

IN THE SUPREME COURT OF FLORIDA

**IN RE: FLORIDA RULES OF CRIMINAL
PROCEDURE 3.131 AND 3.132**

CASE NO. SC0-5739

Comments of Circuit Judge Robert L. Doyel

The Court is reviewing the circumstances under which trial judges may consider nonmonetary pretrial release for defendants charged with dangerous crimes, including domestic violence. The Court has invited comments concerning whether Rules 3.131 and 3.132 should be amended to reflect the legislative intent and policy concerns as stated in 907.041, to wit, protecting “the community from risk of physical harm to persons.”

To accomplish this important goal, I propose re-adopting Rule 3.131 and amending it as set forth in Attachment A. As you will see from the attachment, in order to protect the community from risk of physical harm to persons, and to provide essential safeguards for victims, I propose amending the rule to provide judicial officers with the discretion and tools necessary to order uniform no-contact and surrender of firearms provisions where appropriate under the circumstances, as well as judicial discretion for nonmonetary pretrial release. In addition, my proposal would provide notice to defendants of the federal and state laws implicated when defendants fail to comply with the orders, and notice that the orders will be accorded full faith and credit, and thereby will be enforceable in other states.

* * *

Section 907.041, Florida Statutes, portions of which in *State v. Raymond*, No. SC05-739 (Fla. June 30, 2005), were found to be an unconstitutional encroachment upon this court’s rule-making authority, has a salutary goal of protection of the public and victims of dangerous crimes from physical harm caused by defendants awaiting trial. By establishing a presumption that monetary conditions are required for release in cases involving dangerous crimes including

domestic violence, however, it sweeps too broadly in that it does not allow for the exercise of judicial discretion appropriate to the circumstances of individual cases. This is particularly true for domestic violence cases in which the person charged with a crime is often the family bread winner, sometimes the children's caregiver, or both. In these circumstances, monetary conditions create a hardship on the family, or incarceration stops the family income or deprives the primary caregiver of child support payments. Furthermore, though sometimes frustrating to prosecutors, judges, and others in the legal system, victims of domestic violence often want their alleged abusers to be released pending further proceedings or while the victim attempts to convince the state to waive prosecution. Finally, some persons accused of domestic violence are less dangerous than others, and the presumption that monetary conditions are required is simply wrong as a matter of fact⁰.

A rule or statute that *presumes* pretrial incarceration of every single domestic violence defendant who cannot post bond, therefore, may be counter to the needs or wishes of the defendant's victim, thereby "re-victimizing" the victim and the parties' family. Likewise, such a rule or statute fails adequately to consider whether the defendant poses so great a threat that a monetary bond is even necessary for the protection of the victim or the public. And it does not permit judges the opportunity to tailor non-monetary conditions of release that may be sufficiently protective under a given set of circumstances in which monetary conditions would otherwise be required. Finally, it does not consider the cost, especially to small counties like Hardee, of housing accused persons who do not pose a threat.

Proposal to Amend Rule 3.131

Re-adoption of Rule 3.131, amended as proposed in Attachment A hereto, will go a long way toward protecting crime victims, especially victims of domestic violence crimes, and permit judicial discretion to establish conditions of release appropriate for individual defendants, their victims, and their families. The proposal recognizes and implements three statutes which, in addition to Section 907.041, were adopted for the protection of crime victims from the persons charged with victimizing them. The statutes, one state and two federal, are as follows:

Section 903.047, Florida Statutes, (requiring that the court order as a condition of *any* pretrial release that the defendant have no contact with the victim unless certain procedures are followed, including an opportunity for the victim to be heard, and only upon a showing of good cause);

The Violence Against Women Act, 18 United States Code, Sections 2265-2266 (providing for full faith and credit to both *civil and criminal* orders entered for the purpose of preventing violence to, harassment of, contact with, or physical proximity to another person);

18 United States Code, Sections 922(g)(8) and (9) (domestic-violence-related federal firearms statutes prohibiting possession of firearms by anyone subject to an order entered for the purpose of preventing violence to, harassment of, contact with, or physical proximity to another person if the other person is an “intimate partner”).

