IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CRIMINAL
PROCEDURE **CASE NO:**

THREE-YEAR-CYCLE AMENDMENTS TO THE
FLORIDA CRIMINAL PROCEDURE RULES

The Honorable Thomas H. Bateman III, Chair, Florida Criminal Procedure Rules Committee, and John F. Harkness, Jr., Executive Director, The Florida Bar, file this three-year-cycle report of the Florida Criminal Procedure Rules Committee under *Fla. R. Jud. Admin.* 2.140(b). All rule and form amendments have been approved by the full committee and, as required by *Rule* 2.140(b)(2), reviewed by The Florida Bar Board of Governors. The voting records of the committee and the Board of Governors are shown on the attached table of contents (*see* Appendix A).

The proposed amendments were published for comment in the July 1, 2008, Florida Bar *News* (see Appendix D) and posted on the Bar's website. No comments were received.

The proposed rules and forms are attached in full-page (see Appendix B) and two-column (see Appendix C) formats. The reasons for change are as follows:

Rule 3.131. PRETRIAL RELEASE. At the request of then

committee chair George Tragos, the committee reviewed this rule in connection with Chapter 2006-279, Laws of Florida (*see* Appendix E). The rule is amended to incorporate changes to sections 903.02 and 903.047, Florida Statutes, concerning conditions of pretrial release.

Rule 3.132. PRETRIAL DETENTION. At the request of then committee chair George Tragos, the committee reviewed this rule in light of *Ho v. State*, 929 So. 2d 1155 (Fla. 5th DCA 2006), in which the defendant asserted "that since the State did not file a motion for pretrial detention pursuant to Florida Rule of Criminal Procedure 3.132, bond cannot be denied." As stated by Judge Sawaya (concurring specially), the issue was "whether a motion for pretrial detention filed by the state is a necessary prerequisite to detaining a criminal defendant prior to trial when the defendant is charged with an offense that may subject him or her to pretrial detention . . . and the defendant is found to be a danger to the community, a flight risk, or one who will undermine the integrity of the judicial process." *Id.* The special concurrence stated that it was difficult to determine from the rule whether the Court intended that a motion for pretrial detention is a necessary prerequisite.

Subdivision (a) of the rule is amended to provide that if a motion for pretrial detention is not filed or is facially insufficient, the judicial officer

must determine whether the defendant should be detained or released, and if release is appropriate, determine the conditions of release.

Rule 3.190. PRETRIAL MOTIONS. The committee reviewed this rule generally for errors in substance and style and proposes the following amendments. First, subdivision (f) is deleted to conform to law; the rule, concerning section 924.07(1), Florida Statutes, contains the term "quashing," which the legislature replaced with the term "dismissing" in 1970. *See* Ch. 70-339, §148, Laws of Fla. (*See* Appendix F). The remaining subdivisions are renumbered accordingly. Second, subdivision (h)(2), concerning motions to suppress confessions or admissions illegally obtained, is added to include provisions on the content of motions that are consistent with those found in subdivision (g), concerning motions to suppress evidence in unlawful searches. Third, subdivision (i)(2) is amended to correct a cross-reference to conform to the renumbering.

Rule 3.191. SPEEDY TRIAL. At the request of then committee chair William C. Vose, the committee reviewed this rule in connection with section 925.12(4), Florida Statutes (2006). Section 925.12(2), Florida Statutes, requires judges to inquire, when taking a plea, to determine whether there is DNA evidence available that could exonerate the defendant. If so, the judge "may postpone the proceeding on the defendant's behalf and

order DNA testing.” *Id.* The statute directs that if the judge postpones the proceeding on the defendant’s behalf and orders DNA testing, the speedy trial period should be extended, with the extension “attributable to the defendant.” § 925.12(4), Fla. Stat. The rule amendment adds a clause in subdivision (i)(4) expressly recognizing postponement of the proceedings for DNA testing ordered on the defendant’s behalf as one of the circumstances that will result in an extension of the time periods set forth in the rule.

