

O.A. 8-29-95

FILED 097  
SID J. WHITE

IN THE SUPREME COURT OF FLORIDA

DEC 9 1996

CLERK, SUPREME COURT

CASE NOS. 85,585 & 85,801

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

IN RE: AMENDMENT TO FLORIDA RULES  
OF CRIMINAL PROCEDURE 3.220(h), ETC.

COMMENTS OF ROBERT A. BUTTERWORTH,  
ATTORNEY GENERAL FOR THE STATE OF  
FLORIDA, TO PROPOSED RULE 3.220 (p) (3)  
OF THE FLORIDA RULES OF CRIMINAL PROCEDURE

COMES NOW, the Office of the Attorney General, by and through the undersigned counsel, pursuant to this Court's Order of September 12, 1996, and files the instant Comments to Proposed Rule of Criminal Procedure 3.220(p) (3):

1. On September 12, 1996, this Court had published a proposed amendment to the Rules of Criminal Procedure, and requested comment thereupon within ninety (90) days. See In Re: Amendment to Florida Rule of Criminal Procedure 3.220(h), etc., 21 Fla. L. Weekly s369 (Fla. Sept. 12, 1996). The amendment, suggested by the Honorable O.H. Eaton, Jr., Circuit Judge, would be contained in Rule 3.220(p) (3), and would provide that if the prosecution intends to

seek the death penalty in a capital case, the court shall order the disclosure of aggravating and mitigating circumstances to be relied upon at trial; this provision would be set forth in the section of the rule involving pretrial conferences.

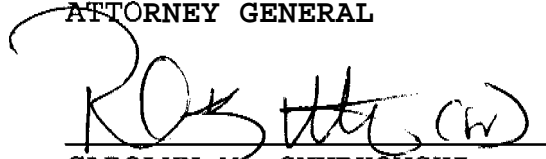
2. The undersigned has been served with a copy of the comments to this proposed rule filed by Katherine Fernandez Rundle, State Attorney for the Eleventh Judicial Circuit, and Michael J. Satz, State Attorney for the Seventeenth Judicial Circuit, and would respectfully state substantial agreement therewith. As this State's twenty elected State Attorneys will be most affected by any rule amendment in this regard, the Office of the Attorney General respectfully contends that this Court should give great weight to their comments on this matter. As the prosecutors' comments make plain, this proposed amendment does not solve any existing problem. This Court's precedents have long recognized that § 921.141, Fla. Stat. (1995), itself provides a defendant with sufficient notice as to potential aggravating circumstances. See, e.g., Gore v. State, 475 So. 2d 1205, 1210 (Fla. 1985); Sireci v. State, 399 So. 2d 964, 970 (Fla. 1981). It cannot be said that, in more than twenty years of practice, any defendant has been substantially prejudiced, or even "surprised", as a result of the lack of formal pretrial disclosure of potential aggravating circumstances.

3. Additionally, the Office of the Attorney General agrees with the concerns of the prosecutors regarding the difficulties inherent in requiring any pretrial disclosure of potential mitigation (presumably by the defense). As mitigation is truly unlimited, see, e.g., Walton v. Arizona, 497 U.S. 639, 656-668 (1990) (opinion of Scalia, J., concurring in part), defense counsel's task would likewise be unlimited, and subject to perpetual revision or amendment. It is difficult to see how this could be viewed as an improvement on the present state of the law, and the undersigned also concurs with the prosecutors' view that promulgation of the proposed rule could significantly undermine the holding of such decisions of this Court as State v. Bloom, 497 So. 2d 2 (Fla. 1987), which have consistently recognized that the decision to seek the death penalty in a case is within the discretion of the prosecution, and that no pretrial determination by the court is appropriate or permissible.

For all of the above reasons, as well as those set forth in the Comments by State Attorneys Rundle and Satz, the Office of the Attorney General respectfully moves this Honorable Court to decline to adopt proposed rule 3.220(p) (3).

Respectfully submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

A handwritten signature in black ink, appearing to read 'Carolyn M. Snurkowski', with a large, stylized initial 'C' on the left and a circled 'CW' on the right.

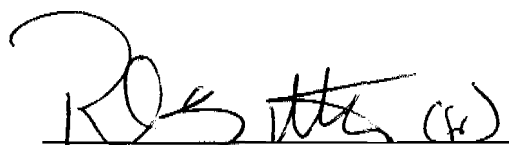
CAROLYN M. SNURKOWSKI  
Assistant Attorney General  
Florida Bar No. 158541

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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 Harry Shorstein, State Attorney, Fourth Judicial Circuit, 330 East Bay Street, 600 Duval County Courthouse, Jacksonville, Florida **32202**; Nancy Daniels, Public Defender, Second Judicial Circuit, 301 South Monroe Street, Fourth Floor North, Tallahassee, Florida 32301; Arthur Jacobs, 111 N. Gadsden Street, Suite **200**, Tallahassee, Florida 32301; Thomas Powell, Post Office Box **1674**, Tallahassee, Florida **32302-1674**; Honorable O.H. Eaton, Circuit Judge, Seminole County Courthouse, **301 N. Park Avenue**, Sanford, Florida **32771-1243**; Howard Dimmig, II, Polk County Courthouse, Public Defender's Office, Bartow, Florida **33830-9000**; John Harkness, Executive Director, The Florida Bar, Post Office Box 389, Tallahassee, Florida **32302-0389**; Henry M. Coxe, Coxe & Mitchell, **424 E. Monroe Street**, Jacksonville, Florida 32202-2837; Honorable Dedee Costello, Circuit Judge, Bay County Courthouse, Post Office Box 1089, Panama City, Florida **32402-1089**; Elizabeth Hapner, **101 S. Franklin Street**, Suite 100, Tampa, Florida **33602-5327**, Ward Metzger, Asst. Public Defender, **330 East Bay Street**, Room **407**, Jacksonville, Florida **32202-2994**; Douglas Crow, Asst. State Attorney, Post Office Box **5028**, Clearwater, Florida

34618-5028; Louis Frost, 330 East Bay Street, Room 401,  
Jacksonville, Florida 32202-2910; C. Richard Parker, Post Office  
Box 2820, Gainesville, Florida 32602-2820; Benedict Kuehne, Sale &  
Kuehne, 100 S.E. 2nd Street, 21st Floor, Miami, Florida 33131-2154,  
and to Thomas C. Gano, Lubin & Gano, 1217 Flagler Drive, Suite 2,  
West Palm Beach, Florida 33401-6706, this 9th day of December,  
1996.

A handwritten signature in black ink, appearing to read "Carolyn M. Snurkowski", written over a horizontal line.

CAROLYN M. SNURKOWSKI  
Assistant Attorney General