IN THE SUPREME COURT OF FLORIDA

IN RE: FLORIDA RULES OF CRIMINAL PROCEDURE 3.131 AND 3.132

Case Number SC05-739

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The Florida Public Defender Association, Inc., ("FPDA") offers the following comments in response to this Honorable Court=s republication for comment Florida Rules of Criminal Procedure 3.131 and 3.132. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants, FPDA members are deeply interested in the rules of criminal procedure, and especially in rules governing the pretrial release of indigent criminal defendants.

This rule case arises from this Court=s decision in *State v. Raymond*, 30 Fla. L. Weekly S500 (Fla. June 30, 2005), holding section 907.041(4)(b), Florida Statutes (2000), unconstitutional as a violation of the separation of powers. This Court held that section was a purely procedural provision, and therefore beyond the power of the Legislature. *Id*.

This Court also noted that Chapter 2000-178, Laws of Florida, which enacted the section in question, also repealed rules 3.131 and 3.132 to the extent inconsistent with the act. *See Raymond*, 30 Fla. L. Weekly at S502. Apparently the rules committees never brought this statute to this Court=s attention.

Therefore, this Court temporarily readopted the rules of procedure as previously promulgated, and published them for comment on whether this Court should modify them to Areflect the Legislature=s intent as demonstrated in section 907.041.@ *Id*. at S502.

This phrase is ambiguous and could mean any one of three things: First, it could mean modifying the rules to incorporate only the narrow provision ruled unconstitutional, section 907.041(4)(b), Florida Statutes (2000). Second, and more broadly, it could mean modifying the rules to incorporate other changes made to section 907.041 in that same session law, Chapter 2000-178. These changes include alterations to the presumption of nonmonetary release in section 907.041(3)(a), Florida Statutes, and certification requirements for release to a pretrial release service in section 907.041(3)(b), Florida Statutes. Third, and most broadly of all, it could mean a wholesale amendment of the rules to incorporate large portions of section 907.041.

Perhaps this Court=s pronouncement was deliberately vague, so that the Legislature=s comments (however broad or narrow) would serve as a *de facto* proposal to amend the rules of procedure. The bench, bar, and the public at large should have an opportunity to review the Legislature=s proposal, and then provide comments. As the situation currently stands, however, the Legislature=s

and everyone else=s comments are due simultaneously. Neither the FPDA nor anyone else will have any effective way to review and respond to the Legislature=s specific proposal.

The better procedure would be for this Court to send the Legislature=s comments to the appropriate committee as a proposed change in the rules of procedure.[1] Alternatively, this Court could publish the Legislature=s proposal, once received, and allow an additional time for filing of comments.

The FPDA recognizes that this issue has already been delayed and regrets that such a procedure would create a further delay. In 2000, the Legislature enacted the law in question, Chapter 2000-178, Laws of Florida. By the time *Raymond* worked its way up to this Court, oral arguments were not heard until 2004 and this Court=s opinion was delivered this year. Considering the five-year delay that has already occurred, a few months to publish specific proposed changes and receive comments would be reasonable. The delay in bringing these proposals should not truncate this Court=s deliberative process in publishing and receiving comments on explicit proposals.

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[1]Just prior to submitting these comments, undersigned counsel learned of a proposal in the criminal rules committee and submitted a version of these comments in a letter to the committee. The committee had not published its proposal and the time frames did not allow the FPDA as a whole to consider and respond. Therefore the letter was submitted as a personal letter.

In the absence of a specific proposal, the FPDA will address only the sections of Chapter 2000-178, Laws of Florida, that this Court may be considering adopting as rules.

I.

THIS COURT SHOULD NOT ADOPT SECTION 907.041(4)(b), FLORIDA STATUTES, AS A PROCEDURAL RULE.

A.

ADOPTING THIS SECTION AS A RULE OF PROCEDURE WOULD RESULT IN A WASTE OF PUBLIC RESOURCES.

