IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE
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CASE NO.SC04-100

COMMENT IN OPPOSITION TO PROPOSED CHANGE TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.180

The explanation given for the proposed change to Fla. R. Crim. P. 3.180 is that the, "Amendment clarifies the court's authority to require a defendant to be present at any pretrial conference despite the defendant's written waiver of presence." I submit that, rather than "clarifying" the existing state of the law, the proposed change would establish a rule which contradicts current caselaw and repeals, rather than clarifies, the existing rule.

In Lynch v. State, 736 So.2d 1221 (Fla. 5th DCA 1999), the defendant was served with a pre-trial conference notice containing the phrase, "YOUR APPEARANCE IS MANDATORY." At the pretrial conference, the defendant's attorney presented the court with a signed waiver of appearance. The court refused to accept the waiver and instructed counsel to return the next day with the defendant being present with counsel. The defendant filed a petition for writ of

mandamus to require the court to accept the defendant's signed waiver of presence. In Lynch the court held that "[t]he mandatory appearance language of the notice of a pre-trial conference and the trial court's refusal to accept Lynch's written waiver are in direct contravention of our rules of criminal procedure." The court stated that the "county court must follow the clear dictates of these rules and accept the written waiver of appearance proffered on behalf of Lynch by his counsel."

The Fourth District Court of Appeal adopted the reasoning in Lynch when faced with a similar factual situation. *See* Stout v. State, 795 So.2d 227 (Fla. 4th DCA 2001). In Stout, the trial court rejected the defendant's signed, written waiver of appearance for a pretrial conference. The trial court said that the defendant's presence was required because most pleas were entered at pretrial conferences. Counsel for the defendant assured the judge that he would have his client present at the pretrial conference if he had been able to negotiate a plea, but there was not going to be a plea so there was no reason to require the defendant to miss work for every hearing and possibly jeopardize his employment. The appellate court adopted the reasoning in Lynch that the trial court's refusal to accept the written waiver

contravened rule 3.180(a)(3) and granted the petition for writ of mandamus.

In Lynch and Stout the appellate court's interpreted rule 3.180(a)(3) literally. This strict, literal construction of rule 3.180 is consistent with the Florida Supreme Court's strict construction applied to rule 3.180 in Coney v. State, 653 So.2d 1009, 1013 (Fla. 1995). In Coney, the Court's strict construction of rule 3.180 could not be more clear: "We conclude that the rule means just what it says: The defendant has a right to be physically present at the immediate site where pretrial juror challenges are exercised." Coney at 1013. The proposed change to rule 3.180 contradicts the literal construction that has been given to rule 3.180 by the Supreme Court and the Fourth and Fifth District Courts of Appeal.

The strict construction of rule 3.180(a)(3) in Lynch and Stout is consistent with the holding in Emmanuel v. State, 366 So.2d 513 (Fla. 2d DCA 1979). In Emmanuel, the trial court set the case for pretrial conference and commanded the defendant to appear at the conference. The court refused to accept the defendant's waiver of presence for the pretrial conference and issued a bench warrant for failure to appear. The Second District Court of Appeal held the trial court departed from the essential

requirements of the law in ordering the bench warrant despite the fact that the court had commanded the defendant to attend the pretrial conference.

The Third District Court of Appeal has not strictly read rule 3.180(a)(3) as did the courts in Lynch, Emmanuel and Stout. In Cruz v. State, 822 So.2d 595 (Fla. 3d DCA 2002), the court stated, in dicta, that the judge "can require the personal presence of the defendant in court, notwithstanding the waiver, if there is good reason to do so." The court explained that "defense counsel and the defendant must be clearly advised that the defendant's personal presence is required, notwithstanding the waiver of presence." Cruz at 596. I assume that this is the decision that the proposed change to rule 3.180 (a)(3) would "clarify." However, the proposed rule change does not clarify the Cruz decision – it would contradict the Cruz decision by greatly expanding the court's authority to compel the attendance of the defendant before the court. The Cruz decision and rule 3.180(a)(3) only apply to the defendant's presence at pretrial conferences. The proposed change to rule 3.180(a)(3), however, would greatly expand the scope of rule 3.180(a)(3) by making the court's new authority to compel attendance all-encompassing because the proposed rule change would apply to "any proceeding." The

proposed rule change also greatly expands the scope of the Cruz decision because the proposed rule, unlike the Cruz decision, does not require that there be good reason – or even any reason – for the court to require the presence of the defendant at any proceeding. I submit that the proposal to change rule 3.180(a)(3) does not clarify the court's authority; the proposal instead contradicts the decisions of the Fifth, Fourth, and Second District Courts of Appeal above and greatly expands, rather than clarifies, the decision of the Third District Court of Appeal in Cruz, *supra.*

