

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO FLORIDA
RULE OF CRIMINAL PROCEDURE
RULE 3.111**

CASE NO.: SC08-2163

**COMMENT OF THE CRIMINAL PROCEDURE
RULES COMMITTEE**

The Honorable Thomas H. Bateman III, Senior Judge, Second Judicial Circuit, Chair, Florida Criminal Procedure Rules Committee (CPRC), and John F. Harkness, Jr., Executive Director, The Florida Bar, file this comment pursuant to the Florida Supreme Court's request that the CPRC comment on the Court's proposed amendment to rule 3.111. The proposed amendment is as follows:

RULE 3.111. PROVIDING COUNSEL TO INDIGENTS

(a)-(c) [No Change]

(d) Waiver of Counsel.

(1)-(2) [No Change]

(3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point where the defendant is not competent to conduct trial proceedings by his or her self.

(4)-(5) [No Change]

(e) [No Change]

Committee Notes

[No Change]

The proposed amendment, whether to amend Rule 3.111(d)(3) in light of *Indiana v. Edwards*, 128 S. Ct. 2379, 171 L.Ed 345, ___ U.S. ___ (2008), was referred to the appropriate subcommittee of the CPRC for consideration. The subcommittee presented its recommendation to the full committee at its January 16, 2009, midyear meeting in Miami, Florida, where it was fully discussed and voted upon.¹ The subcommittee voted 5-0 to recommend approval of the Court’s proposed amendment but with the word “severe” deleted. However, the full

¹ **January 16, 2009, Meeting Minutes Excerpt:**

Referral 09-06-1: Whether to comment in favor of the proposal of the Florida Supreme Court to amend Rule 3.111(d)(3) in light of *Indiana v. Edwards*, 128 S.Ct. 2379 (2008) to allow a trial court to deny the right to self-representation where the accused suffers from a “severe mental illness to the point where the defendant is not competent to conduct trial proceedings by his or her self?” The subcommittee voted (by a vote of 5-0) to comment in favor of the proposal with the deletion of the word “severe.” While the holding in *Edwards* uses the phrase “severe mental illness,” some members felt that upon close examination *Edwards* only requires a showing of “mental illness.”

Some members of the full committee, however, were concerned that without the word “severe” the judges were being asked to assess mental illness in a vacuum. Members of the committee were also concerned that the deletion of the word “severe” would improperly interfere with the defendant’s right to self-representation in light of the decision in *Indiana v. Edwards*. After a full discussion of the matter, the committee voted (by a vote of 22-8) to reject the suggestion of the subcommittee to delete the word “severe” from the Florida Supreme Court’s proposal. Mr. Martinez proposed that the committee comment in favor of the proposal as sent to the committee, *i.e.*, with the word “severe” included. Judge Arias seconded the motion. After further discussion, including concerns related to the use of the word “competent” and the standard to be applied to the determination of whether to deny a request for self-representation, the committee voted (by a vote of 15-13) in favor of writing a comment in favor of the proposal of the Florida Supreme Court.

committee voted 22-8 to not approve the subcommittee's recommendation. The full committee then voted 15-13 in favor of the amendment the Court proposed.

Some members of the CPRC are concerned with the use of the word "severe" as it modifies mental illness in the proposed rule. Their concern centers on the fact that the word is subjective, is not defined in Florida statutes or case law relating to mental illness (nor does the U.S. Supreme Court define it), and is subject to an unsupported and arbitrary interpretation or application by individual judges. They feel that under Florida law, if a defendant suffers from a "severe" mental illness, he or she most likely will be determined to be incompetent to proceed to trial.

A majority of the members approve of the word in the proposed rule in light of the Supreme Court's use of the term in *Edwards*. The majority sees the term relating to a mentally ill defendant's competence to represent himself or herself, and not necessarily to the defendant's competence to stand trial. In other words, a mentally ill defendant may be competent enough to stand trial under Florida law, but be not competent to represent himself or herself adequately in the trial proceedings without the assistance of counsel.

It appears that the following editorial changes should be made to the proposed rule (shown as strikethrough and italics):

(3) Regardless of the defendant's legal skills or the complexity of the case, the court shall not deny a defendant's unequivocal request to represent himself or

herself, if the court makes a determination of record that the defendant has made a knowing and intelligent waiver of the right to counsel, and does not suffer from severe mental illness to the point ~~where~~that the defendant is not competent to conduct trial proceedings by ~~his~~himself or ~~her~~selfherself.

The Criminal Procedure Rules Committee respectfully requests that the Court amend the Florida Rules of Criminal Procedure as outlined in this report.

Respectfully submitted on January 30, 2009.

THOMAS H. BATEMAN III
Senior Judge
Chair, CPRC
Florida Bar Number 0349781
Leon County Courthouse,
c/o Trial Court Administrator
301 South Monroe Street
Tallahassee, Florida 32301
Telephone: 850-577-4401
Facsimile: 850-922-0327

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson St.
Tallahassee, FL 32399-2300
850 561-5600
Florida Bar No. 123390