

IN THE SUPREME COURT OF FLORIDA

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

Case No.:

**FOUR-YEAR CYCLE REPORT OF
THE FLORIDA BAR
CRIMINAL PROCEDURE RULES COMMITTEE**

John F. Harkness, Jr., Executive Director of The Florida Bar, and Jerome C. Latimer, Chair of The Florida Bar Criminal Procedure Rules Committee, file this four-year cycle report under *Fla. R. Jud. Admin.* 2.130(c).

The committee proposes amendments to the rules and forms as shown on the attached table of contents (Attachment A), which includes the voting record of the committee for each proposal. As required by *Fla. R. Jud. Admin.* 2.130(c)(2), The Florida Bar Board of Governors approved the proposed amendments on February 4, 2000, by a vote of 32 in favor, 0 opposed. The proposed amendments are attached (Attachment B).

I

Since its last report, the committee has approved creation of or amendments to 18 rules and forms. The committee believes that the adoption of these rules and forms will significantly improve the Florida Rules of Criminal Procedure and facilitate the correction of various problems arising under the current rules.

Some of the amendments are technical or editorial in nature, with no substantive effect. For example, forms were amended to make date references “Y2K” compliant; competency rules were amended to reflect a transfer of responsibilities between executive departments; an amendment is proposed to clarify that the Office of Statewide Prosecution is a prosecuting authority under the rules.

Significant modifications to rules proposed by the committee seek to implement recent Florida

Supreme Court decisions. For example, new rules governing competency determinations in capital postconviction relief proceedings were prompted and guided by the court's opinion in *Carter v. State*, 706 So. 2d 873 (Fla. 1997). A category of illegal sentences that may be corrected "at any time" is added in response to the court's decision to that effect in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). Modification of expungement and sealing of criminal records rules are sought as a direct result of the court's opinion declaring that expungement or sealing of nonjudicial records, under the doctrine of separation of powers, is within the exclusive province of the legislature. *State v. D.H.W.*, 686 So. 2d 1331 (Fla. 1996).

A form by which a court may remove court-appointed counsel in petty misdemeanor cases, when there has been a determination that no jail time will result, is proposed by the committee in response to a legislative invitation to create such a form. § 27.512 (2), Fla. Stat. (1999). Rules concerning electronic service on parties are proposed in response to a directive contained in a rule of judicial administration recently promulgated by the court.

Finally, the committee responded to perceived problems arising under current rules. For example, the committee proposes that time-triggering pleadings filed under speedy trial rules must be filed separately and clearly captioned to avoid being inadvertently overlooked by parties and the court. Also, an amendment eliminating provisions requiring formal written out-of-court waivers of counsel is proposed to remove current confusion about their application in police interrogation sessions. An amendment requiring that motions to suppress evidence be filed "a reasonable time before trial" seeks to prevent delay and prejudice that result from last minute motions to suppress being filed on the day of trial.

II

The recommended amendments and their rationale are as follows:

Rule 3.025. State and Prosecuting Attorney Defined.

This new rule is technical in nature and seeks no substantive change. Proposed by the Statewide Prosecutor, Melanie Ann Hines, a member of the committee, the rule recognizes that the Florida Rules of Criminal Procedure contain various terms (*i.e.*, "state," "state attorney," "prosecutor," "prosecution") to describe the prosecuting authority. The committee voted in favor of this proposal, which seeks to clarify that, when various terms are used in the rules to describe the prosecuting authority, the Office of Statewide Prosecution is included. Because the committee believed that the use of specific terms to describe the prosecuting authority in particular rules may have a particular grammatical or contextual meaning that should not be disturbed, the committee decided that the proper solution was the adoption of this new rule rather than amendment of every specific reference in the rules.

Rule 3.030. Service of Pleadings and Papers.

The proposed amendment to Rule 3.030 was prompted by the court’s opinion in *Amendments to the Rules of Judicial Administration — Rule 2.090 — Electronic Transmission and Filing of Documents*, 681 So. 2d 698 (Fla. 1996).