This court has previously approved domestic violence injunction forms which implement the full-faith-and-credit and firearms provisions of the federal statutes cited above. Those forms are mandatory and uniform throughout the state but are civil, not criminal. The pretrial release form which is a part of my proposal was drafted to be consistent with provisions in the injunction forms. Section 903.047 does not apply to civil cases, so it has not been implemented in injunction cases. Actually, it has not been implemented uniformly in criminal cases either.

Although I do not have empirical data on implementation of the above statutes, I have heard many times in my years of participation on domestic violence committees that most Florida courts, with Dade County as a major exception, do not enforce these statutes. Even

within my own circuit, judges are not uniformly using the no-contact pretrial release form which we copied from Dade County. And I know from discussions in the past year that the Florida Department of Law Enforcement does not receive sufficient information from Florida's courts about criminal no-contact orders to include them in the registry which tracks current domestic violence protective orders. For the officer on the street to be able to enforce criminal no-contact orders, that information must be accessible from the registry. The proposed amendments would facilitate inclusion of this vital safety information on the registry and permit enforcement of the no-contact provision of the Florida statute and the firearms provisions of the federal law.

In a nutshell, my proposal, which is set forth in full as Attachment A, would do the following:

1. Implement part of Section 903.047 by adding to 3.131(b) a requirement for the judge to "order the defendant to refrain from criminal activity of any kind;"
2. Implement the other critical part of Section 903.047 by adding a new 3.131(b)(2)(A) which requires the judge to "order the defendant to have no contact with the victim of the alleged offense or establish conditions under which contact is authorized;"
3. Implement the federal firearms statute by adding a new 3.131(b)(2)(B) which requires the judge to "order the defendant not to possess firearms and to surrender firearms" if "required by applicable law or safety of the victim." Invoking the firearms provision for the "safety of the victim" exceeds the scope of the federal law but is consistent with achieving the goals of victim and public safety which underlie sections 903.047 and 907.041;
4. Establish in a new 3.131(b)(7) a standard format for pretrial release orders which implements the changes in the rule, informs defendants of the risks of federal felony violations (risks which exist even without the proposed rule changes and risks about which defendants are not presently informed), and facilitates inclusion of the order on the state-wide registry;
5. Make clear in an amendment to 3.131(g) that a violation of a non-monetary condition of pretrial release may result in the arrest of the defendant.

Need for Uniform No-Contact/Firearms Provisions in Pre-Trial Release Order

These proposals are not new. In 2001, as chair of the domestic violence subcommittee of the Family Court Steering Committee, I attended the Regional Meeting on Implementing Full Faith and Credit sponsored by the National Center for State Courts and the National Criminal Justice Association in Atlanta. A Florida contingent to the conference included representatives from the Florida Sheriff's Association, the Attorney General's office, two U.S. Attorneys' offices, the Florida Department of Law Enforcement, and court administration. We uniformly agreed that most Florida criminal "stay away" orders are not currently written to clearly entitle them to full faith and credit in other states and that in cases of "intimate partner" violence, the federal firearms statutes are not being consistently addressed.

The group agreed that the first step in addressing this situation was to develop a uniform form which could be used for pretrial release. Elaine New, who was then an attorney in the Office of the State Courts Administrator, and I drafted a proposed form and submitted it to the Committee for Review and Notification of Criminal and Juvenile Legislation, which forwarded it to the Criminal Procedure Rules Committee. A subcommittee of that committee asked me to propose language to amend Rule 3.131. I did so with the assistance of Eydie Nash who by then had replaced Elaine New. Ms. Nash and I participated in some of the subcommittee's telephone conferences, and I appeared twice at meetings of the rules committee. Randolph Murrell, a federal public defender in Tallahassee who chaired the subcommittee, worked with me and Ms. Nash to simplify the proposal, and he is largely responsible for the form which I am now proposing that this court adopt. The subcommittee, by a vote of 3 to 2, favored amending the rule and adopting the form. The rules committee in 2003 voted to reject the proposal at a meeting I could not attend. At my request, Judge Amy Karan, Administrative Judge of the

Domestic Violence Court in the Eleventh Circuit, and I were permitted to argue for reconsideration of the committee vote. The committee once again declined to adopt the proposal. The main arguments against the proposal, as I recall, were that Florida courts do not enforce federal law, that there is not a proven need for the amendment, and that the amendment encroached upon the freedoms of some of the committee members' clients.

