IN THE SUPREME COURT OF FLORIDA

In Re: Florida Rules of Civil Procedure for Involuntary Commitment of Sexually Violent Predators
_____/

CASE NO.: SC08-998

RESPONSE TO THE COMMENTS OF THE PUBLIC DEFENDERS OF THE SECOND AND FOURTH JUDICIAL CIRCUITS, AND THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

Comes now the Criminal Court Steering Committee, by and through the Honorable O. H. Eaton, Jr., Circuit Court Judge, Chair of the committee, and files this response to the comments received by the Public Defender of the Second Judicial Circuit; the Public Defender of the Fourth Judicial Circuit, and the Florida Association of Criminal Defense Lawyers (FACDL).

The committee filed a petition with the Court on May 28, 2008. In the petition, the committee proposed a comprehensive set of rules to be used in "Jimmy Ryce Act" commitment proceedings. The Court published the proposed rules for comment in *The Florida Bar New*s, and directed that comments be filed with the Court no later than September 2, 2008. Comments were received by the Public Defender of the Second Judicial Circuit on July 8, 2008. FACDL filed its comments with the Court on September 2, 2008, and the Public Defender of the Fourth Judicial Circuit filed comments on September 9, 2008. The committee was directed to file a response by October 1, 2008. The committee sought an extension of time to file its response, and the Court extended the time for filing to November 3, 2008. The committee sought an additional extension of time on November 3, 2008, and the Court extended the time for filing a response to November 25, 2008.

The Public Defender of the Second Judicial Circuit submitted comments that are subdivided into eight paragraphs. Paragraphs three through eight address various proposed rules that have been submitted by the committee, or offer suggested additional rules to supplement those already filed by the committee. This response addresses each paragraph in the order they were submitted.

The committee agrees with the suggestion in paragraph three of the comments that proposed rule 4.240 be expanded to provide for a status hearing

within 5 days after the summons is served. This hearing will permit the court to inquire regarding the appointment of counsel, and to consider any motion by the respondent to waive the right to a trial within 30 days. The committee believes that the best way to ensure that a trial is commenced in a timely fashion after the filing of a waiver is to reset the trial date not less than 90 days after the date of the waiver of the 30 day trial period. The mandatory setting of the trial date serves the same purpose as permitting the respondent to be able to proceed to trial by recapturing the 30 day waiver period. In addition, the committee has added a provision to conduct a Faretta inquiry in the event the respondent expresses a desire to engage in self-representation.

The committee does not agree with the suggestion in paragraph four of the comments that the time for filing an answer by the respondent be extended from 10 to 20 days. This suggestion was also offered by FACDL in its comments filed with the Court. Although the committee recognizes that the statutory deadline set forth in s. 394.916(1), Florida Statutes (2008), to conduct a trial within 30 days after the finding of probable cause is almost impossible to meet, the committee believes that extending the time for filing an answer from 10 to 20 days would mean no trial would ever be conducted within the 30 day time frame set forth in the statute.

The public defender in paragraph five disagrees with the committee's proposed rule 4.220(e) with regard to a finding of no probable cause and the release of the respondent from custody pending trial. The public defender suggests that a finding of no probable cause prohibits the state from commencing further proceedings against the respondent. In the alternative, the public defender suggests that the state be given a window of opportunity to "initiate further proceedings." The committee disagrees. The public defender was unable to cite any appellate case that suggests that a finding of no probable cause in a criminal case warrants either dismissal or prohibits the state from continuing the prosecution. Although the legislature has failed to provide any guidance with regard to a finding of no probable cause, the committee is satisfied that the appropriate remedy is a release from custody pending the trial considering that a Jimmy Ryce proceeding is a civil action.

The public defender in paragraph six has opined that the state cannot compel the respondent to submit to a mandatory mental health evaluation by a qualified expert, as provided in proposed rule 4.360. The committee has reviewed the case law cited by the public defender, and the provisions of s. 394.9115(7), Florida Statutes (2008), and has reached the same conclusion. The proposed rule has been

amended to include the statutory sanctions set forth in the statute in the event the respondent refuses to be interviewed by a state mental health expert.

