To: The Florida Supreme Court
From: Bart Schneider
Date: 8/22/05
Re: Comments on Fla. R. Crim. P. 3.131 and 3.132
Case Number: SC05-739

In Fla. R. Crim. P. 3.131(a), the Court uses the language "…the proof of guilt is evident or the presumption is great…."[1] The problem is that no one knows exactly what "proof evident, presumption great" means.

In State v. Arthur, 390 So. 2d 717 (Fla. 1980), this Court hinted that the standard is the same as "beyond a reasonable doubt" when it wrote that the State's evidence had to be legally sufficient to sustain a jury verdict of guilty. In Kirkland v. Fortune, 661 So. 2d 395 (Fla. 1st DCA 1995), however, the First District cited other Florida Supreme Court cases that stood for the proposition that the phrase "proof evident, presumption great" means proof that is higher than proof beyond a reasonable doubt.

A case that addresses the meaning of "proof evident, presumption great" is Simpson v. Owens, 85 P. 3d 478, 487-492 (Ariz. App. Div. 1 2004). The Arizona court wrote that this phrase means different things in different jurisdictions. The phrase is sometimes used to mean only a "fair

[1] This language mirrors Article I, Section 14 of the Florida Constitution.

likelihood of conviction." On the opposite extreme, it appears that Florida has the highest standard of "proof evident, presumption great" in the United States, at least if Kirkland is the law.

"Proof evident, presumption great" should mean more than probable cause, but less than proof beyond a reasonable doubt. "Proof beyond a reasonable doubt" is what is necessary to convict; it doesn't make sense that the standard to hold somebody temporarily before trial should be higher than the standard to impose incarceration after trial, especially when the person detained can demand a speedy trial. Additionally, this Court has promulgated the "beyond a reasonable doubt" standard in its rules for pretrial detention. See Fla. R. Crim. P. 3.132(c)(1). It does not make sense that the burden of proof on the state for a bond hearing on a capital case be higher than the burden of proof on the state for pretrial detention on a less serious, non-capital case.

I propose that Florida follow Arizona with the following addition to Rule 3.131(a):

> Unless charged with a capital offense or an offense punishable by life imprisonment and the proof of guilt is evident or the presumption is great, every person charged with a crime or violation of municipal or county ordinance shall be entitled to pretrial release on reasonable conditions. "Proof evident, presumption great" means that it is plain and clear that the accused committed the offense. The proof must be substantial, but it need not rise to proof beyond a reasonable doubt. If no conditions of release can 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, the accused may be detained.

But even if this Court disagrees, I still recommend that the Court define "proof evident, presumption great" in Rule 3.131(a) because no one uses the language "proof evident, presumption great" anymore and because there appears to be a conflict between Arthur and Kirkland (and the cases cited in Kirkland).

As a separate matter, it is obvious from the plain language of Article I, Section 14 of the Florida Constitution and Rule 3.131(a) that the three main concerns at the time of bail are protecting the community from risk of physical harm, assuring the presence of the accused at trial, and assuring the integrity of the judicial process. However, Rules 3.131(b)(1)(F) and 3.131(b)(2) only mention the presence of the accused. They do not mention the other two concerns – protection of the community from risk of physical harm and assuring the integrity of the judicial process. Thus, I recommend the following additions:

3.131(b)(1)(F) – any other condition deemed reasonably necessary to assure appearance as required, protect the community from risk of physical harm, and assure the integrity of the judicial process, including a condition requiring that the person return to custody after specified hours.

3.131(b)(2) – The judge shall at the defendant's first appearance consider all available relevant factors to determine what form of release is necessary to assure the defendant's appearance, protect the community from risk of physical harm, and assure the integrity of the judicial process. If a monetary bail is required, the judge shall determine the amount.

Finally, in light of the "proof evident, presumption great" debate and this Court's review of Rule 3.132, this Court should revisit **both:**

a) the "beyond a reasonable doubt standard" that was promulgated in Rule 3.132(c)(1); and

b) the requirement in 3.132(c)(1) that pretrial detention shall not be based exclusively on hearsay evidence.

Neither of those requirements is contained in the pretrial detention statute – Section 907.041 Fla. Stat. In fact, the "beyond a reasonable doubt" standard that was promulgated in Rule 3.132(c)(1) conflicts with the "substantial probability" standard set forth in 907.041(4)(c) Fla. Stat.

Additionally, in the interest of consistency, it would preferable if pretrial detention hearings and bond hearings were conducted under the same evidentiary rules since they address the same concerns. For

example, a revocation of pretrial release under 903.0471 can be based solely on hearsay. See Perry v. State, 842 So. 2d 301 (Fla. 5th DCA 2003). I suggest that an order of pretrial detention could also be based solely on hearsay, as long as the trial judge determines that the state has met its burden (which is either "beyond a reasonable doubt" or "substantial probability" depending on whether the rules or the statute apply).

Respectfully submitted,

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