IN THE SUPREME COURT OF FLORIDA

CASE. NO. SC08-998

IN RE: FLORIDA RULES OF CIVIL
PROCEDURE FOR INVOLUNTARY
COMMITMENT OF SEXUALLY
VIOLENT PREDATORS
_____/

COMMENTS ON PROPOSED RULES OF CIVIL PROCEDURE FOR INVOLUNTARY COMMITMENT OF SEXUALLY VIOLENT PREDATORS

The Office of the Public Defender, Second Judicial Circuit, through undersigned counsel, hereby submits the following Comments to the Proposed Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators.

1. Our office greatly appreciates the work of the Criminal Court Steering Committee and the positive steps taken in its Proposed Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators.

2. While our office agrees with many of the Committee's proposals, there are a number of Rules that need to be clarified and additional Rules that need to be addressed.

3. While Rule 4.200 and Rule 4.240 address the appointment of counsel and trial proceedings after a finding of probable cause, from a practical standpoint, the Rules should be clarified so that a hearing is set within five days of the order of finding probable cause or within five days after the summons has been served and filed with the clerk of the court. At the hearing,

the court can make a determination of counsel and indigency and set the case for trial within thirty days or have the Respondent waive the right to be tried within thirty days. The Public Defender's office should only be temporarily appointed at the time of the finding of probable cause. By setting the case for a hearing within five days of the finding of probable cause or within five days after the summons has been served and filed with the clerk of the court, the Public Defender's office and his/her investigator will have an opportunity to meet with the Respondent, obtain names of witnesses from the Respondent, have releases signed by the Respondent for obtaining records to provide to an expert, and explain the proceedings to the Respondent. This is particularly useful since the Florida Civil Commitment Center in Arcadia, for example, is six hours away from Tallahassee.

There should also be a sentence in Rule 4.240 that allows for the right to trial within thirty days be waived by the Respondent but that the waiver can be recaptured upon the filing of notice, pleading or motion that expressly demands and renews the right to trial within thirty days. Curry v. State, 880 So. 2d 751 (Fla. 2d DCA 2004).

4. While the Committee recognizes that a Respondent and his counsel can be located in different areas of the State, its tenuous rationale to reduce delay by requiring an answer and a

demand for jury trial be filed within ten days after the summons has been returned served and filed with the Clerk of Court is not practical. Undersigned counsel can discern no reason that Respondent should not be afforded twenty days within which to file an answer and demand for jury trial after the summons has been returned served and filed with the Clerk of Court as would any other civil litigant. Proposed Rules 4.070(a) and 4.430(b).

5. Rule 4.220(e) provides that the court shall release the Respondent from custody if the evidence does not establish probable cause to believe the Respondent is a sexually violent predator following an adversarial probable cause hearing. While the committee relies upon F.R.Cr.P. 3.133(b)(5) for guidance and deems dismissal too drastic a remedy, counsel would suggest that once a court finds that the evidence does not establish probable cause to believe the Respondent is a sexually violent predator following an adversarial probable cause hearing, there are no further proceedings that can be commenced by the State Attorney. Thus, the Committee's reliance upon F.R.Cr.P. 3.133(b)(5) is misplaced.

In the alternative, counsel would suggest the state be given a window period to initiate further proceedings if the evidence does not establish probable cause to believe the Respondent is a sexually violent predator after an adversarial probable cause hearing and the Respondent is released from custody. If further

proceedings are not initiated by the State within the window period, the petition shall be dismissed.

6. Rule 4.360, Examination of the Respondent, does not apply to Involuntary Commitment of Sexually Violent Predator proceedings and should be stricken. The State is not entitled to a compulsory mental examination of a Respondent. There is no authority for a court under Chapter 394, Part V, Florida Statutes, (2007) to order a compulsory examination of a Respondent. Section 394.9155(7)(a) and (b) limits the power of the State to compel a mental health examination of a person in an Involuntary Commitment of a Sexually Violent Predator proceeding. Stated otherwise, the Involuntary Commitment of Sexually Violent Predator Act confers and creates a substantive right of a Respondent to be free from a compulsory mental examination.

