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FILED

SID J. WHITE

OCT 31 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN RE: AMENDMENTS TO FLORIDA  
RULES OF CRIMINAL  
PROCEDURE

3.220 DISCOVERY

CASE NO. <sup>84</sup>82,273

COMMENTS AND SUGGESTIONS TO PROPOSED AMENDMENTS TO  
FLORIDA RULES OF CRIMINAL PROCEDURE 3.220 - DISCOVERY

The Florida Public Defender Association (hereinafter FPDA) respectfully requests this Honorable Court to consider the following comments and suggested changes regarding the Florida Bar Criminal Procedure Rules Committee's proposed amendments to Florida Rules of Criminal Procedure 3.220 - Discovery:

1. Rules 3.220(c)(1)(J) and (d)(1)(A)

FPDA COMMENTS: It is imperative that the proposed amendment maintain the provision that when defense experts will only be testifying at the penalty phase of the trial, any examination, testing, or evaluation by court and/or state experts must not be permitted until after the guilt phase of the trial. Furthermore, the provision that defense experts cannot be questioned until after the guilt phase must be maintained. A defendant's pre-trial statement to experts concerning mitigating factors is irrelevant to guilt and should not be able to be used against him in the guilt phase. This suggested procedure will protect a defendant's constitutional rights against self-incrimination and will not unduly burden the court or the state.

2. Rule 3.220(1)

FPDA PROPOSED CHANGE: "In a capital case, the court shall delay the defendant's disclosure required by this rule of witnesses whom the defense intends to call only in a penalty phase . . . ."

FPDA COMMENTS: This provision of the rule regarding protective orders should be mandatory upon a showing by the defense that defense penalty phase witnesses could have information which could be used by the prosecution at the guilt phase of the trial to the defendant's detriment. The defendant must not be placed in a position of providing evidence against himself to the state. Therefore, this provision should be made mandatory.

3. Rule 3.220(n)

FPDA PROPOSED CHANGE: Delete the proposal of the Criminal Rules Committee which would permit exclusion of defense mental health expert witnesses.

FPDA COMMENTS: Exclusion of these witnesses is an extreme sanction which could skew Florida's death penalty scheme. If a defendant with extreme mental problems refuses (perhaps because of those mental problems) to cooperate with state's experts and the defense witnesses are therefore excluded, a defendant who should not proportionally receive the death penalty because of his mental infirmity could, in fact, receive the ultimate punishment. The state can rebut mental health mitigating factors by having its experts review the reports, testing, and evaluations of the defense experts, so there is no

sound policy reason for total exclusion of defense experts' testimony.

If this Court is inclined to allow exclusion of defense witnesses, it should be stressed in the Comments to the rule that such exclusion is an extreme option which should rarely be utilized.

Respectfully submitted,

*Nancy Daniels*

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NANCY A. DANIELS  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Melanie Hines, Chair, Criminal Rules Committee, Office of Statewide Prosecutor, 2020 Capital Circle, S.E. Suite 300, Tallahassee, Florida, 32301-6232, by U.S. Mail, this 31 day of October, 1994.

*Nancy Daniels*

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NANCY A. DANIELS