Rule 3.180(a)(3) should not be changed because the presence of the defendant at a pretrial conference is completely unnecessary. A pretrial conference - also known as docket sounding in some locales - is a simple, organizational "calendar call" proceeding where the court calls all of the pending cases to hear one of three things: 1) the case has been resolved through a plea negotiation; 2) the case should be scheduled for trial, or; 3) one side or the other is requesting that the case be continued to another pretrial conference or docket sounding. The pretrial conference or docket sounding is so perfunctory that in the circuit court of Brevard County there are judges who do not even preside in the courtroom at pretrial

conference. The clerk of the court simply sets court dates in the absence of the judge when a case is announced as a plea, or trial, or when both sides agree to a continuance. The judge comes to the courtroom at the end of pretrial conference only to preside over the cases where one side seeks a continuance but the other side objects. It is no wonder then that the presence of the defendant at pretrial conferences has been found to be unnecessary because the defendant's presence is of no assistance or use. *See, for example,* Cruz v. State, 822 So.2d 595, 597 (Fla. 3d DCA 2002), Judge Sorondo concurring, ("Although the term 'pretrial conference' is not defined with much specificity, it seems clear that the intended purpose of such a conference is organizational in nature. At a hearing that seeks to 'promote a fair and expeditious trial,' the court would expect to be provided a realistic list of the witnesses that would actually be called to testify; the number and nature of expert witnesses expected to testify; the number and nature of exhibits to be use; whether any evidentiary motions are pending and need to be resolved before a jury is selected; the amount of time the parties believe the trial will take to complete; the existence of any extraordinary security concerns that the case presents; and any other factors that may affect the orderly progress

of the trial. Given the purely organizational nature of this type of hearing, it is understandable that the rules allow the defendant to waive his appearance.")(emphasis supplied); See also, Cotton v. State, 764 So.2d 2 (Fla. 4th DCA 1998) ("We do not agree with the defendant that the calendar call or later hearing at which his counsel requested a continuance were pretrial conferences as contemplated by Rule 3.180(a)(3). Even if they were, appellant's absence would be harmless, because he could not have assisted in any way.").

In Brevard County, the five circuit judges assigned to the criminal division don't even have the incarcerated defendants transported to pretrial conferences. The attorneys announce plea, trial, or continuance in their absence. Since the pretrial conference is merely a scheduling mechanism, the courts can be confident that proceeding in the defendant's absence, if error at all, is only harmless error because fundamental fairness is not thwarted. *See* Pomeranz v. State, 703 So.2d 465, 471 (Fla. 1997); Cotton v. State, *supra*, Coney v. State, 653 So.2d 1009, 1112-1113 (Fla. 1995); Junco v. State, 510 So.2d 909,911 (Fla. 3d DCA 1987). Under the proposed change to rule 3.180(a)(3), what would result in at least some circuits is that persons will have to travel hundreds or

thousands of miles only to have to hear their lawyer say trial, plea, or motion for continuance at a pretrial conference. Meanwhile, defendants who are in the jail across the street from the courthouse won't even be brought to court for the same pretrial conference that others who are out of jail had to travel great distances to go to and others had to lose their jobs that support their families - all for a purely administrative court appearance not requiring the presence of the defendant.

Changing rule 3.180(a)(3) to allow the court to order the defendant's presence at any proceeding will lead to hardship that is completely unnecessary. A Brevard County Judge years ago informed me that he had devised a way to coerce defendants into pleading guilty rather than have a trial. His plan was to schedule multiple pretrial conferences after the defendant had announced their intention to have a trial so that the hardships caused by the multiple court appearances would coerce them to plead guilty. The only thing that prevented the judge from succeeding in this scheme was the decision in Emmanuel v. State, 366 So.2d 513 (Fla. 2d DCA 1979). The proposed change to rule 3.180(a)(3) would permit the court to create these unnecessary hardships in an effort to coerce guilty pleas from defendants. Even if the court were not to

require attendance at multiple pretrial conferences, even attending one pretrial conference can be an expensive, difficult, unnecessary hardship to a person who lives out of state, is indigent and belongs to the working poor class who lose their meager jobs for missing work, or is ill, disabled, or diseased. It is absurd to allow a court to require the personal attendance of a defendant at a pretrial conference in a case, for example, where a person charged with an open alcohol container violation who lives in Minnesota must travel to Florida only to hear his lawyer say "trial" at a pretrial conference and then come back to Florida two weeks later only to have the state announce a nolle prosequi. As it is currently worded, rule 3.180(a)(3) prevents such an absurd, unjust result from occurring.