It is recommended by the public defender in paragraph seven that the committee should consider a proposed rule for assessing the competency of a respondent in a Jimmy Ryce proceeding. The committee considered a rule, but has opted to not attempt to craft one similar to Fla. R. Crim. P. 3.211. The committee believes the best practice is to let the trial court decide the issue of competency on a case by case basis, rather than create a blanket rule of procedure.

The public defender in paragraph eight suggests that the committee should consider a postconviction relief rule similar to Fla. R. Crim. P. 3.850 to allow a post judgment collateral attack on the issue of ineffective assistance of counsel by habeas corpus. Section 394.9215(1)(a), Florida Statutes (2008), provides for persons under commitment under the Jimmy Ryce Act to file a petition for habeas corpus in the county where the facility in which they are housed is located. The statute limits habeas relief to test conditions of confinement and whether the facility is "an appropriate secure facility." An opportunity to test the effectiveness of counsel should be included in these rules and the venue should be in the county where the judgment was rendered since that is where the critical records and witnesses are located. The committee has amended the proposed rules by adding proposed rule 4.460, referred to as Post Judgment Habeas Corpus. The proposed rule does not disturb the provisions of section 394.9215(1)(a). Habeas actions brought to test conditions of confinement and whether the facility is "an appropriate secure facility" can be best filed in the county where the facility is located. Rather than attempt to include a rule that mirrors rule 3.850, the committee voted unanimously to require that habeas corpus proceedings be governed by rule 3.850. This ensures that existing mechanisms in place for handling these claims, together with the existing case law, remain undisturbed.

The Public Defender of the Fourth Judicial Circuit noted that proposed rule 4.240(e) is incorrect. The committee agrees. The proposed rule has been amended to reflect that if three or more jurors do not find that the respondent is a sexually violent predator, the court shall enter a final judgment in favor of the respondent.

After reviewing all the comments filed with the Court, the committee also amended other proposed rules as follows.

Rule 4.070(b) has been amended to change the time in which the state attorney must file the return of service with the clerk of the court. The original

proposal provided for a 24 hour window, but the committee recognizes that the return of service could be received by the state attorney at the end of the work week. Therefore, the requirement to file the return on the summons has been changed to the next business day.

Rule 4.260 has been amended to permit a motion for continuance to be made in writing or in open court. The proposed rule previously read: "A motion for continuance by either party shall be in writing unless made at a trial and shall be signed by the party or attorney requesting the continuance."

Rule 4.431 has been amended to change the term "defendant" to "respondent" in the oath taken by the trial jurors. Throughout the rules, the term "respondent" is the term or choice, rather than "defendant.

Rule 4.440 has been amended by removing the reference to the sanctions that can be imposed by the trial judge. These sanctions are contained in rule 4.360, and it is not necessary for them to appear in two separate rules.

Based upon the comments received, and a subsequent review of the proposed rules, Appendix A and Appendix D have been amended, and are attached to this response.

Respectfully submitted this ____day of November, 2008.

_____
THE HONORABLE O. H. EATON, JR.
Circuit Court Judge, Eighteenth Judicial Circuit
Chair, Criminal Court Steering Committee
101 Bush Blvd.
Sanford, Florida 32773
Florida Bar Number 0111108

CERTIFICATE OF FONT SIZE

I hereby certify that this Response has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
THE HONORABLE O. H. EATON, JR.
Circuit Court Judge, Eighteenth Judicial Circuit
Chair, Criminal Court Steering Committee
101 Bush Blvd.
Sanford, Florida 32773
Florida Bar Number 0111108

CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing Response has been furnished to:

Robert S. Friedman
Assistant Public Defender
Second Judicial Circuit
Leon County Courthouse
301 South Monroe Street
Tallahassee, Florida 32301

Michael Ufferman, Esquire
Chair, FACDL Amicus Curiae Committee
Michael Ufferman Law Firm, P.A.
2022-1 Raymond Diehl Road
Tallahassee, Florida 32308

Ann E. Finnell
Assistant Public Defender
Office of the Public Defender
Fourth Judicial Circuit
25 North Market Street
Jacksonville, Florida 32202

by U.S. mail this _____day of November, 2008.

_____
THE HONORABLE O. H. EATON, JR.
Circuit Court Judge, Eighteenth Judicial Circuit
Chair, Criminal Court Steering Committee
101 Bush Blvd.
Sanford, Florida 32773
Florida Bar Number 0111108