IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE SC09-159

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COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to the Florida Rules of Criminal Procedure. 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 procedure designed to ensure the fairness, integrity, and accuracy of the criminal justice system.

The FPDA appreciates the opportunity to raise before this Court the few areas where the FPDA either disagrees with, or sees room for improvement in, the proposed amendments. The FPDA supports the vast majority of the proposed amendment and thanks the Florida Criminal Procedure Rules Committee ("Committee") for its efforts in making these revisions.

For ease of reference, these comments will follow the numerical order of the proposed amendments.

I.
RULE 3.131(a) SHOULD TRACK THE STATUTORY LANGUAGE.

The Committee has proposed amending Rule 3.131(a) to conform to section 903.047, Florida Statutes, which reads:

> **903.047. Conditions of pretrial release**
>
> (1) As a condition of pretrial release, whether such release is by surety bail bond or recognizance bond or in some other form, the defendant shall:
> (a) Refrain from criminal activity of any kind.
> (b) Refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure.
> (c) Comply with all conditions of pretrial release.
> (2) Upon motion by the defendant when bail is set, or upon later motion properly noticed pursuant to law, the court may modify the condition required by paragraph (1)(b) if good cause is shown and the interests of justice so require. The victim shall be permitted to be heard at any proceeding in which such modification is considered, and the state attorney shall notify the victim of the provisions of this subsection and of the pendency of any such proceeding.

§ 903.047, Fla. Stat. (2008) (emphasis supplied).

As written, however, the proposed amendment fails to include the emphasized language above giving the trial judge discretion to modify the conditions on contact with alleged victims:

> **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. <u>As a condition of pretrial release, whether such release is by surety bail bond or recognizance bond or in some other form, the defendant shall refrain from any contact of any type with the victim, except through pretrial discovery pursuant to the Florida Rules of Criminal Procedure and shall comply with all conditions of pretrial release.</u> 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.[1]

The inadvertent omission of all the statutory language in the proposed rule would, if approved, would make the prohibition on alleged victim contact absolute. There are many scenarios in which some type of contact with the alleged victim is justified and where an absolute ban would result in injustice, often leaving even the alleged victims disgruntled with the criminal justice system. As the Legislature has done, this Court should trust the trial judges in this state to use their judgment to modify this condition of release as necessary on a case-by-case basis. The statutory language emphasized in the quotation above should be added to the proposed amendment before its adoption.

There are also two other drafting issues with the proposed language. First, the courts should maintain their neutrality and use the phrase "alleged victim"

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[1] The <u>underlined</u> language is that proposed by the Committee.

rather than "victim," even if the statute is less neutral. Second, the proposed language is circular in that it makes complying "with all conditions of pretrial release" "a condition of pretrial release." Changing the phrase to "all other conditions of pretrial release" would solve the problem.

II.
PROPOSED AMENDMENT TO RULE 3.132 SHOULD BE REJECTED AS CONTRARY TO CASE LAW AND THE PRETRIAL DETENTION STATUTE.

This proposed amendment to allow trial courts to order pretrial detention on their own motion conflicts with the governing pretrial detention statute, which contemplates that state attorneys will file motions for pretrial detention. When a person potentially subject to pretrial detention is arrested, the arresting agency must provide the state attorney with all information it has relevant to that issue. *See* § 907.041(4)(d), Fla. Stat. (2008). The arresting agency may then detain the person "prior to the filing by the state attorney of a motion seeking pretrial detention" for up to 24 hours. § 907.041(4)(e), Fla. Stat. (2008). A pretrial detention hearing must be held "within 5 days of the filing by the state attorney of a complaint to seek pretrial detention." § 907.041(4)(f), Fla. Stat. (2008).

In contrast to the pretrial detention statute, section 903.0471, Florida Statutes, explicitly allows the court to revoke bond "on its own motion" if it finds probable cause to believe the defendant committed a new crime while on pretrial release. In upholding the constitutionality of that statute, this Court specifically

noted that probable cause determinations do not require an adversarial evidentiary hearing. *See Parker v. State*, 843 So. 2d 871, 879-80 (Fla. 2003) (citing and quoting *Gerstein v. Pugh*, 420 U.S. 103, 120-22 (1975)). Pretrial detention hearings, however, require such a hearing. *See* §907.041(f), (h) & (i), Fla. Stat. (2008); Fla. R. Crim. P. 3.132(c)(1)&(2).