In fact, prior to a multi-disciplinary team psychologist conducting an evaluation of a particular Respondent, the Respondent is given an informed consent form wherein one can choose to not participate in the evaluation. (Appendix) When a statute confers a substantive right, a conflicting procedural rule is invalid. Hines v. State, 931 So. 2d 148 (Fla. 1st DCA 2006); In the Interest of S.R., a child, 346 So. 2d 1018 (Fla. 1977). As the Court in Kakuk v. State, 908 So. 2d 1088, 1092 (Fla. 5th DCA 2005) noted, the Jimmy Ryce Act Statute is a special statutory proceeding created by the Legislature and if

the discovery provisions are fully applicable to Jimmy Ryce Commitment proceedings it appears that the Legislature has enacted a useless and meaningless Statute in that Section 394.9155 (7)(a) and (b) limits the power of the State to compel a mental health examination of a person in a Jimmy Ryce proceeding.

7. The proposed Rules omit a Rule similar to F.R.Cr.P. 3.211 for assessing competency standards in Involuntary Commitment of Sexually Violent Predator proceedings. A Rule should be considered even though the Ryce Act itself contains no provision concerning a Respondent's right to be competent during the proceeding.

In Branch v. State, 890 So. 2d 322, (Fla. 2d DCA 2004), the court held that Ryce Act Respondents have a due process right to be competent when the State intends to present hearsay evidence of alleged facts that have neither been admitted by way of a plea nor subjected to adversarial testing at trial and so are subject to dispute and counter evidence. It is an incompetent Respondent's inability to assist counsel in challenging the facts contained in those hearsay statements that violates due process. A trial court should hold a competency hearing when there are specific factual matters at issue that require a Respondent to competently consult with counsel and testify on his own behalf. In Camper v. State, 933 So. 2d 1271 (Fla. 2d DCA 2006), the Court held that the rationale of Branch applies to not only untested

hearsay evidence but also to expert testimony at trial concerning untested factual allegations. As noted in Branch, claims raising purely legal issues that are of record and factual claims that do not require a Respondent's input may proceed without the necessity of a competency hearing.

8. The proposed Rules omit a Rule similar to F.R.Cr.P. 3.850 for use in these proceedings. A Rule should be considered. In Manning v. State, 913 So. 2d 37 (Fla. 1st DCA 2005) the First District held that claims of ineffective assistance of trial counsel should be brought by a Petition of Writ of Habeas Corpus in the jurisdiction where the Respondent is presently committed not where the case was tried. This means these claims would be brought in DeSoto County Circuit Court since the Florida Civil Commitment Center is in Arcadia, DeSoto County. In the opinion, the First District suggested that a Rules Committee take a look at this due to the problem of petitions being filed in one circuit and the records and files being in the circuit where the case was tried.

The Second District, in Ivey v. Department of Children and Family Services, 974 So. 2d 480 (Fla. 2d DCA 2008), agreed with the Manning Court and acknowledged that the process of using a Petition for Writ of Habeas Corpus in DeSoto County is cumbersome, inconvenient, and unsatisfactory because, in many cases the circuit in which the commitment facility is located is

not the circuit where the commitment proceedings occurred. Undersigned counsel would also suggest that it would not make sense to have a Respondent file in Leon County Circuit Court simply because the Department of Children and Family Services headquarters are in Leon County. The same problems recognized by the Manning and Ivey Courts would arise.

Wherefore, undersigned counsel on behalf of the Office of the Public Defender, Second Judicial Circuit, supports the proposed Rules with the exceptions of the matters noted above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the committee chair, Honorable O.H. Eaton, Jr., c/o Les Garringer, Office of the General Counsel, 500 South Duval Street, Tallahassee, FL 32399-1925, on this 8th day of July, 2008.

Respectfully submitted,

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APPENDIX

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Appendix: