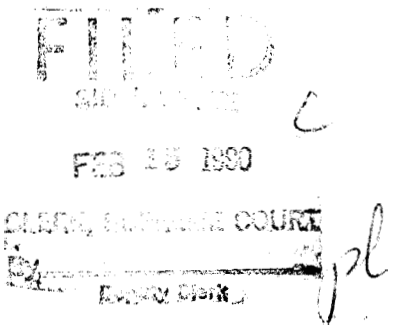
IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,961



IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE, RULE 3.133(b)(6), (PRETRIAL RELEASE).

RESPONSE OF FLORIDA PUBLIC DEFENDER ASSOCIATION TO PETITION TO AMEND RULE 3.133(b)(6)

The Florida Public Defender Association, Inc. responds to the Petition to Amend Rule 3.133(b)(6) filed by the Florida Criminal Procedure Rules Committee, and in opposition to the petition states:

THE PRESENT RULE 3.133(b)(6)

Subsection (6) of Rule 3.133(b) was promulgated by this Court effective January 1, 1989, "to protect against the possibility of prisoners remaining in custody indefinitely without being charged in cases in which no justification exists for the delay." (A. 5)[1] The subsection was added by this Court to section (b) of Rule 3.133 governing adversary preliminary hearings and provides for the release on recognizance of persons

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[1] Citations are to the Appendix ("A.") attached hereto.

not charged by indictment or information within 30 days of their arrest, or, upon a showing of good cause by the state, within an additional 10 days. The subsection further provides that in no event should a person remain in custody beyond 40 days unless charged.

Prior to the adoption of this subsection, there was no limitation on custody pending indictment or information and an arrestee was protected only by the pretrial release provisions of Rule 3.131 regarding bail. If a court found probable cause for a person's arrest and he could not make bail, he could be held indefinitely awaiting the filing of charges until he was discharged under the speedy trial rule.

The present subsection limits the length of time a prisoner may remain in custody awaiting the filing of charges against him by indictment or information. Since the subsection falls under section (b), the adversary preliminary hearing section of Rule 3.133, the subsection only applies to prisoners arrested for felony violations.[2] The subsection gives the state an additional nine days after the arrestee's entitlement to the 21-day adversary preliminary hearing to bring its charges by indictment or information, and then gives the state an additional 10 days to obtain its indictment or information if the state shows good cause. Thus, subsection *(6)* does not affect the power of the state to bring its charges, but merely limits the length

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[2] Subsection (1) of Rule 3.133(b), Fla.R.Crim.P., specifically states that the adversary preliminary hearings outlined in section (b) are applicable to prisoners arrested for felony violations.

of time a person may be held in custody by the state with no charges.

Subsection *(6)* is fair and reasonable, and its adoption was long overdue. The subsection should be retained in its entirety as promulgated by this Court. It affords the state ample time within which to bring its charges, yet protects against indefinite custody without charges. As the Florida Prosecuting Attorneys Association has noted, "in routine cases there should be no difficulty in filing charges within the 30 day time period." (A. 2) In almost all situations, charges can be brought based on the arrest. Thus, a protracted period of time is wholly unnecessary.

The concern of the state attorneys is in regard to the "tough" cases, "where extra investigation is often required before the filing decision can be made." (A. 2) The prosecutors suggest that murder defendants may be "inappropriately released from custody" before they can "muster the necessary quorum of Grand Jurors within the 30 or 40 day time periods," and that "the natural concern of an Assistant State Attorney over the possibility of a defendant being released might cloud the decision making process and result in the inappropriate filing of formal charges before a thorough investigation has taken place." (A. 1-2)

The present rule gives ample weight to the state's concerns. The state has provided absolutely no empirical data to support its claims that grand jurors cannot be timely summoned or investigations cannot be adequately completed within the time

frame of subsection (6). In fact, in complex cases and in cases in which a grand jury indictment is sought, charges are brought based on previous investigation, so extended time beyond the present 40 days is unnecessary. In the rare instance where the grand jury cannot be convened, the state, with the stroke of a pen, can file an information, and obtain an indictment thereafter.

Moreover, murder defendants will not be "inappropriately released from custody." The state need only avail itself of the options under Rule 3.132 and § 907.041, Florida Statutes (1989), to seek continued pretrial detention of certain dangerous defendants. The Florida legislature and this Court have fully provided for the continued pretrial detention for up to 90 days of certain defendants deemed a danger to the community. § 907.041, Fla. Stat. (1989); Rule 3.132, Fla.R. Crim.P.

The state's right to charge is unimpeded by the time limits imposed by the subsection. The basis for the subsection and the remedy for "violation" by the state of these time limits is merely a question of pretrial release, not the dismissal of charges. For this reason, subsection (6) is in accord with the practical realities of our overburdened criminal justice system. The time limits in subsection (6) reduce the number of uncharged defendants remaining in custody, thereby alleviating already overcrowded jails. Subsection (6) prompts action on the part of the state within a reasonable time, which in turn, permits more efficient trial preparation and more effective representation by the defense, as well as a speedier resolution

of cases by the courts. The adoption of the committee's proposal would be a setback in that regard.