This proposed amendment would also overrule established case law. Every District Court of Appeal that has considered the issue has ruled that the state must file a motion for pretrial detention and that the trial court may not order pretrial detention on its own motion. *See, e.g., Golden v. Crow*, 862 So. 2d 903, 904 (Fla. 2d DCA 2003); *Resendes v. Bradshaw*, 935 So. 2d 19, 20 (Fla. 4th DCA 2006); *Nguyen v. State*, 925 So. 2d 435, 435 (Fla. 5th DCA 2006). Only one judge has ever found the present rule to be ambiguous or expressed dissatisfaction with the governing case law. *Ho v. State*, 929 I 2d 1155, 1155-60 (Fla. 5th DCA 2006) (Sawaya, J., specially concurring).

Overruling this case law and allowing courts to consider pretrial detention *sua sponte* creates internal contradictions with another provision in Rule 3.132, requiring that: "The state attorney has the burden of showing beyond reasonable doubt the need for pretrial detention pursuant to the criteria in section 907.041, Florida Statutes." Fla. R. Crim. P. 3.132(c)(1); *see also* § 907.041(4)(g), Fla. Stat. (2008). The state has carried this burden since *State v. Arthur*, 390 So. 2d 717,

719-20 (Fla. 1980) (holding that "[i]t should be the state's burden to prove facts which take away the entitlement to bail provided for by article 1, section 14," and that "as a matter of convenience, fairness, and practicality," "the state is in [a] better position to present to the court the evidence upon which it intends to rely.")

If the state attorney does not believe there is a good-faith basis to file a motion for pretrial detention, the state necessarily cannot shoulder its burden of proof. The court itself cannot prove the elements necessary for pretrial detention without becoming a litigant and violating judicial neutrality. Even Judge Sawaya's opinion in *Ho* would allow judges to consider pretrial detention *sua sponte* only if "the necessary showing is made by the state and the appropriate findings are made by the trial court." 929 So. 2d at 1158 (emphasis supplied). That opinion never explains how the state is to make that proof if it never files the motion putting pretrial detention at issue.

Nothing in any of the case law suggests a problem with state attorneys inadvertently forgetting to file pretrial detention motions. Even in opinions ostensibly granting habeas corpus relief such as *Ho*, the District Courts of Appeal allow the state to file a belated motion for pretrial detention without prejudice, staying any release long enough for the trial court to consider the belated motion. *See Ho*, 929 So. 2d at 1155; *see also, e.g.*, *Duffy v. Crowder*, 960 I 2d 909, 909-10 (Fla. I DCA 2007); *Juste v. State*, 946 So. 2d 102, 102 (Fla. I DCA 2007); *Kelly v.*

State, 939 So. 2d 1150, 1151 (Fla. I DCA 2006). If a state attorney does not file a motion for pretrial detention, it is because that state attorney has decided not to do so. If the state changes its mind, the state may file the motion "at any time prior to trial." Fla. R. Crim. P. 3.132(b). If there are exigent circumstances, the court can order the defendant immediately arrested. *Id*.

This proposed amendment should be rejected as contrary to established case law and the pretrial detention statute itself.

III.
PROPOSED AMENDMENTS TO RULE 3.190(i)(2) SHOULD APPLY ONLY TO DEFENSE MOTIONS.

The proposed amendments suggest copying the rule requiring fact pleading in motions to suppress evidence derived from unlawful searches and transplanting it to the rule governing motions to suppress illegally obtained confessions. A problem arises, however, because that the two rules are not completely symmetrical. "A defendant aggrieved by an unlawful search may move to suppress anything so obtained." Fla. R. Crim. P. 3.190(h)(1) (to be renumbered as (g)(1)). A court may suppress illegal confessions, however, "[o]n motion of the defendant or on it own motion." Fla. R. Crim. P. 3.190(i)(1) (to be renumbered as (h)(1)) (emphasis supplied). The difference is because coerced or involuntary confessions risk conviction of the innocent, *see Brown v. Mississippi*, 297 U.S. 278, 286-87 (1936), in a way that illegal searches do not.

