hand-deliver the originally signed comment to the
Florida Supreme Court, Office of the Clerk, 500 South Duval Street, Tallahassee,
Florida 32399-1927; no additional copies are required or will be accepted.

APPENDIX

RULE 3.181. NOTICE TO SEEK DEATH PENALTY

In a prosecution for a capital offense, if the prosecutor intends to seek the death penalty, the prosecutor must give notice to the defendant of the state's intent to seek the death penalty. The notice must be filed with the court within 45 days of arraignment. The notice must contain a list of the aggravating factors the state intends to prove and has reason to believe it can prove beyond a reasonable doubt. The court may allow the prosecutor to amend the notice upon a showing of good cause.

Committee Note

2016 Amendment. This is a new rule, in response to legislation, and intended to complement Florida Rules of Criminal Procedure 3.202 (Expert Testimony of Mental Mitigation During Penalty Phase of Capital Trial; Notice and Examination by State Expert) and 3.780 (Sentencing Hearing for Capital Cases).

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 Seek Death Penalty. The provisions of this rule apply only in those capital cases in which the state gives timely written notice of its intent to seek the death penalty ~~within 45 days from the date of arraignment.~~ Failure to give timely written notice under this subdivision does not preclude the state from seeking the death penalty.

(b) – (e) [No Change]

Committee Note

2016 Amendment. This is a new rule, in response to legislation, and intended to complement Florida Rules of Criminal Procedure 3.181 (Notice to Seek Death Penalty) and 3.780 (Sentencing Hearing for Capital Cases).

RULE 3.220. DISCOVERY

(a) [No Change]

(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, except that any property or material that portrays sexual performance by a child or constitutes child pornography may not be copied, photographed, duplicated, or otherwise reproduced so long as the state attorney makes the property or material reasonably available to the defendant or the defendant's attorney:

(A) – (K) [No Change]

(L) any tangible paper, objects, or substances in the possession of law enforcement that could be tested for DNA; and

(M) [No Change]

(2) – (4) [No Change]

(c) – (g) [No Change]

(h) Discovery Depositions.

(1) – (3) [No Change]

(4) Depositions of Sensitive Witnesses. Depositions of children under the age of ~~16~~18 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, or an intellectual disability as defined in section 393.063, Florida Statutes, to be in the presence of the trial judge or a special magistrate.

(5) – (8) [No Change]

(i) – (o) [No Change]

Committee Notes

[No Change]

Court Commentary

[No Change]

RULE 3.780. SENTENCING HEARING FOR CAPITAL CASES

(a) Evidence. In all proceedings based on section 921.141, Florida Statutes, the state and defendant will be permitted to present evidence of an aggravating or mitigating nature, consistent with the requirements of the statute and the notice requirements of Florida Rule of Criminal Procedure 3.181. Each side will be permitted to cross-examine the witnesses presented by the other side. The state will present evidence first.

(b) – (c) [No Change]

Committee Notes

[No Change]