Subsection (6) is also critically important for the quality of justice afforded in Florida. The continued custody of uncharged individuals constitutes a serious impingement on their liberty interest, right to counsel, and right of access to the courts. For example, in Florida now, attorneys in two public defender offices are unable to see their clients prior to arraignment, and attorneys in four offices do not begin case preparation until after arraignment. In Dade County, by far the largest public defender office in the state, the lack of resources prevents assistant public defenders from meeting with their clients prior to arraignment, which is 21 days after arrest. Caseloads are so high that many attorneys cannot meet with their clients for another two weeks following arraignment. A recent evaluation of that office noted that "[d]uring this period there is normally no attorney/client contact or case preparation, even though the case has been assigned to a particular judge. . . . No client preparation takes place in any form. . . . Trial preparation normally begins after arraignment when the Public Defender receives a copy of the police reports." Draft Final Report of the National Center for State Courts, Southeastern Regional Office, January 1990. (emphasis in original) (A. 9) Thus, a delay in charging postpones the arraignment, which in turn delays active client representation, discovery and case preparation, affecting the defendant's right to a speedy trial, ultimately delaying the entire resolution of

the case.[3]

THE PROPOSED AMENDMENT

The proposed amendment would thwart the protection established by this Court in promulgating subsection *(6):* "to protect against the possibility of prisoners remaining in custody indefinitely without being charged in cases in which no justification exists for the delay." (A. 5) There are four major reasons why the proposal should be rejected.

First, the proposed amendment would limit subsection (6) to only those situations when a person "remains in custody and has not been charged by information, indictment or otherwise, and for whom no adversary preliminary hearing has been held within 30 days of the date of his or her arrest or service of capias upon him or her." (emphasis supplied) Thus, under the proposal, when a person in custody has had an adversary preliminary hearing,

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[3] The draft report of the National Center for State Courts further describes the situation in Dade County as follows: "Except for the possibility of an interview solely on bail issues, the Assistant Public Defender has no direct contact with the client (custody or bail) during the three weeks between initial bond hearing and arraignment, and generally have [sic] no contact with their custody clients for at least fifteen to twenty-one days following arraignment. Thus, custody clients frequently wait as much as six weeks after their arrest before having the opportunity to talk to an attorney about their case: defense preparation and investigation is inordinately delayed; and defendant attorneys are totally unable to adequately consult with and advise their clients as to whether the client should seek or accept disposition of their case as early as the initial arraignment. This lack of meaningful early entry into the case, which stems entirely from a lack of resources in the Public Defender's Office, is harmful to the attorney/client relationship, effective representation and appropriate cooperation with other criminal justice agencies, particularly the Court and the State Attorneys Office." (A. 10)

these time limits would not apply. Since no other time limits exist under the rules for arrestees who have had preliminary hearings, the proposal would be a regression to the system prior to subsection (6), which provided no limit as to the length of time people could be held in custody uncharged.[4]

Second, the proposed amendment provides for unlimited 10 day periods following the initial 30 day period, so long as the state can show good cause for the detention, during which time the person may be held in custody uncharged. Since the number of 10 day periods is unlimited, the proposal fails to adequately protect against the possibility of people remaining in custody indefinitely without being charged. In addition, a continued showing of "good cause" narrows the time available for trial preparation and frustrates the defendant's right to a speedy trial, as demands for speedy trial cannot be filed until charges are brought.

Third, the suggested standard for continued detention without charges is "good cause," but this is not defined and no guidelines are given, thereby opening the possibility of unequal application by courts.

Fourth, the committee's proposal of repeated 10 day court hearings will add unnecessary weight to our already overburdened system and would require additional court personnel, attorneys, and facilities. And since the committee's proposal will likely result in requests for additional adversary preliminary hearings,

[4] Subject, of course, to the speedy trial limits, Rule 3.191.

the system's limited resources will be taxed even further.[5] In Dade County, adversary preliminary hearings are already held twice weekly on a general calendar, during which both defense attorneys and prosecutors are required to wait for long periods of time. Encouraging additional court hearings will, in all probability, add a serious burden to already-crowded court dockets.[6]

RENUMBERING THE PROVISION

The committee has also proposed that this Court renumber subsection (6) as Rule 3.133(c), and that the present section ***(c)*** be renumbered as Rule 3.133(d). The reason for this is that since subsection (6) falls under section (b), which pertains only to adversary preliminary hearings in felony cases, the time limits of subsection (6) would only apply to felony cases, not misdemeanors, which the committee felt "was not the intent of this Court in adopting Rule 3.133(b)(6).

The Florida Public Defender Association agrees that the time

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[5] The Special Committee on Criminal Justice in a Free Society, ABA Criminal Justice Section, has identified the "lack of resources as a major problem for the entire criminal justice system." Criminal Justice in Crisis, "The Major Problems of the Criminal Justice System," Chapter 4, (November 1988).

[6] The critical problem of an overcrowded and over burdened court system can be seen from the data in the recent report of The American University, Bureau of Justice Assistance, Adjudication Technical Assistance Project, entitled "An Assessment of the Felony Case Process in Cook County, Illinois, and Its Impact on Jail Crowding," November 1989. (A. 4) The data show that Dade County felony courts handle two to five times more cases per judge than other urban areas such as Detroit, Cook County, Los Angeles, and New York City. (A. 4) Also, the Dade County judges have been reduced to trying only 1% of their cases. (A. 4)

limits set forth in subsection *(6)* are just as important in misdemeanor cases as in felony cases, and that the subsection should be renumbered as Rule 3.133(c).

CONCLUSION

The Florida Public Defender Association opposes the amendment of subsection *(6)* of Rule 3.133(b), and urges this Court to retain the subsection and to renumber it as 3.133(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was mailed to Anthony C. Musto, Chairman, Florida Criminal Procedure Rules Committee, 999 Ponce de Leon Blvd., #510, Coral Gables, Florida 33134; Benedict P. Kuehne, Counsel for Florida Association of Criminal Defense Lawyers, One Biscayne Tower, 26th Floor, Two South Biscayne Blvd, Miami, Florida 33131; and to John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 14th day of February, 1990.

BENNETT H. BRUMMER