Rule 2.090(d)(2) provides:

Any document electronically transmitted to a court or clerk of the court shall also be served on all parties and interested persons *in accordance with the applicable rules of court*. [emphasis supplied]

Paul R. Regensdorf, then Chair of the Florida Rules of Judicial Administration Committee, asked the committee to adopt applicable rules of criminal procedure for electronic filing.

The proposed amendment to Rule 3.030 seeks to regulate electronic service of pleadings and papers on parties and to recognize that electronic filing on the court is permissible. Our proposed revision tracks the language of the analogous *Fla. R. Civ. P.* 1.080(b)(5). Under the proposed rule, service of a document is recognized if it is transmitted electronically to each party with a cover sheet containing information identifying the sender and specifying the total number of pages transmitted. The proposed rule also mandates that the time of service is when the document has been fully transmitted. Finally, if the document is received after 5:00 p.m., it is considered received on the next day that is not a Saturday, Sunday, or legal holiday.

Concern was expressed in the committee that the failure of the proposed rule to require additional service by other traditional means would lead to unprofessional exploitation of the service process. For instance, agencies having multiple offices, each having facsimile machines, may be subjected to useless service at remote branches. It was suggested that an unprofessional attorney purposely may do so to seek an advantage. By motion, language was sought to be included that would have required additional service by traditional means; this motion was defeated by a vote of 7 in favor and 19 in opposition. However, the committee responded to this concern by including, as a committee note, language that seeks to deter unprofessional exploitation of the rule.

Rule 3.111. Providing Counsel to Indigents.

1. Subdivision 3.111(d)(4).

The first committee proposal to Rule 3.111 concerns “out of court” waivers of counsel in subdivision (d)(4) and the addition of a committee note to eliminate the confusion concerning whether this rule is applicable to nonjudicial investigative proceedings, such as police interrogations. The Florida Supreme Court has held that the current Rule 3.111(d)(4), if read in context, does not apply to waiver of counsel in investigative proceedings. *State v. S.L. W.*, 465 So. 2d 1231 (Fla. 1985); *Jordan v. State*, 334 So. 2d 589 (Fla. 1976). The court held that a waiver of rights under *Miranda v. Arizona*, 384 U.S. 436,

86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), may be made orally or by gesture. More recently, the court assumed the applicability of this provision for written out-of-court waivers to a police interrogation session but found that, in the absence of prejudice, compliance with the formal requisites of the current rule was not required. *Johnson v. State*, 660 So. 2d 637 (Fla. 1995). See also *Hogan v. State*, 330 So. 2d 557 (Fla. 2d DCA 1976). The District Court of Appeal, Fifth District, likewise assumed the applicability of the current provision to police interrogations when it “reminded” the Orlando Police Department of the requirement of this rule in *Randall v. State*, 691 So. 2d 573 (Fla. 5th DCA 1997). It was clear to the committee that the continued presence of the reference in the current rules to “out of court” waivers still causes confusion.

The proposed modification to Rule 3.111(d)(4) and the committee note attempt to remove this confusion and adhere to Rule 3.010, which declares that the Florida Rules of Criminal Procedure are applicable only to criminal proceedings in state courts. Additionally, the proposed rule no longer seeks to regulate the form of “out of court” waivers for judicial proceedings. Other provisions of Rule 3.111(d) insure that all waivers of counsel for judicial proceedings, including those “out of court,” must be informed and freely and voluntarily given. This modification of Rule 3.111(d) was made by the committee at the request of Leslie A. Hess, Chief Assistant State Attorney for the Ninth Judicial Circuit, who is a member of this committee.

2. New subdivision 3.111(e)(1)(E).

The second modification to Rule 3.111 sought by the committee is the addition of a new subdivision (e)(1)(E). This subdivision makes no substantive change; it merely seeks to have the criminal procedure rule conform exactly to the same requirements in *Fla.R. App. P.* 9.140(b)(5), addressing the withdrawal of defense counsel after judgment and sentence. The committee felt that greater compliance likely will result with the addition of this conforming rule because trial practitioners in criminal proceedings are more familiar with the rules of criminal procedure than with the rules of appellate procedure. This modification was prompted by the request of R. Michael MacMillan, formerly Chief Public Defender, Sixth Judicial Circuit.

Rule 3.125. Notice to Appear.