The amendment also corrects cross-references in subdivisions (j) and (*l*).

Rule 3.192. MOTIONS FOR REHEARING. At the request of committee member Angelica Zayas, the committee recommends adoption of new *Rule* 3.192.

This rule authorizes the state to move pretrial for rehearing, which would toll the time within which the state must file an interlocutory appeal. Currently, *Rules* 3.850(g) and 3.853(e) contain provisions for rehearing by the defendant. With the exception of *Rule* 3.851(f)(7), which provides for rehearing by either party, the Florida Rules of Criminal Procedure do not otherwise provide for rehearing by the state. Unauthorized motions do not toll the rendition of the order subject to appellate review or the time for

filing the notice of appeal. *See*, *e.g.*, *Mathis v. State*, 720 So. 2d 1116 (Fla. 5th DCA 1998); *Kosek v. State*, 640 So. 2d 1127 (Fla. 5th DCA), *rev. dismissed,* 648 So. 2d 723 (Fla. 1994); *Newman v. State*, 610 So. 2d 455 (Fla. 4th DCA 1992); *Griffis v. State*, 593 So. 2d 308 (Fla. 1st DCA 1992).

Because the state has only 15 days to file a notice of appeal, it is deprived of a meaningful opportunity for discretionary rehearing before a notice of appeal must be filed. If a notice of appeal is filed before discretionary rehearing is addressed by the trial court, the motion will be deemed abandoned by the state. *See, e.g., In re Forfeiture of $104,591 in U.S. Currency*, 589 So. 2d 283 (Fla. 1991); *Moore v. State*, 789 So. 2d 551 (Fla. 5th DCA 2001); *Cabrera v. State*, 623 So. 2d 825 (Fla. 2d DCA 1993). *See also Fla. R. App. P.* 9.020(h)(3).

Including a provision for rehearing by the state tolling the rendition of the order subject to appeal will allow trial courts the opportunity to correct an erroneous ruling without the delay and expense associated with an interlocutory appeal by the state. If the state's motion is denied, it could still proceed with the appeal as authorized by law. Because the defendant is not entitled to an interlocutory appeal and must raise claims of error on direct appeal after conviction, there is no need to expressly authorize motions for rehearing by the defense. The express authorization of motions for rehearing

by the state does not preclude motions for discretionary rehearing by either party, nor does it deprive the trial court of the inherent authority to consider such motions. *See Savoie v. State*, 422 So. 2d 308 (Fla. 1982); *Obregon v. State*, 601 So. 2d 616 (Fla. 3d DCA 1992); *State v. Harvey*, 573 So. 2d 111, 113 (Fla. 2d DCA 1991).

Furthermore, having this procedure in the criminal rules will clearly make such motions “authorized” for purposes of *Rule* 9.020(h) (Rendition (of an Order)), which makes express reference to “authorized and timely” motions for rehearing.

Rule 3.203. DEFENDANT’S MENTAL RETARDATION AS A BAR TO IMPOSITION OF THE DEATH PENALTY. The committee reviewed this rule generally for errors in substance and style and proposes the following amendments. Subdivision (b) is amended to correct a reference to Florida Administrative Code Rule 65B-4.032; this rule was transferred to Rule 65G-4.011 on January 14, 2004. Subdivision (d) is amended to delete obsolete references to time periods in 2004.[1]

Rule 3.210. INCOMPETENCE TO PROCEED: PROCEDURE

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[1] In its report to the full committee, the subcommittee considering this rule noted that the rule conflicts with section 921.137(4), Florida Statutes, which directs that motions for determination of mental retardation in death penalty cases be filed only after an advisory jury returns a verdict recommending death. *Rule* 3.203(d) requires that the motion to determine mental retardation be filed prior to trial. In 2005, the full committee debated this issue and voted unanimously not to amend this rule to conform with the statute. Therefore, action proposed in this report is consistent with the committee’s prior action, even though this subdivision conflicts with the statute.