In the FPDA=s experience, the operation of section 907.041(4)(b), Florida Statutes was an example of pointless bureaucracy and a waste of governmental resources. To the best of the FPDA=s knowledge, the only circuit to enforce section 907.041(4)(b), Florida Statutes, was the Eleventh Judicial Circuit in Miami-Dade County.[2] That section reads, in part: ANo person charged with a dangerous crime shall be granted nonmonetary pretrial release at a first appearance hearing . . . .@ " 907.041(4)(b), Fla. Stat. (2004).

Most Adangerous crimes@ are serious felonies such as homicide, sexual battery, kidnapping, etc. Persons charged with such offenses are, as a practical matter, unlikely to receive nonmonetary conditions for pretrial release. In many cases, persons charged with such crimes may not receive <u>any</u> conditions for pretrial release until after a hearing as required by *State v. Arthur*, 390 So. 2d

[2]Why the other circuits neglected to enforce it is a question best addressed by the judges and state attorneys from those circuits.

717 (Fla. 1980). Therefore, the only large-scale application of the statute was in domestic violence cases. Even misdemeanor domestic violence cases are Adangerous crimes.@ *See* ' 907.041(4)(a)18, Fla. Stat. (2004).

The Eleventh Judicial Circuit has a Domestic Violence Division that conducts bond hearings separate from other misdemeanors or felonies. As noted in the facts of *Raymond*, the procedure in the Domestic Violence Division was to bring all defendants before the court for a first appearance hearing. *See* 30 Fla. L. Weekly at S501. In accordance with Florida Rules of Criminal Procedure 3.130 and 3.133, the court would inform the defendants of the charges, appoint counsel if they were indigent, and decide if the state had shown probable cause to hold them. The court would also set the conditions for pretrial release. If, as occurred in *Raymond*, the court was going to release a defendant to a pretrial release service (known locally as Pretrial Services or APTS@), the court would usually set a $1,500.00 bond, and then reset the case for the next working day for the person to be formally ordered released to PTS. *See id.* If, as in *Raymond*, a defendant was unlucky enough to be indigent and have a first appearance on a Friday or before a holiday, the person would have to wait over the weekend or holiday to be brought back to court and released to PTS. *See id.*

This second hearing was short, because all of the judicial work had already

been done at the previous hearing. Nevertheless, the clerk=s office, state attorney=s office and public defender=s office all had to pull their files and reproduce their paperwork for this Asecond appearance@ hearing. The local department of corrections (the equivalent of the sheriff=s office in many counties) had to house the person in the interim and then re-transport the person for this second hearing. No assistant public defenders assigned to that court can recall any case where anything happened at this second hearing that could not have been done at the first appearance.

As this Court=s opinion in *Raymond* suggests, section 907.041(4)(b), Florida Statutes, would be pointless as a rule of procedure:

> In this case, section 907.041(4)(b) does not set forth a specific period of time that a defendant must be detained before a judicial hearing. In fact, even the State agrees that the trial court could have called Raymond=s case for a second hearing immediately following her initial appearance. If the trial courts choose to hold a second hearing immediately following the first appearance, the judicial workload would certainly be increased and the judicial system affected. In essence the trial judge, the assistant state attorney, and the defense counsel will need to schedule more time for two hearings to address the same subject without having any additional information.

Id. at S502.

In *Raymond*, the state claimed that this unnecessary delay facilitated the

state=s investigation to determine eligibility for pretrial services release. *Id*. at S502. This Court should view that claim as a litigation-inspired attempt to come up with a face-saving, plausible, non-procedural explanation for the statute. The attempt failed. As this Court noted, A[t]he same investigation and recommendation that the judge utilized before the amendment to determine whether a defendant is eligible is used after the amendment.@ *Id*. at S502. For present purposes, the more important point is that the state did not use the second hearing to report results of any alleged investigations and readdress pretrial release decisions.

Instead, anytime the state discovers additional information it did not have at the first appearance hearing, the state moves to modify the conditions for pretrial release pursuant to rule 3.131(d). Such motions require only three hours notice. *See* Fla. R. Crim. P. 3.131(d)(2). The state used this procedure before, during and after the period when section 907.041(4)(b), Florida Statutes, was in effect and continues to use this procedure. Commonly, the state files such motions during the morning calendar and the hearing is held immediately after the lunch recess. Given this procedural mechanism to address any subsequently discovered information, an automatic resetting of every case for a subsequent hearing was an unnecessary waste of resources. This Court should not reinstate

that wasteful practice with a rule of procedure.