Circumstances have changed since then. The legislature's amendment of Section 907.041 to presume that domestic violence defendants should be given a monetary condition of release, which is far more onerous than the restrictions the proposed rule amendment and form order impose, had only recently been adopted and had not yet created the controversy that led to the case which led to the re-adoption of Rule 3.131. The legislature obviously sought to protect the public and crime victims by the change to Rule 907.041. This court invalidated the monetary bond requirement of 907.041 on separation-of-powers grounds in *Raymond*, and put back in play the viability of Rule 3.131. In so doing, the court invited comments about implementing the legislature's intent. The rule amendment I proposed in 2001 and now submit to the court is right on the mark, especially for domestic violence crimes but also for other crimes, for implementing the legislature's goal of "protection of the community from risk of physical harm to persons." 907.041(1) Fla. Stat. And the amendment is more considerate of victims and families, recognizes that one size of pretrial release does not fit all defendants, and places in the hands of judges the discretion to do the most appropriate thing for the circumstances of each case.

The amended Rule 3.131 I am proposing in Attachment A differs somewhat from the amendments proposed to the criminal rules committee by its subcommittee. The subcommittee declined the language in (b)(2)(B) "and to surrender firearms" because the subcommittee was concerned that it would preclude transfer of firearms to a friend or a relative. It also declined the

language in (g)(1) that authorizes arrest for violation of “any condition of pretrial release,” the subcommittee being of the belief that the new language was unnecessary. A more significant difference is in (b)(7), specifically this language in paragraph 4(b) of the form: “Either the victim has requested contact or upon notice to the victim who was given an opportunity to be heard the court finds that good cause has been shown and the interests of justice require that contact should be permitted.” I added this sentence as an express implementation of the language in 903.047(2), and as implementation of the public policy inherent in both 903.047 and 907.041 of “protection of the community from risk of physical harm to persons.”

As supported by the foregoing presentation, I propose, that this court amend Rule 3.131 to read as set forth in Attachment A as a means of achieving the community safety goals of Section 907.041 while preserving the trial courts’ ability to determine on a case-by-case basis whether pretrial release on non-monetary conditions is sufficiently protective of crime victims and the public.

Respectfully submitted this 29th day of August, 2005.

Robert L. Doyel, Circuit Judge
Florida Bar Number: 0714429
417 West Main Street, Room 325
Wauchula, FL 33873

Certificate of Service

I certify that an original (with fax signature) and nine copies of the foregoing were hand-carried to the Clerk of Court, Supreme Court of Florida, and an electronic copy was emailed to e-file@flcourts.org this 29th day of August, 2005. An original with original signature was mailed to the Clerk of Courts on the same date.

Robert L. Doyel

ATTACHMENT A TO DOYEL COMMENTS RE: RULE 3.131

Rule 3.131. Pretrial Release

(a) Right to Pretrial Release. 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. 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.

(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. There is a presumption in favor of release on nonmonetary conditions for any person who is granted pretrial release. The judicial officer shall order the defendant to refrain from criminal activity of any kind, and 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:

- (A) personal recognizance of the defendant;
- (B) execution of an unsecured appearance bond in an amount specified by the judge;
- (C) placement of restrictions on the travel, association, or place of abode of the defendant during the period of release;
- (D) placement of the defendant in the custody of a designated person or organization agreeing to supervise the defendant;
- (E) execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu thereof; provided, however, that any criminal defendant who is required to meet monetary bail or bail with any monetary component may satisfy the bail by providing an appearance bond; or
- (F) any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

(2) The judicial officer shall:

(A) order the defendant to have no contact with the victim of the alleged offense or establish conditions under which contact is authorized, and

(B) if required by applicable law or safety of the victim order the defendant not to possess firearms and to surrender firearms.

(23) 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. If a monetary bail is required, the judge shall determine the amount.

(34) In determining whether to release a defendant on bail or other conditions, and what that bail or those conditions may be, the court may consider the nature and circumstances of the offense charged and the penalty provided by law; the weight of the evidence against the defendant; the defendant's family ties, length of residence in the community, employment history, financial resources, and mental condition; the defendant's past and present conduct, including any record of convictions, previous flight to avoid prosecution, or failure to appear at court proceedings; the nature and probability of danger that the defendant's release poses to the community; the source of funds used to post bail; whether the defendant is already on release pending resolution of another criminal proceeding or is on probation, parole, or other release pending completion of sentence; and any other facts the court considers relevant.

