IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE **CASE NUMBER: SC05-739**

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OUT-OF-CYCLE REPORT OF THE
FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE

John F. Harkness, Jr., Executive Director of The Florida Bar, and George Euripedes Tragos, 2005–2006 Chair of The Florida Bar Criminal Procedure Rules Committee (hereafter "the Committee"), file this out-of-cycle report under rule 2.130(f), Florida Rules of Judicial Administration. The recommendations in this report were approved unanimously by the Committee's Fast Track Subcommittee. See Appendix C. The subcommittee recommendations were reported to the full committee by e-mail pursuant to the Committee's fast track procedures. By e-mail vote, 25 committee members approved the recommendations and one opposed. The recommendations were presented to The Florida Bar Board of Governors on November 16, 2005, and were approved by a vote of 36 to 0.

THE COMMITTEE'S COMMENTS AS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.131 AND 3.132, AND PROPOSED AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.790

1. Rule 3.131, Pretrial Release; Rule 3.132, Pretrial Detention

Introduction

The Committee Chair directed the Committee's Fast Track Subcommittee (hereafter "the subcommittee") to respond to the Court's opinions in *State v. Raymond*, 906 So. 2d 1045 (Fla. 2005), and *In re: Florida Rules of Criminal Procedure 3.131 and 3.132*, 907 So. 2d 1169 (Fla. 2005). In particular, the subcommittee was asked to comment on whether Florida Rules of Criminal Procedure

3.131 and 3.132 should be amended to comport with section 907.041(4)(b), Florida Statutes, which the Court struck down as unconstitutional in *Raymond*.

Florida Rule of Criminal Procedure 3.130(d) requires trial judges to determine and impose conditions of pretrial release pursuant to Fla.R.Crim.P. 3.131 at the first appearance hearing. Prior to 2000, rule 3.131(b)(1)(D) in turn provided that one of the pretrial release conditions to be considered at first appearance was "placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant." Pretrial Services (hereafter "PTS") qualified as a designated person or organization under the rule.

In 2000, however, the legislature amended section 907.041 to specify that "no person charged with a dangerous crime shall be granted non-monetary pretrial release at a first appearance hearing." In so doing, the legislature repealed all contrary portions of rules 3.131 and 3.132.

In *State v. Raymond*, the Court eliminated section 907.041(4)(b), reasoning that by repealing a portion of two procedural rules affecting the timing of a defendant's eligibility for pretrial release to PTS, the legislature improperly imposed a new procedural rule, in violation of the separation of powers clause in article II, section 3 of the Florida Constitution. 906 So. 2d at 1051.

As a consequence, the Court observed that as to those charged with "dangerous crimes," "a vacuum now exists concerning when trial judges may consider these defendants for non-monetary pretrial release," *id*. at 1051–1052 — prompting the temporary readoption of rules 3.131 and 3.132 in their entirety and publishing them for comment concerning whether they should be amended to reflect the policy concerns the legislature was attempting to address in section 907.041(4)(b). *See In re: Florida Rules of Criminal Procedure 3.131 and 3.132*, 907 So. 2d at 1169.

A. Rule 3.131

As its first order, the subcommittee unanimously concluded that based on the express language of the statute, legislative intent was indeed to preclude nonmonetary release for people accused of committing "dangerous crimes" at first appearance, but at first appearance only. In other words, the legislature evidently intended to permit trial courts to consider nonmonetary pretrial release options thereafter.

The subcommittee then proceeded to consider the following issues: First, and most important, by neglecting to address the impact of nonmonetary release upon indigent as opposed to monied "dangerous" defendants, the statute was potentially violative of due process and equal protection. Second, based not only on the experience of individual subcommittee members but those reflected in several comments posted to the Court=s website, the statute evidently fostered waste of limited judicial resources in the form of "sham" first appearance hearings to "get around" the statute. And third, as a general concern, the subcommittee noted that the statute lessened discretion accorded to trial judges to determine an accused's pretrial release status and conditions.