B.

AMENDING RULES 3.131 OR 3.132 TO ACCOMMODATE SECTION 907.041(4)(b), FLORIDA STATUTES, WOULD RESULT IN A CONFLICT WITH RULE 3.130.

Florida Rule of Criminal Procedure 3.130 governs when a first appearance hearing occurs and what happens at that hearing. Rule 3.130(a) requires that a first appearance hearing occur within twenty-four hours after arrest. Rule 3.130(d) requires that a first appearance hearing address the issue of pretrial release. Section 907.041(4)(b), Florida Statutes (2004), conflicts with this rule by delaying some defendants= nonmonetary pretrial releases to a later hearing. The Legislature, however, did not repeal rule 3.130. Instead, it repealed rules 3.131 and 3.132. *See* Ch. 2000-178, '5, at 1909, Laws of Fla.

Florida Rules of Criminal Procedure 3.131 or 3.132 only tangentially conflict with section 907.041(4)(b), Florida Statutes (2004). Those rules primarily govern what happens at bond hearings or pretrial detention hearings. Section 907.041(4)(b) attempted (unconstitutionally) to control when trial courts made some pretrial detention determinations. Even if this Court removed all language referring to first appearance hearings in rule 3.131 and 3.132, rule 3.130 would still require that the pretrial release determination be made at the first appearance

hearing.

Therefore, even if this Court were to amend rules 3.131 and 3.132 to incorporate section 907.041(4)(b), Florida Statutes, such an amendment would only result in relocating conflict. Instead of a conflict between the statute and rule 3.130, the amendment would create an internal conflict within the rules of procedure. This Court should avoid such a situation, which is an additional argument why this Court should either publish specific amendments or refer this issue to the appropriate committee.

C.

ADOPTING THE EXCEPTION CONTAINED IN THIS SECTION WOULD RESULT IN AMBIGUITY AND COUNTERINTUITIVE RESULTS.

Section 907.041(4)(b), Florida Statutes (2004), contains an exception: Ahowever, the court shall retain the discretion to release an accused on electronic monitoring or on recognizance bond if the findings on the record of facts and circumstances warrant such a release.@ ' 907.041(4)(b), Fla. Stat. (2004). If this section were adopted verbatim, it would introduce an ambiguity into the rules of procedure. Florida law does not provide for Arecognizance bonds.@ In Florida, courts may release defendants on their Apersonal recognizance@ or Aan unsecured appearance bond,@ but not a Arecognizance bond.@ See Fla. R. Crim.

P. 3.131(b)(1)(A)&(B).

Even if Arecognizance bond@ were amended to Apersonal recognizance,@ however, another problem remains. Under this exception, a judge could not immediately release a person on a relatively more restrictive condition of monitoring by a pretrial release service, but could immediately release that person on the less restrictive condition of personal recognizance. Such a rule would be counterintuitive at best. The legislative history sheds no light on the reason for this exception in the statute. This Court should not adopt such a rule that defies common sense.

II.

THIS COURT SHOULD NOT ADOPT THE REPEAL OF THE PRESUMPTION OF NONMONETARY CONDITIONS FOR RELEASE CONTAINED IN SECTION 907.041(3)(a), FLORIDA STATUTES (2004). THIS PRESUMPTION IS CONSTITUTIONALLY REQUIRED BY DUE PROCESS AND EQUAL PROTECTION.

Chapter 2000-178, Laws of Florida, also enacted a change in the presumption for release on nonmonetary conditions. Before that law, both the rules of procedure and the statute contained Aa presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release.@ ' 907.041(3), Fla. Stat. (1999); Fla. R. Crim P. 3.131(b)(1). That law changed the

statute by adding, Aunless such person is charged with a dangerous crime as defined in subsection (4).@ ' 907.041(3)(a), Fla. Stat. (2004). *Raymond* did not raise the issue of the constitutionality of that section. Nevertheless, the ambiguous wording of this Court=s publication order may suggest that this Court is contemplating amending this rule to conform to the statute. This Court should not do so. This amendment to the statute sets up a possible violation of constitutional due process and equal protection.