While a fact pleading requirement for motions to suppress involuntary confessions is feasible for defense motions, imposing such pleading requirements on a trial court's own motion would invite a breach of judicial neutrality. The problem can be solved by adding three simple words: "Every motion of a defendant to suppress a confession . . . ."

IV.
THE AMENDMENTS TO RULE 3.191 SHOULD BE AMENDED TO FOLLOW THE STATUTE.

The FPDA has no objection to amending the speedy trial rule to allow extensions for DNA testing. The problem is that the proposed language for the rule does not track the governing statutory language in one important aspect—who requests the testing. The governing statute provides:

> 2) For defendants seeking to enter a plea of guilty or nolo contendere to a felony on or after July 1, 2006, the court shall inquire of the defendant and of counsel for the defendant and the state as to physical evidence containing DNA known to exist that could exonerate the defendant prior to accepting a plea of guilty or nolo contendere. If no physical evidence containing DNA that could exonerate the defendant is known to exist, the court may proceed with consideration of accepting the plea. If physical evidence containing DNA that could exonerate the defendant is known to exist, the court may postpone the proceeding on the defendant's behalf and order DNA testing upon motion of counsel specifying the physical evidence to be tested.
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> (4) It is the intent of the Legislature that the postponement of the proceedings by the court on the defendant's behalf under subsection (2) constitute an

> extension attributable to the defendant for purposes of the defendant's right to a speedy trial.

§ 925.12, Fla. Stat. (2008) (emphasis supplied).

The proposed amendment to Rule 3.191, however, allows extensions of speedy trial times "for DNA testing ordered on the defendant's behalf pursuant to section 925.12(2), Florida Statutes." (emphasis supplied). Thus, the statute requires that the motion be made by defense counsel, while the proposed rule seems to allow a court on its own motion to unilaterally order DNA testing and then extend speedy trial times to accommodate that testing.

Many of the indigent clients represented by FPDA members cannot post bond and must remain in jail pending resolution of their case. In cases with only probationary or credit-time-served sentences, a defendant remains incarcerated while the presumption of innocence still attaches, but will be released as soon as a guilt is established by plea. The result is that while DNA testing that could exonerate a defendant is generally a benefit, it causes a loss of liberty if it delays a plea and release. Thus, the statute provides that the order for such testing must be "on motion of counsel." The language in the rule should incorporate this language, perhaps "for DNA testing ordered on motion of defense counsel pursuant to section 925.12(2), Florida Statutes."

V.
MOTIONS FOR REHEARING SHOULD NOT DELAY THE TIME FOR STATE APPEALS.

Proposed rule 3.192 would allow the state to largely evade the 15-day limit on the state filing notices of appeal in Florida Rule of Appellate Procedure 9.140(c)(3). Under the terms of the proposed rule, the state would have 10 days to file its motion for rehearing, the defense would have 10 days to respond, and the trial court would then have 15 days to decide. Thus, instead of an expedited appeal, this rule would could delay the trial for a month before any notice of appeal is filed, resulting in further delay of the defendant's right to speedy trial. *See* Fla. R. Crim. P. 3.191(m).

Although the Committee's petition suggests proposed rule 3.192 would apply only to interlocutory appeals, the proposed rule (and resulting delay) is broader, applying "[w]hen an appeal by the state is authorized." Pursuant to the proposed rule, the state could move for rehearing even on final orders, such as those dismissing a case for violation of the speedy trial rule, granting a motion of judgment of acquittal after verdict, or those granting habeas corpus. *See* Fla. R. App. P. 9.140(c)(1)(A),(E)&(G).

The cases the petition cites as justification for this new rule all involve defendants, often *pro se* defendants, who failed to file timely notices of appeal awaiting a ruling on a motion for rehearing. *See Mathis v. State*, 720 So. 2d 1116,

1116 (Fla. 5th DCA 1998) (*pro se* defendant's motion for rehearing on motion under Rule 3.800(a) was not authorized and hence the notice of appeal was untimely); *Kosek v. State,* 640 So. 2d 1127 (Fla. 5th DCA 1994) (same); *Griffis v. State*, 593 So. 2d 308, 308 (Fla. 1st DCA 1992) (same, except represented by counsel). The same is true for the cases cited for the proposition that filing a notice of appeal abandons a discretionary motion for rehearing. *See Moore v. State,* 789 So. 2d 2d 551, 552 (Fla. 5th DCA 2001) (*pro se* defendant abandoned motion for rehearing in Rule 3.850 proceedings by filing notice of appeal); *Cabrera v. State*, 623 So. 2d 825, 826 (Fla. 2d DCA 1993)(same); *see also In re Forfeiture of $104,591 in U.S. Currency*, 589 So. 2d 282 (Fla. 1991) (person whose case was forfeited abandoned motion for rehearing by filing notice of appeal).