After considerable discussion, the subcommittee unanimously agreed:

1. The Court declared unconstitutional the legislative enactment as procedural.
2. The existing rule, as readopted by the Court, is adequate and sufficient.
3. Therefore, no changes to rules 3.131 and 3.132 are necessary.

However, the subcommittee further agreed that should the Court wish to amend the rule to comply with the legislature's intent, the Committee should provide as expeditiously as possible a rule draft that comports with the statute for the Court's further consideration.

Therefore, in light of such a possibility, the Committee respectfully suggests as follows:

i. Subdivision (b)(1)

To distinguish between those eligible and ineligible for nonmonetary release at first appearance, rule 3.131(b)(1) would need to be amended thusly:

(b) Hearing at First Appearance — Conditions of Release.

(1) Unless the state has filed a motion for pretrial detention pursuant to rule 3.132, the court shall conduct a hearing to determine pretrial release. For the purpose of this rule, bail is defined as any of the forms of release stated below. Except as otherwise provided by this rule,

~~T~~there is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release. The judicial officer shall impose the first of the following conditions of release that will reasonably protect the community from risk of physical harm to persons, assure the presence of the accused at trial, or assure the integrity of the judicial process; or, if no single condition gives that assurance, shall impose any combination of the following conditions. . . .

ii. Subdivisions (b)(2), *et seq.*

Further amendment might then be made by creating new subdivision (b)(2) to substantially track the stricken statutory language, as well as reference the "dangerous crime" provision of section 907.041(4)(a), Florida Statutes.

Upon so doing, the Committee would also suggest that former section 907.041(4)(b) be "corrected" to the extent that Florida does not provide for "recognizance bonds," but rather "personal recognizance" or "unsecured appearance bonds."

Finally, in addition to electronic monitoring, personal recognizance, or unsecured appearance bonds, the Committee would encourage according discretion to trial judges to include "any condition the court deems appropriate if the findings on the record of facts and circumstances warrant such a release."

The Committee thus suggests for the Court's prospective consideration the following new language for rule 3.131(b)(2), and to renumber the ensuing subdivisions accordingly:

> <u>(2) No person charged with a dangerous crime, as defined in section 907.041(4)(a), Florida Statutes, shall be granted nonmonetary pretrial release at a first appearance hearing. At a subsequent hearing, however, a court has the discretion to release an accused on electronic monitoring, personal recognizance, an unsecured appearance bond, or any condition the court deems appropriate if the findings on the record of facts and circumstances warrant such a release.</u>

[Current subdivisions 2 through 5 would be renumbered 3 through 6 as shown in Appendix A.]

In the event the Court decides to re-incorporate the statute, the Committee reiterates its concern that the Court analyze the statute's seeming disparate impact upon the indigent at first appearance.

B. Rule 3.132

i. Subdivision (a)

The Committee would further suggest a minor modification to subdivision (a) of rule 3.132 to now refer to both subdivisions (old and "new") of potential rule 3.131(b):

> **(a) Motion Filed at First Appearance.** A person arrested for an offense for which detention may be ordered under section 907.041, Florida Statutes, shall be taken before a judicial officer for a first appearance within 24 hours of arrest. The state may file with the judicial officer at first appearance a motion seeking pretrial detention, signed by the state attorney or an assistant, setting forth with particularity the grounds and the essential facts on which pretrial detention is sought and certifying that the state attorney has received testimony under oath supporting the grounds and the essential facts alleged in the motion. If no such motion is filed, or the motion is facially insufficient, the judicial officer shall proceed to determine the conditions of release pursuant to the provisions of rule 3.131(b)~~(1)~~. If the motion for pretrial detention is facially sufficient, the judicial officer shall proceed to determine whether there is probable cause that the person committed the offense. If probable cause is found, the person may be detained in custody pending a final hearing on pretrial detention. If probable cause is established after first appearance pursuant to the provisions of rule 3.133 and the person has been released from custody, the person may be recommitted to custody pending a final hearing on pretrial detention.

ii. Subdivision (d)

As to subdivision (d), the Committee would suggest it be amended to refer to "new" rule 3.131(b)(2) in place of section 907.041(4)(b):

> **(d) Length of Detention**. If ordered detained pending trial pursuant to ~~section 907.041(4)(b), Florida Statutes~~ rule 3.131(b)(2), the defendant may not be held more than 90 days. Failure of the state to bring the defendant to trial within that time shall result in the defendant's release from detention subject to any conditions of release, unless the trial delay was requested or caused by the defendant or the defendant's counsel.