(45) All information provided by a defendant in connection with any application for or attempt to secure bail, to any court, court personnel, or individual soliciting or recording such information for the purpose of evaluating eligibility for or securing bail for the defendant, under circumstances such that the defendant knew or should have known that the information was to be used in connection with an application for bail, shall be accurate, truthful, and complete, without omissions, to the best knowledge of the defendant. Failure to comply with the provisions of this subdivision may result in the revocation or modification of bail. However, no defendant shall be compelled to provide information regarding his or her criminal record.

(56) Information stated in, or offered in connection with, any order entered pursuant to this rule need not strictly conform to the rules of evidence.

(7) The order granting pretrial release shall be in substantially the following form:

IN THE CIRCUIT COURT OF THE _____ JUDICIAL CIRCUIT,
IN AND FOR _____ COUNTY, FLORIDA

Case No.: _____
Criminal Division

STATE OF FLORIDA,

vs.

_____,
Defendant.

Description of Defendant:

Sex:

Race:

Eye color:

Hair color:

Height:

Last known address:

Weight:

DOB:

SSN: (If available)

Description of protected person:

Sex:

Race:

Eye color:

Hair color:

Height:

Last known address:

Weight:

DOB:

SSN: (If available)

ORDER GRANTING PRETRIAL RELEASE

() Original () Amended () Re-issued

It is intended that this order meet the requirements of 18 U.S.C. s. 2265 and therefore intended that it be accorded full faith and credit by the court of another state or Indian tribe as if it were the order of the enforcing state or of the Indian tribe.

Pursuant to §903.047 Florida Statutes, the Defendant is granted pretrial release under the following conditions and it is hereby ORDERED that:

1. Defendant shall refrain from criminal activity of any kind by not violating any Federal, State or Local law, including the use (or attempted or threatened use) of physical force against the protected person(s) that would reasonably be expected to cause bodily harm.
2. The first of the following conditions of release are imposed or, if no single condition gives that assurance, any combination of the following conditions is imposed, so as to 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:
3. [Initial and complete **all** that apply; write N/A if it does **not** apply]
 - _____ (a.) the defendant is released on personal recognizance;
 - _____ (b.) the defendant shall execute an unsecured appearance bond in the amount of \$ _____;
 - _____ (c.) the defendant shall have the following restrictions on travel, association, or place of abode during the period of release: _____
_____;
 - _____ (d.) the defendant shall be placed in the custody of the following-designated person or organization agreeing to supervise the defendant: _____;
 - _____ (e.) the defendant shall execute a bail bond with sufficient solvent sureties in the amount of \$ _____, or deposit cash in lieu thereof; provided, however, that defendant may satisfy this bail by providing an appearance bond; or
 - _____ (f.) the defendant shall meet the following condition(s) deemed reasonably necessary to assure appearance as required: _____.

[Initial a. or b. as it applies in number 3. below]

4. _____ (a.) The Defendant shall have no contact with the protected person(s) *{name of victim and protected members of victim's family}* _____ either directly or indirectly, through mail, e-mail, fax, telephone, through another person or in any other manner. If the victim(s) tries to contact you, you are violating this Order if you communicate with a protected person. Unless otherwise provided herein, **Defendant shall not** go to, in, or within 500 feet of: protected person's current or future residence; current or future place of employment; current or future school; or the following other places (if requested by protected person) where protected person or protected person's minor child(ren) go often:

_____.

Defendant may not knowingly come within 100 feet of protected person's automobile at any time.

- _____ (b.) Either the victim has requested contact or upon notice to the victim who was given an opportunity to be heard the court finds that good cause has been shown and the interests of justice require that contact should be permitted. The Defendant may have peaceful non-violent contact with the protected person(s) _____ *{name(s)}* unless such contact with protected persons or children is prohibited or restricted by an injunction or order in another case.