Changes to this rule are editorial and technical in nature and effect no substantive change.

Rule 3.190. Pretrial Motions.

The committee seeks to modify subdivision (h)(4), which addresses motions to suppress evidence. The modification would require that the motion be made not only before trial, but “at a reasonable time” before trial. This proposal seeks to curb the practice of filing motions to suppress, which generally require an evidentiary hearing, on the day of and immediately before trial, often resulting in prejudice or delay. When motions are filed in this manner, the witnesses needed to respond to the merits often are not trial witnesses and are not present, and the need to obtain these witnesses may cause a delay of the trial. Even

if the witnesses for the motion are available, the length of the evidentiary hearing on the belated motions may cause a delay of the trial. Additionally, the committee proposes that a “good cause” prerequisite be included regarding the court’s discretion to entertain a belated motion at trial. Again, because of the delay and potential prejudice that may arise, some demonstration of reasonable justification for the tardy motion should be required.

These proposals were prompted by a request from the Honorable Kevin M. Emas, a member of the committee, on behalf of the Florida Conference of County Court Judges. Of primary concern of those in opposition to the proposal were that (1) a specified time period rather than “reasonable time” should be mandated, and (2) the insertion of a “good cause” requirement might preclude unrelated evidentiary objections to the same evidence at trial. The committee favored the “reasonable time” language because it provides the trial court with an opportunity to access the underlying circumstances in making its determination of reasonableness. Additionally, this language permits the trial court greater flexibility in dealing with its calendar. The second concern was believed to be unfounded because the requirement for good cause must be considered in the context of the rule, which is restricted to motions to suppress evidence. Hearsay, relevancy, or other evidentiary objections to the same evidence would not be governed by this rule.

Rule 3.191. Speedy Trial.

Most of the proposed changes to Rule 3.191 are editorial and technical corrections without substantive change. However, one substantive change is sought to subdivisions (b) and (p)(2). The Eighteenth Judicial Circuit proposed, by local rule, that “Demand for Speedy Trial” or “Notice of Expiration of Time” pleadings be captioned as such and filed as a separate pleading. Additionally, the court sought to require service of the pleadings on the state attorney’s office where the case was docketed and on the trial judge. Former Chief Justice Stephen H. Grimes referred this matter to the committee for consideration as a statewide rule.

The committee approved a proposed amendment that would require that a “Demand for Speedy Trial” or “Notice of Expiration of Time” be captioned as such and filed in a separate pleading. This requirement would prevent these time-triggering pleadings from being buried in pleadings addressing unrelated matters. The committee rejected further requirements that the pleadings be served at specific locations and on specific individuals. The committee felt that the requirement of a properly captioned pleading filed separately would prevent most abuses and prevent the pleadings from being inadvertently overlooked. The committee believed that special problems or abuses occurring in particular judicial circuits or offices would be handled best by administrative rules or instructions and by the ability of parties to seek sanctions for the abuse of judicial process.

The proposed amendment should be considered in light of the current Rule 3.090, which requires, in part, that “[a]ll papers filed in the action shall be styled in such a manner as to indicate clearly the subject matter of the paper and the party requesting or obtaining relief.”

- Rule 3.213. Continuing Incompetency to Proceed, Except Incompetency to Proceed With Sentencing: Disposition.**
Rule 3.217. Judgment of Not Guilty by Reason of Insanity: Disposition of Defendant.
Rule 3.218. Commitment of a Defendant Found Not Guilty by Reason of Insanity.
Rule 3.219. Conditional Release.

The proposed changes to these rules reflect that the functions of the Department of Health and Rehabilitative Services regarding involuntary placement of mental health patients have been transferred to the Department of Children and Family Services.

- Rule 3.692. Petition to Seal or Expunge.**
Rule 3.989. Affidavit, Petition, and Order to Expunge or Seal — Forms.

The amendments to these rules and forms seek to conform them to the decision of the Florida Supreme Court in *State v. D.H.W.*, 686 So. 2d 1131 (Fla. 1996). The Supreme Court in *D.H.W.* held that the determination of eligibility for expungement and sealing of nonjudicial records was a substantive matter within the exclusive province of the legislature. The Florida legislature, in § 943.0585, Fla. Stat. (expungement), and in § 943.059, Fla. Stat. (sealing), requires that one seeking relief must have no prior specified adjudications and must obtain a “Certificate of Eligibility” from the Florida Department of Law Enforcement. The current Rule 3.692 and the accompanying forms in Rule 3.989 do not require a “Certificate of Eligibility” or statement of nonadjudication of specified offenses, even when the petitioner seeks to expunge or seal nonjudicial records. The court in *D.H.W.* held that a certificate and statement of nonadjudication is a prerequisite to expunging or sealing nonjudicial records.

The modifications to this rule and the accompanying forms seek to facilitate the process of expungement and sealing of both judicial and nonjudicial records. The proposed committee note simply references *State v. D.H.W.* These changes were prompted by a request from John P. Booth, Assistant General Counsel, Florida Department of Law Enforcement.

Additional amendments to Rule 3.989 were made at the request of The Florida Bar liaison. These are technical amendments to the forms so that date references would be “Y2K” compliant.

- Rule 3.800. Correction, Reduction, and Modification of Sentences.**

The committee seeks to add language to Rule 3.800(a) to specify that sentences that fail to grant proper credit for time served and when proper credit is determinable from the record without the necessity of an evidentiary hearing are illegal and correctable under that subdivision. The proposed amendment attempts to incorporate within Rule 3.800(a) the holding to this effect by the Florida Supreme Court in *State v. Mancino*, 714 So. 2d 429 (Fla. 1998). The proposed committee note simply references the change to that case. The Honorable Major B. Harding, Chief Justice, referred this matter to the committee on the request of The Honorable Gerald B. Cope, Jr.

The modification sought by the committee is unaffected by the recent changes to Rule 3.800 by the court in response to a proposal of the Florida Supreme Court Criminal Appeal Reform Act Committee.

Rule 3.851. Collateral Relief After Death Sentence Has Been Imposed.

1. Title and subdivision 3.851(a).

The efficacy of this proposal, at the time of this report, is uncertain. The Death Penalty Reform Act of 2000 repeals Rule 3.851. In its place, this act would establish a dual-track procedure that would be in direct conflict with the committee's proposal. By order of the Florida Supreme Court on February 7, 2000, the previously existing Rule 3.851 temporarily was readopted until the court adopts new rules or until June 30, 2000. *In Re: Rules Governing Capital Postconviction Actions*, 25 Fla. L. Weekly S119 (Fla. Feb. 7, 2000).

The proposal by the committee sought to amend the title of Rule 3.851 and subdivision (a) to conform to the rest of the rule and would have reflected the status of the law before enactment of the Death Penalty Reform Act of 2000. Additionally, it sought to remove a perceived ambiguity that might result when a death sentence is imposed but thereafter is reduced to a life sentence on direct appeal. This proposal was prompted by request of Richard B. Green, Assistant Public Defender, Fifteenth Judicial Circuit.

2. Subdivision 3.851(d).

Although the Death Penalty Reform Act of 2000 repeals Rule 3.851, the committee, at its January 14, 2000 meeting, believed that this proposed modification to existing Rule 3.851 could be a free-standing rule. The committee concluded that the court should have the benefit of this work product. This conclusion acknowledges that the proposed amendment does not relate to any specified time periods and that time periods are not tolled by the application for determination of competency. Additionally, the committee noted that the Death Penalty Reform Act of 2000 did not address this issue.

The Florida Supreme Court, in *Carter v. State*, 706 So. 2d 873 (Fla. 1997), directed the committee to adopt rules governing the determination of competency in postconviction proceedings in capital cases. In the *Carter* opinion, substantial guidance was given to the committee concerning the general content and tenor of the rules desired by the court. The court directed that a hearing to determine competency be held in a postconviction proceeding in capital cases only when there are "factual matters at issue that require the defendant to competently consult with counsel." 706 So. 2d at 875. This, the court suggested, would occur only when there are "reasonable grounds to believe that a capital defendant is incompetent to proceed" and when the postconviction proceeding involves "factual matters at issue, the development or resolution of which require the defendant's input." 706 So. 2d at 875. The proposed rule incorporates these court-delineated precepts.