However, independent of *Raymond* and the assignment to which the Committee was tasked, the subcommittee considered the remaining language of rule 3.132 which requires that a defendant not be held more than 90 days. In particular the subcommittee considered a letter posted to the Court's website from The Florida House of Representatives Justice Council arguing that subdivision (d) must necessarily be deleted because of a change in the law.

Deeming this worthy of more extensive research and deliberation than permitted on the "fast track," the subcommittee requested that the Committee Chair refer the "90-day" matter to the appropriate substantive subcommittee for further consideration.

2. Rule 3.790. Probation and Community Control.

Introduction

Independent of the Court's call for comments as to rules 3.131 and 3.132, the Committee Chair simultaneously directed the fast track subcommittee to examine rule 3.131 with regard to The Jessica Lundsford Act (hereafter "the Act"), which became effective September 1, 2005 (Chapter 2005-28, Laws of Florida), and addresses a host of statutes regarding high-risk sexual predators and offenders. A copy of the act is provided in Appendix D. In particular, in section 13, the Act amends section 948.06(4), Florida Statutes ("Violation of probation or community control; revocation; modification; continuance; failure to pay restitution or cost of supervision") to prohibit bail for offenders convicted of certain sex crimes until the court holds a "danger to the community" hearing.

The subcommittee thus undertook a review of rule 3.131 to determine whether a modification need be made regarding the presumption of bail. In doing so, the subcommittee considered: (1) The importance of providing procedural protections to the accused to ensure a fair and meaningful hearing (akin to those described in section 907.041(4)(h), Florida Statutes); (2) the importance of ensuring judicial discretion, given the existence of statutory language that binds a reviewing court to a previous and, because of the short time frame, likely under-informed judge's findings; and (3) whether, because there is no Florida right to pretrial release for alleged probation and community control violators, *their* "first appearance" merited attention independent of rule 3.131 altogether.

The subcommittee also digested numerous comments posted to the Court's website — many of which questioned the constitutionality of the statute, others which denied its constitutionality outright, and almost all proposing their own procedural language.

Additionally, because of its unique fast track function, the subcommittee again considered the importance, where appropriate, to send to the Court as expeditiously as possible a rule proposal that comports with the Act, as well as advise the Court of the full Committee's opinion as to its validity.

With that said, after considerable research and discussion, the subcommittee unanimously agreed that the portion of the Act requiring a "danger to the community" hearing is rightly incorporated into the Rules of Criminal Procedure. The subcommittee further agreed unanimously that this matter is properly addressed not in rule 3.131,[1] which deals generically with first appearances, but instead in rule 3.790 — primarily because there is no Florida right to pretrial release for alleged probation and community control violators.

A. Subdivision (b)(1)

Because the Act permits a *county* judge to conduct a "danger to the community" hearing, but a county judge is *ineligible*, absent special designation, to otherwise adjudicate many aspects of an alleged probation or community control

[1] The subcommittee formerly considered this language for inclusion as new subdivision (b)(4)(B) of rule 3.131.

violation, the subcommittee specified in subdivision (b)(1) that courts of "competent jurisdiction" must perform all attendant functions.

The following amendment to create subdivision (b)(1) is therefore proposed:

> **(b) Revocation of Probation or Community Control; Judgment; Sentence.**
>
> (1) When a probationer or a community controllee is brought before a court of competent jurisdiction charged with a violation of probation or community control, the court shall advise the person of the charge and, if the charge is admitted to be true, may immediately enter an order revoking, modifying, or continuing the probation or community control. If the violation of probation or community control is not admitted by the probationer or community controllee, the court may commit the person or release the person with or without bail to await further hearing, or it may dismiss the charge of violation of probation or community control. If the charge is not admitted by the probationer or community controllee and if it is not dismissed, the court, as soon as practicable, shall give the probationer or community controllee an opportunity to be fully heard in person, by counsel, or both. After the hearing, the court may enter an order revoking, modifying, or continuing the probation or community control. Following a revocation of probation or community control, the trial court shall adjudicate the defendant guilty of the crime forming the basis of the probation or community control if no such adjudication has been made previously. Pronouncement and imposition of sentence then shall be made on the defendant.

B. Subdivision (b)(2)

The primary provisions of the Act have been incorporated in a new subdivision (b)(2) of the suggested amendments.

In that subdivision, the Committee made a minor change to phrase the court's role more "positively" and thus to make it more understandable (*i.e.*, "the court . . . must make a finding whether the probationer or offender is a danger to the public

. . .," versus "the court must make a finding that the probationer or offender is not a danger to the public prior to release with or without bail").

In order to permit adequate time for the parties (the accused in particular) to prepare, something the Committee considered especially critical given the binding nature of the "danger" court's findings — and to which the Act is silent — the Committee provided in subdivision (b)(2)(A) that the "danger" hearing may not be conducted for 24 hours following arrest.[2]

The Committee also agreed to impose upon the prosecution a "good cause" requirement for requesting any delay, as well as interpose the same "competent jurisdiction" prerequisite as in subdivision (b)(1).

Finally, in subdivision (b)(2)(B), the Committee provided procedural safeguards for the accused, including the right to counsel, to present evidence, and to cross-examine witnesses.

Encompassing all of the above, the Committee respectfully proposes to create subdivision (b)(2) of the rule as follows:

> (2) When a probationer or community controllee is arrested for violating his or her probation or community control in a material respect and is under supervision for any criminal offense proscribed in chapter 794, Florida Statutes, section 800.04(4), Florida Statutes, section 800.04(5), Florida Statutes, section 800.04(6), Florida Statutes, section 827.071, Florida Statutes, or section 847.0145, Florida Statutes, or is a registered sexual predator or a registered sexual offender, or is under supervision for a criminal offense for which, but for the effective date, he or she would meet the registration criteria of section 775.21, Florida Statutes, section 943.0435, Florida Statutes, or section 944.607, Florida Statutes, the court must determine whether the probationer or community controllee is a danger to the public prior to release with or without bail.
>
> (A) The hearing to determine whether the offender is a danger to the public shall be conducted by a court of competent jurisdiction no sooner

[2] The Committee considered but unanimously rejected a suggestion to "cap" that time period at 72 hours post-arrest.

than 24 hours after arrest. The time for conducting the hearing may be extended at the request of the accused, or at the request of the state upon a showing of good cause.

(B) At the hearing, the offender shall have the right to be heard in person or through counsel, to present witnesses and evidence, and to cross-examine witnesses.

(C) In determining the danger posed by the offender's release, the court may consider the nature and circumstances of the violation and any new offenses charged; the offender's past and present conduct, including convictions of crimes; any record of arrests without conviction for crimes involving violence or sexual crimes; any other evidence of allegations of unlawful sexual conduct or the use of violence by the offender; the offender's family ties, length of residence in the community, employment history, and mental condition; his or her history and conduct during the probation or community control supervision from which the violation arises and any other previous supervisions, including disciplinary records of previous incarcerations; the likelihood that the offender will engage again in a criminal course of conduct; the weight of the evidence against the offender; and any other facts the court considers relevant.

WHEREFORE, the Committee and The Florida Bar request that the court retain Rules 3.131 and 3.132 as currently worded. It also is requested that the court adopt amendments to Rule 3.790 as proposed in this report.

Respectfully submitted on December ____, 2005, by

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
850-561-5600
Florida Bar Number: 123390

George Euripedes Tragos
2005-2006 Chair of The Florida Bar
Criminal Procedure Rules Committee
600 Cleveland Street, Suite 700
Clearwater, Florida 33755-4158
727-441-9030
Florida Bar Number: 184830