The Two Year Cycle Report of the Florida Bar Criminal Procedure Rules Committee offers just two justifications for the proposed change to rule 3.180. The first justification propounded is that "requiring a defendant to be present at any pretrial conference would make the pretrial more meaningful because the defendant would have to be present to consider any plea offers." This statement could be read to imply that defense lawyers are not conveying plea offers to their clients. If this is the

implication that is intended, I submit that there is not a shred of truth to it. Fla. R. Crim. P. 3.171(c)(2)(A) and Rule 4-1.4 of The Rules of Professional Conduct (see comment to rule specifically) require that a defense lawyer promptly inform the client of the substance of a proffered plea bargain and lawyers do scrupulously adhere to these rules. What has not been said by the committee is that prosecuting attorneys too often procrastinate and do not make a plea offer until a pretrial conference occurs. Changing the rules of criminal procedure in response to the procrastination of prosecuting attorneys would be ill advised. A defense lawyer needs to the take the time to talk to their client about the terms and consequences of a plea offer. The crowded, hectic atmosphere of the courthouse at pretrial conference does not allow the lawyer to counsel their client in this important decision and the decision does not have to be made at the pretrial conference anyway.

The committee's only other justification for the proposed change is that, "many members felt that, in cases where the defendant is not incarcerated, the prosecution would be able to make sure that the defendant is actually around and will show up for trial." This justification for the proposal does not withstand scrutiny. Trials are

typically scheduled from one week to several months after "trial" is announced at a pretrial conference. A defendant's appearance at a pretrial conference does not provide any assurance that they will appear for trial because there is not the threat of being remanded to jail at a pretrial conference like there is at trial.

It is the practice of assistant public defenders in the Eighteenth Circuit, and presumably across the state, to not make any announcement of plea, trial, or continuance in the case of client who is not incarcerated when the attorney has not had any contact with the client. In these cases, when the defendant's name is called at pretrial conference and the defendant is not present, the assistant public defender announces that they have not had contact with the defendant and a bench warrant for their arrest is ordered.[1] The assistant public defender will announce plea, trial, or continuance only when the attorney has spoken to the client about the case and has discussed with the client what will be done at pretrial conference. Colloquially stated, the lawyer will not "cover" for a client whom they have never heard from or spoken to even though the

[1] Kelly v. Goldstein, 649 So.2d 921,922 (Fla. 4th DCA 1995) provides an example of where an assistant public defender announces that they have not had any contact with their client.

judge may not require a written waiver of appearance for pretrial conference to be signed by the defendant.[2]

The proposed change to rule 3.180 should be rejected because it is all-encompassing and would allow judges to make defendants appear at any and every type of hearing that the judge or state attorney might schedule, including arraignment. The proposed rule change provides that the court will have the "authority to order the defendant's presence at any proceeding." Thus, if the rule change is adopted, rule 3.180(a)(2) would directly conflict with the terms of new rule 3.180(a)(3). Paragraph (a)(2) allows the defendant to not be present for arraignment if a written not guilty plea is filed by counsel. However, under the all-encompassing wording of the proposal to change paragraph (a)(3), the judge can order the defendant to be present at <u>any</u> <u>proceeding</u>. The result would be that new rule 3.180(a)(3) would allow judges to order that defendants and lawyers appear for arraignment even though in some felony cases there may be a dozen meaningless arraignments where the arraignment is re-scheduled every

[2] If there is any judge who believes that lawyers in their circuit do "cover" at pretrial conference for clients whom the lawyer has never spoken to, all the judge would have to do to counter this belief is enforce current rule 3.180(c)(3) and 3.220(p) by requiring that a written waiver of appearance be signed by the defendant prior to pretrial conference.

two weeks for six months until the state attorney finally files its notice of no information.

The committee's proposal also directly conflicts with Fla. R. Crim. P. 3.220 (p). Rule 3.220(p) reads, in its entirety, as follows:

> **(p) Pretrial Conference.**
>
> (1) The trial court may hold 1 or more pretrial conferences, with trial counsel present, to consider such matter as will promote a fair and expeditious trial. The defendant shall be present unless the defendant waives this in writing.

The committee's proposal to change rule 3.180 cannot be reconciled with Fla. R. Crim. P. 3.220(p) and the committee's proposal should therefore be rejected by the Court.

The proposal to change rule 3.180(a)(3) would authorize judges to try to "wear down" defendants into pleading guilty by making them attend numerous pretrial conferences like what was attempted by the Brevard County Judge described above. Judges who decide to pursue this course of action would be able to defend their practice by pointing-out that the rules committee justification for the new rule was to see if defendants would show up for the pretrial conferences and therefore show up for trial. Under this rationale, judges across Florida may feel that

the Florida Supreme Court has given its imprimatur to schedule repeated pretrial conferences where the only purpose is to "make sure the defendant is actually around and will show up for trial." (see committee report).