The apparent genesis of this presumption for nonmonetary release was the *Pugh v. Rainwater* litigation during the 1970s.[3] A panel of the United States Fifth Circuit Court of Appeals held that the Florida Rules of Criminal Procedure were unconstitutional because this Court had twice refused to create a presumption of nonmonetary release. *See Pugh v. Rainwater*, 557 F.2d 1189, (5th Cir. (AWe hold that equal protection standards are not satisfied unless the judge is required to consider less financially onerous forms of release before he imposes money bail.@). The court noted that a monetary bail system discriminates in favor of non-indigent criminal defendants and that equal protection prohibits such discrimination. *See id*. at 1196-97 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956),

[3]The litigation is best known for the decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), setting forth the constitutional standards for probable cause determinations.

Williams v. Illinois, 399 U.S. 235 (1970), and *Tate v. Short*, 401 U.S. 395 (1971)). Under an alternative rationale, because the fundamental right to liberty is at stake, due process requires that the government employ the least restrictive means of accomplishing its ends. *See, e.g., Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001). A presumption of nonmonetary release is a crucial part of the scheme by which the trial judge starts with minimal conditions for pretrial release and works up to the least restrictive means of assuring the presence of the accused at trial, the integrity of the judicial process, and protect the community for physical harm. *See* Fla. R. Crim. P. 3.131(b)(1).

An *en banc* decision reversed the panel decision, but not on the constitutional issue. *See Pugh v. Rainwater*, 572 F.2d 1053, 1056 (5th Cir. 1978) (*en banc*) (holding that Awe accept the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.@). Instead, the *en banc* opinion held that the failure to explicitly incorporate a presumption of nonmonetary release did not mean that the rules of procedure were facially unconstitutional because judges could still follow the constitution and apply such a presumption. The court noted that:

> The Committee Note to Rule 3.130, 343 So.2d 1251, provides: AThis proposal leaves it to the sound discretion of the judge to determine the least onerous form of release which will still insure the defendant's

> appearance.@ The panel rejected this analysis, pointing out that committee notes were not adopted by the Supreme Court of Florida and that nothing in the rule requires a judge to give priority to forms of release that do not impose a financial burden. *The validity of the committee=s thesis is enhanced, however, by the absence of a constitutional alternative.*

572 F.2d at 1058 n.8 (emphasis supplied). Ultimately, this Court adopted an explicit presumption of nonmonetary release. *See In re Rules of Criminal Procedure 3.130*, 436 So. 2d 60, 61 (Fla. 1983).

Chapter 2000-178 removed this constitutionally required presumption for persons Acharged with a dangerous crime.@ ' 907.041(3)(a), Fla. Stat. (2004). At best, this language reverts to the *status quo ante* upheld in *Pugh v. Rainwater* in which the trial judges still apply the uncodified presumption. At worst, the language acknowledging such a presumption, but excepting some defendants, means that the presumption does not apply to them. Under this reading, the statute directly contravenes *Pugh v. Rainwater* and, more generally, equal protection and due process. Unfortunately, the legislative staff analysis suggests that this latter (unconstititonal) interpretation is what the legislature intended. *See* Fla. S. Comm. on Crim. Just., CS for SB 134 (2000) Staff Analysis, 5 (Jan. 20, 2000) (stating the effect of the law as Aremoving the presumption.@).

This Court has previously refused to adopt as rules of procedure statutes whose constitutionality was questionable. *See In re Amendments to the Florida*

Evidence Code, 782 So. 2d 339 (Fla. 2000) (declining to adopt as a rule of evidence statutory modification to the former testimony exception to the hearsay rule, subsequently declared unconstitutional in *State v. Abreu*, 837 So. 2d 400 (Fla. 2003)); *In re Amendments to Rules of Criminal Procedure*, 794 So. 2d 457 (Fla. 2000) (declining to adopt rule of criminal procedure because of constitutional concerns). This Court should again exercise this discretion and not adopt section 907.041(3)(a), Florida Statutes (2004), as a rule of procedure.