[Initial and complete **all** that apply; write N/A if it does **not** apply]

- _____ 5. The Defendant shall not use, possess or purchase a firearm or ammunition. Defendant shall surrender any firearms and ammunition in Defendant's possession to _____ County Sheriff's Department and submit a written receipt to pre-trial release or to the Clerk of Court within 48 hours.

_____ 6. The Defendant and the protected person are intimate partners and therefore Defendant is hereby advised that: **it is a federal criminal felony offense to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce while subject to this order. 18 U.S.C. s. 922(g)(8).**

_____ 7. The Defendant may return to the residence at _____ one time only at a time arranged with the law enforcement department with jurisdiction over the residence, to obtain personal belongings, including clothing, items of personal hygiene and tools of the trade. **Going to the residence without a law enforcement officer is a violation of your pre-trial release.** A law enforcement officer with jurisdiction over the residence from which these items are to be retrieved shall accompany defendant to the home and stand by to ensure that defendant vacates the premises with only such personal belongings.

_____ 8. The Defendant shall abide by the following special conditions:

This Court is aware in certain cases there may be a possible conflict between the terms of this Order and a prior injunction order, visitation order, shared parenting order, or other court order. The terms of this Order must be followed if the Defendant is to remain on Pretrial Release. Nothing in this Order increases or expands Defendant's rights of custody, visitation, contact with protected persons or children, or access to property if those rights have been restricted by an order or orders in another case.

Violation of this Order will subject you to arrest. Upon probable cause to believe that you have violated the terms of this No Contact Order, law enforcement is authorized pursuant to §901.15, Florida Statutes to conduct a warrantless arrest of you, the Defendant. A willful violation of the terms of this No Contact Order constitutes a misdemeanor of the first degree, pursuant to §741.29(6), Florida Statutes which carries a maximum punishment upon conviction of one (1) year in jail and a fine of \$1000.00, or may subject defendant to a criminal contempt of court charge and/or result in revocation of bond and/or pretrial release.

After arrest upon violation of this No Contact Order, said Defendant is to be held in custody until his/her First Appearance, pursuant to §741.29(6), Florida Statutes.

ATTENTION LAW ENFORCEMENT OFFICER(S): YOU MAY VERIFY THAT THIS ORDER IS IN EFFECT BY CONTACTING _____ {telephone number}.

ORDERED on _____.

JUDGE

COPIES TO:

Sheriff of _____ County

Victim (or his or her attorney): _____

By U.S. Mail

By hand delivery in open court

Defendant: _____

Forwarded to sheriff for service

By hand delivery in open court (Defendant must acknowledge receipt in writing on the face of the original order — see below)

____ Defendant's Attorney

By U.S. Mail

By hand delivery in open court

____ State Attorney

____ Jail

____ Probation Officer

____ Domestic Violence Coordinator

____ Other:

I CERTIFY the foregoing is a true copy of the original as it appears on file in the office of the Clerk of the Circuit Court of _____ County, Florida, and that I have furnished copies of this order as indicated above.

CLERK OF COURT

(SEAL)

By: _____

Deputy Clerk

I understand that I can be returned to custody pending trial without further hearing upon violation of the conditions as set forth herein and that I will be subject to a federal felony if this order involves an intimate partner and I possess a firearm or ammunition in violation of this order. I have read this entire order, have received a copy of it and fully understand it.

Defendant

Rule 3.131(c) [through (f) - no changes]

(g) Arrest and Commitment by Court. The court in which the cause is pending may direct the arrest and commitment of the defendant who is at large on bail when:

- (1) there has been a breach of the undertaking or any condition of the order granting pretrial release;
- (2) it appears that the defendant's sureties or any of them are dead or cannot be found or are insufficient or have ceased to be residents of the state; or
- (3) the court is satisfied that the bail should be increased or new or additional security is required.

The order for the commitment of the defendant shall recite generally the facts on which it is based and shall direct that the defendant be arrested by any official authorized to make arrests and that the defendant be committed to the official in whose custody he or she would be if he or she had not been given bail, to be detained by such official until legally discharged. The defendant shall be arrested pursuant to such order on a certified copy thereof, in any county, in the same manner as on a warrant of arrest. If the order provided for is made because of the failure of the defendant to appear for judgment, the defendant shall be committed. If the order is made for any other cause, the court may determine the conditions of release, if any.

Rule 3.131(h) [through **(l)** - no changes]