The committee's proposal to change rule 3.180 is extraordinary in that it is the only proposed rule change that would repeal a long-standing rule of criminal procedure and which would effectively overrule existing caselaw. All of the other proposed rule changes have been proffered so that the rules will either conform to recent decisions of the Supreme Court and the district courts of appeal or have been proffered in response to the request of the Supreme Court.[3] Even the rules committee report acknowledges that the proposal to change rule 3.180 was initiated by Judge Scott J. Silverman because he was "concerned by recent court opinions that have narrowly interpreted Rule 3.180(a)(3)." Clearly, the intent of the proposed rule change is to effectively overrule these appellate decisions. I submit that there should be an extraordinarily high burden of persuasion that the committee should have to meet for the Court to approve a rule change which is proposed to overrule appellate

[3] *See* proposals to amend Fla. R. Crim. P. 3.150; 3.191; 3.575; 3.710; 3.800.

decisions which go back at least twenty-four years[4] which have consistently interpreted a long-standing rule of criminal procedure.[5] The committee report offers only two weak arguments in support of its proposal: 1) to see if the defendant is still around and; 2) to learn about a plea offer that the state has waited until the pretrial conference to make. These justifications, I submit, do not even come close to satisfying the heavy burden of persuasion that should have to be met in this extraordinary proposal.

The Court should also consider that there was substantial opposition to the proposal to change rule 3.180 among the voting members of rules committee. Although the livelihood of the voting members was not published to my knowledge, it is safe to assume that prosecutors and judges voted in favor of the proposal while the outnumbered defense attorneys voted against the proposal. It is easy to see why prosecutors and judges would vote in favor of the proposal even though the stated justifications for it are unconvincing: judges have a lot of power and for the

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[4] *See* Emmanual v. State, 366 So.2d 513 (Fla. 2nd DCA 1979).

[5] The written waiver of presence at pretrial conference provision in rules 3.220 and 3.180 have been part of the rules of criminal procedure for at least 31 years. *See* In re Florida Rules of Criminal Procedure, 272 So.2d 65,95,108 (Fla. 1972).

most-part welcome more; prosecutors have to be in court a lot of the time and requiring defendants to be in court as well is fine with them even if it does needlessly result in the loss of the defendant’s job.

Undersigned counsel submits that there is no reason to change rule 3.180(a)(3). The committee report does not identify any existing problem that the proposed amendment would remedy. Undersigned counsel submits that in fact there is not any existing problem in the state concerning the presence of defendants at pretrial conferences. Lawyers scrupuloulsy comply with their duty to promptly advise their clients of proffered plea bargains. At pretrial conference, appointed counsel, such as assistant public defenders, who have not had communication with their client advise the court of this fact and bench warrants are then ordered for their arrest. Clients who are in contact with their lawyers are able to execute written waivers of their appearance if required by the judge in strict compliance with rule 3.180(a)(3) and 3.220(p), and, because of this, they are able to keep their jobs which support their families and they are able to avoid traveling hundreds of miles for the most brief, purely administrative, scheduling conference where the defendant’s present is completely unnecessary.

Finally, it bears repeating that the proposed change to rule 3.180(a)(3) does not clarify the existing authority of the court. There is not any caselaw which holds that the court has the authority to order the presence of the defendant at a pretrial conference for no reason at all despite the defendant's written waiver of presence. Rather than clarifying the authority of the court, the proposal repeals existing rule 3.180(a)(3) because there is no rule at all if the court for any reason, or no reason, can disregard a defendant’s written waiver of appearance for pretrial conference. As Judge Sorondo correctly recognized in the Cruz, *supra*, decision, given the purely organizational nature of the pretrial conference, it is understandable that the rules allow the defendant to waive his appearance. The Supreme Court was correct in adopting the current version of rule 3.220(p) and 3.180(a)(3) at least 31 years ago and nothing has changed since their promulgation which warrants adoption of the proposed change.

For the reasons above, I respectfully urge the Florida Supreme Court to reject the Criminal Procedure Rules Committee proposal to change rule 3.180(a)(3).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing comment in opposition to proposed change to Florida Rule of Criminal Procedure 3.180 was sent by U.S. mail this ___ day of March 2004 to Judge Olin Wilson Shinholser, committee chair, P.O. Box 9000, Bartow, FL 33831-9000 and to Judge Scott J. Silverman, 1351 N.W. 12th St., Suite 712, Miami, FL 33125-1627, proponent of amendment.

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Blaise Trettis