III.

THIS COURT SHOULD NOT ADOPT SECTION 907.041(3)(b), FLORIDA STATUTES, AS A RULE OF PROCEDURE, OR, AT THE VERY LEAST THIS COURT SHOULD PRESERVE THE FLEXIBILITY OF THE CURRENT SYSTEM.

The final change enacted by Chapter 2000-178, Laws of Florida, requires the pretrial release services to certify to the court that it has investigated certain facts before a court releases a defendant to their custody. This certification is virtually identical with reports that the Department of Corrections would have to supply on request of the court. *See* 903.03(2)(a), Fla. Stat. (2004).

This requirement for a certification is substantive and does not require a rule of procedure for its implementation. At best, the rule of procedure would simply order trial courts to obey section 907.041(3)(b), Florida Statutes (2004). The law is full of statutes regulating pretrial release. *See* Chap. 903, Fla. Stat. (2004). Duplicating these statutes in the rules of procedure would result only in this Court having to amend its rules every time the Legislature amends the statutes.

As a matter of practice, the local pretrial release services usually conduct these investigations before the first appearance hearing and have these certifications available at that hearing. Occasionally, however, this investigation is delayed. Often the delay is caused by defendants who have the misfortune of

being arrested when they were not carrying a valid identification card. In such cases, the court at first appearance may provisionally grant release to a pretrial release service pending further verification by the service of the defendant=s true identity and that the person meets the local requirements for such release.

Should this Court decide to incorporate section 907.041(3)(b), Florida Statutes, into the rules of procedure, this Court should draft its rule to preserve the flexibility for trial courts to grant release to a pretrial release service contingent on the service subsequently completing the investigation required by that section. Such flexibility avoids the need for duplicitous hearings to merely confirm the previous rulings when the service verifies all the information. Under this procedure, the first appearance judge need handle the case again only if the pretrial release service investigation turned up information contrary to that which was originally presented.[4] Additionally, even these delayed investigations are often completed within a few hours after the first appearance hearing. This procedure allows the jails to immediately release the defendants rather than

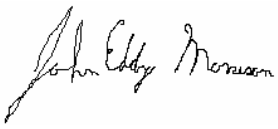
[4]Defendants who provide false information for purposes of securing pretrial release will also be have to go back for another first appearance hearing because they have committed a separate crime. *See* ' 903.035, Fla. Stat. (2004).

incurring the costs of housing and feeding them for another day before transporting them back to court.

Therefore, section 907.041(3)(b), Florida Statutes, is substantive and does not belong in the rules of procedure. Should this Court nevertheless decide to adopt it, this Court should draft and publish for comment rules that preserve the current system=s flexibility and avoid unnecessary hearings and their associated costs.

CONCLUSION

The Florida Public Defender Association, Inc., is grateful for the opportunity to address this Court about possible amendments to Florida Rules of Criminal Procedure 3.131 and 3.132. Without specific proposals, these comments are necessarily speculative. The Florida Public Defender Association hopes that it will have an opportunity to review and provide comments on any specific amendments that this Court is considering.



Respectfully submitted,

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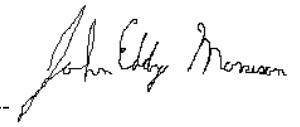
CERTIFICATE OF FONT SIZE

I hereby certify that these comments were printed in 14 point Times New Roman.

BY:___ 

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JOHN EDDY MORRISON
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

IN RE: FLORIDA RULES OF CRIMINAL PROCEDURE 3.131 AND 3.132

Case Number SC05-739

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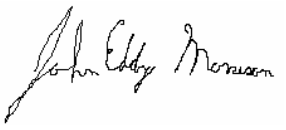
REQUEST FOR ORAL ARGUMENT

The Florida Public Defender Association, Inc., hereby requests that this Honorable Court grant oral argument in this case. The Florida Public Defender Association, Inc., would be represented by undersigned counsel in that oral argument.

Respectfully submitted,

Florida Public Defender Association, Inc.

BY:___ 

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