To aid the trial court in a determination about whether these criteria for a competency determination

are met, the committee required specificity in the motion for examination. In this, the committee was influenced by Justice Wells' concurring opinion in *Carter*, which suggested that the motion for competency determination "must allege with specificity the factual matter at issue and the reason that competent consultation with the defendant is necessary in respect to each factual matter specified." 706 So. 2d at 877. Additionally, the committee was guided by current provisions in the comparable pre-trial competency Rule 3.210 (b) (1)–(2), which require similar specificity. A few members of the committee voiced concern that the specificity requirement placed an unfair burden on defense counsel.

In *Carter*, the court expressly declared that issues involved in a postconviction proceeding that are purely legal in nature or do not require factual input from the defendant should continue to be addressed in a timely manner by counsel and the court regardless of the suggested incompetency or actual incompetency of the defendant. 706 So. 2d at 876. The committee incorporates this mandate in proposed amendment 3.851(d)(1)(A)(2).

The court concluded in *Carter* that the time periods for filing a postconviction motion in a capital case should not be delayed because of the possible incompetency of the defendant and his or her apparent inability to sign and verify the motion. Additionally, the court concluded that the filing by counsel of a motion for postconviction relief together with a certificate in good faith that counsel has reason to believe that the client is incompetent would be equivalent to the defendant verifying the postconviction motion. These conclusions are included in the committee's proposed rule at 3.851(d)(1)(A)–(B).

Regarding the appointment, examination, and report of experts and the hearing on expert reports, the committee, as did the court in *Carter*, looked to the rules regarding the determination of competency at trial. See Rules 3.210–3.212. Those rules served as a model for provisions in 3.851(d)(2)(D), (3)–(4). Some members of the committee felt that language borrowed from Rules 3.210 and 3.212 was unclear and should not be incorporated into the new rule. However, the majority of the committee felt that, because this language had been the subject of significant judicial interpretation and application, greater clarity would be achieved by retention of that language in this postconviction rule.

The proposed rule provides in subdivision 3.851(d)(4)(B) that, when the court, after inquiry, finds the defendant to be competent to proceed or, if incompetent, finds that competency has been restored, the defendant shall have 60 days within which to amend the motion for postconviction relief regarding those issues that were deferred by the court's determination that they required factual consultation with counsel. Considerable debate over this provision ensued before its adoption. Some felt that this gave advantage to attorneys who might file baseless motions for competency determinations to gain more time. Others felt that this provision might shorten a defendant's opportunity to file amendments because there might be cases in which, at the time of the determination of competency, more than 60 days may exist before the expiration of the limitation period. The committee rejected these concerns. Regarding the former, it relied on the fact that the motion suggesting reasonable grounds to believe the client is incompetent must be made in "good faith." Regarding the latter concern, it was felt that the proposed language, in context, would be construed to permit more than 60 days to amend if the limitation period has not expired.

Rule 3.986. Forms Related to Judgment and Sentence.

Rule 3.987. Motion for Postconviction Relief.

Rule 3.993. Forms Related to Capital Postconviction Records Production.

At the request of The Florida Bar liaison, technical amendments to these forms were made by the committee so that date references would be “Y2K” compliant.

The continued efficacy of the Rule 3.993 form, even amended as proposed, is problematic because of the repeal of Rules 3.851, 3.852, and parts of 3.850 by the Death Penalty Reform Act of 2000.

Rule 3.994. Order of No Imprisonment.

In petty misdemeanor cases, when the court declares that, on a finding or verdict of guilt or a plea of guilty or nolo contendere, no sentence of imprisonment will be imposed, an indigent defendant is not constitutionally nor statutorily entitled to court-appointed counsel. § 27.512, Fla. Stat.; *State v. Ull*, 642 So. 2d 721 (Fla. 1994). See also *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979); *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed. 2d 530 (1972). § 27.512(2), Fla. Stat., provides that the “form and content” of the order of no imprisonment shall be determined by rule of the Supreme Court. Our committee was requested by Carlos Leon, Staff Attorney, Eleventh Judicial Circuit, to draft an implementing form.

The committee respectfully requests that the court adopt these proposed amendments to the Florida Rules of Criminal Procedure.