Proposed rule 3.192, however, would keep the unauthorized rehearing "'trap' for the unwary" *pro se* defendants, *Mathis*, 720 So. 2d at 1116, while removing it for the state, which is represented by attorneys who have the training and knowledge to avoid it.[2] If anything, rules of procedure should avoid creating pitfalls for unskilled *pro se* litigants.

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[2] The Petition seems to also believe that the proposed rule would solve the problem of premature notices of appeal causing abandonment of pending motions for rehearing. It would not. As the case law for *Moore* and *Cabrera* cases above reveal, the premature filing of a notice of appeal results in abandonment of even an authorized motion for rehearing if it is still pending. *See* Fla. R. App. P. 9.020(h)(3) (the only exceptions are motions to correct sentence or motions to withdraw plea after sentencing).

Proposed rule 3.192 is also unjust as it creates situations where the outcome—whether an appeal must be dismissed as untimely—would vary depending on the identity of the party. For example, under the proposed rule, a state's motion for rehearing from a ruling on a motion to correct sentence under rule 3.800(a) would stay rendition of the final order, but a defendant's motion for rehearing from that same ruling would not.

This Court should not adopt proposed rule 3.192 both because it increases delay and because is manifestly inequitable. If state attorneys believe they need more than 15 days to file a notice of appeal, they should petition the Appellate Court Rules Committee for an amendment to 9.140(c)(3). That committee can then consider whether the advantage of having inundated criminal trial courts reconsider their prior rulings is worth the cost of further delay in the appellate process.

VI.
THE AMENDED LANGUAGE IN PROPOSED RULE 3.220(b)(1)(K) SHOULD BE RELOCATED AND REWORDED.

The FPDA agrees with the Committee and welcomes the comments of Professor Jerome Latimer that the state needs to disclose to the defense any material it has that could be subject to DNA testing. The issues here are merely drafting concerns.

The proposed rule tacks "and any tangible papers, objects or substances seized by law enforcement" on to Rule 3.220(b)(1)(K), the provision about providing tangible papers or objects not obtained from the defendant that the prosecutor intends to use at trial.

There are three problems with this approach. First, the placement of the language in Rule 3.220(b)(1)(K) implies that these are objects seized by law enforcement from persons other than the defendant. DNA testing is often done, however, on objects allegedly seized from the defendant. For instance, DNA testing can help determine whether the defendant ever handled a firearm allegedly in his or her possession.

Second, defense counsel needs to know why the state is producing any particular object. If the two obligations are combined in one subsection, the state can then make undifferentiated disclosures that leave defense counsel guessing whether the state intended to use the object at trial or was merely making a DNA testing disclosure. A separate listing would avoid confusion and forestall needless motions to suppress material the state never intended to use at trial but provided only for DNA testing.

Third, the phrase "seized by law enforcement" is too narrow as it does not include objects in the possession of law enforcement that were not seized but either found or voluntarily given. To take only the most obvious example, a sexual

battery victim's clothing, voluntarily given to law enforcement, is not seized but nonetheless often should be tested for DNA.

Therefore, instead of adopting the language as proposed, this Court should instead create a separate subsection 3.220(b)(1)(L), which might read:

> (L) any tangible paper, objects or substances in the possession of law enforcement that could be tested for DNA.

CONCLUSION

The FPDA appreciates all of the work the Committee did on this three-year revision of the Florida Rules of Criminal Procedure. The FPDA requests that this Court consider these six specific areas of concern when making its final decisions about whether, and how, to amend those rules.

Respectfully submitted,

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CERTIFICATES

I hereby certify that a copy of these comments were served by U.S. Mail on the Honorable Thomas H. Bateman, III, 6551 Velda Dairy Road, Tallahassee, FL 32309-6322, on this 31st day of March, 2009.

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

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Glen P. Gifford