FOR RAISING THE ISSUE. The committee reviewed *Rule* 3.210 through *Rule* 3.216 at the request of Ann Finnell, Chief Assistant Public Defender for the Fourth Judicial Circuit (*see* Appendix G). Subdivision (b) is amended to reflect statutory changes relating to funding for experts and the procedures for determining competency. (*See* Appendix H for Chapter 2007-62, Laws of Florida, which implements Revision 7 to Article V of the Constitution, for amendments to *Rules* 3.210, 3.211, and 3.216.)

The current rule was written when counties funded all competency evaluations, which were conducted only pursuant to court order. As a result of the legislation implementing Revision 7 to Article V of the Florida Constitution, the public defender and regional counsel have funds available for these evaluations, and have their clients evaluated, without court order. If the parties stipulate to a competency determination based on the single evaluation, the court may not order an evaluation at all. However, if conflict counsel is appointed, the court still orders evaluation. The amendment reflects these changes.

Rule 3.211 COMPETENCE TO PROCEED: SCOPE OF EXAMINATION AND REPORT. Also as a result of Revision 7 changes to Article V of the Florida Constitution, subdivision (c) is deleted as obsolete because independent court-appointed experts are no longer needed in

response to a notice of intent to rely on the insanity defense. Instead, the state attorney's offices now have funds available to hire their own experts for this purpose. Subdivisions (d) and (e) are renumbered accordingly.

Rule 3.216. INSANITY AT TIME OF OFFENSE OR PROBATION OR COMMUNITY CONTROL VIOLATION: NOTICE AND APPOINTMENT OF EXPERTS. Subdivisions (a), (d), (f), and current (j) are amended and subdivision (g) is deleted to conform to Chapter 2007-62, Laws of Florida. Subdivisions (h) through (j) are renumbered.

Rule 3.220. DISCOVERY. The amendment to subdivision (b)(1)(K) results from an email from Professor Jerome Latimer requesting that the committee consider this rule in connection with section 925.11, Florida Statutes (2006) (*see* Appendix I). Professor Latimer was concerned that defendants who plead guilty after July 1, 2006, cannot use the DNA rule if they were aware of DNA material at the time of the plea and the judge allowed them to have the opportunity to have it tested. The current rule requires the state to disclose tangible items only if they are exculpatory, and until the item is tested this cannot be determined. The state is only required to disclose those items it intends to use at a trial or hearing. If DNA material has been collected but will not be used at trial, and it has not been tested and therefore it is not determined whether it is exculpatory, the state has no

obligation to disclose its existence. However, section 925.12, Florida Statutes, requires that the defendant be informed of the existence of DNA material and be given an opportunity to test it before entering a plea. Professor Latimer suggested that the reasonable solution would be to require disclosure during discovery. Subdivision (b)(1)(K) is amended to conform to the statute.

The committee also reviewed this rule generally for errors in substance and style and determined that the following amendments should be made. Subdivision (b)(1)(A)(i) is amended to remove language that allowed prosecutors, when disclosing certain witnesses, to determine whether test results or opinions meet the test in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923); whether test results or opinions meet this test is a judicial decision, not a decision made by the party listing the witness. Subdivision (b)(1)(D) is amended to remove "if the trial is to be a joint one," which qualifies the prosecutor's disclosure of statements made by a codefendant and creates an ambiguity; any statements made by a codefendant would be discoverable under subdivision (b)(1)(B) (statements made by "persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto," *Rule* 3.220(b)(1)(A)). Subdivision (h)(2) is amended to delete obsolete language

and add language to correctly reflect that the county is not responsible for payment of transcript costs under this subdivision; the costs are paid through public defender, state attorney, and conflict counsel budgets. Subdivision (h)(5) is amended to clarify that the contempt sanction is applicable to adherence to the notice required under this rule rather than other notice. Subdivision (h)(8) is amended to allow the statement of any witness, rather than only law enforcement officers, to be taken by telephone in lieu of deposition. Subdivision (o) is deleted as obsolete because costs are not "taxed." Subdivision (p) is accordingly renumbered.

VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE.

The title is amended to conform to the Rules of Judicial Administration by deleting "disqualification and."

Rule 3.231. SUBSTITUTION OF JUDGE. The committee reviewed this rule generally for errors in substance and style. The amendment conforms the rule to *Corbett v. State*, 602 So. 2d 1240 (Fla. 1992), concerning successor sentencing judges in death penalty sentencing proceedings. In *Corbett*, the court found that

> [a] judge who is substituted before the initial trial on the merits is completed and who does not hear the evidence presented during the penalty phase of the trial, must conduct a new sentencing proceeding before a jury to assure that both the judge and jury hear the same evidence that will be determinative of whether a defendant lives or dies. To rule

> otherwise would make it difficult for a substitute judge to overrule a jury that has heard the testimony and the evidence, particularly one that has recommended the death sentence, because the judge may only rely on a cold record in making his or her evaluation. We conclude that fairness in this difficult area of death penalty proceedings dictates that the judge imposing the sentence should be the same judge who presided over the penalty phase proceeding.

Id. at 1244.

Rule 3.240. CHANGE OF VENUE. The committee reviewed this rule generally for errors in substance and style. Subdivision (g) is amended to make plain English changes and conform to general law.

Rule 3.800. CORRRECTION, REDUCTION, AND MODIFICATION OF SENTENCES. The committee reviewed this rule generally for errors in substance and style. The amendment to subdivision (b)(2)(A) corrects a cross-reference to the Florida Rules of Appellate Procedure.

Rule 3.851. COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED AND AFFIRMED ON DIRECT APPEAL. This rule was reviewed at the request of Tom Hall, in his individual capacity as a member of The Florida Bar (*see* Appendix J). This amendment to subdivision (i)(9) clarifies a cross-reference to the Florida Rules of Appellate Procedure.

RULE 3.852. CAPITAL POSTCONVICTION PUBLIC

RECORDS PRODUCTION. The committee reviewed this rule generally for errors in substance and style. The amendment to subdivision (d)(4) deletes an incorrect statutory reference.

RULE 3.853. MOTION FOR POSTCONVICTION DNA TESTING. The committee reviewed this rule at the request of then committee chair William C. Vose. The amendment to subdivision (c)(4) conforms the rule to changes in the procedure to determine indigency.

Rule 3.984. APPLICATION FOR CRIMINAL INDIGENT STATUS. This amendment resulted from a request by Nancy Daniels, Public Defender, Second Judicial Circuit, that the committee review the 2005 legislative changes in HB 1935, section 3 (*see* Appendix K). The proposal deletes this form as obsolete based on changes to the procedure to determine indigency in section 27.52, Florida Statutes (2005).

Rule 3.986. FORMS RELATED TO JUDGMENT AND SENTENCE. This rule was reviewed in connection with Chapter 2007-209, Laws of Florida (*see* Appendix L), at the request of then committee chair H. Scott Fingerhut. The amendments to subdivision (c) correct statutory references and delete obsolete statutory references. The amendments to subdivision (d) conform the rule to Chapter 2007-209, Laws of Florida, by adding judicial findings to the form for sentencing, correcting statutory

references, and clarifying the applicability of certain minimum mandatory provisions.

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.

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THOMAS H. BATEMAN III
Senior Judge
Chair,
Florida Criminal Procedure
Rules Committee
Leon County Courthouse,
c/o Trial Court Administrator
301 South Monroe Street
Tallahassee, FL 32301
850/577-4401
Florida Bar No. 349781

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

CERTIFICATION OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court – State* (2008).

I certify that this report was prepared in compliance with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

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Jodi Jennings
Staff Liaison, Criminal Procedure Rules Committee
Florida Bar No. 930880

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to Ann Finnell, Public Defender's Office, 25 N. Market Street, Jacksonville, Florida 32203-2802, Jerome C. Latimer, 11370 Walker Ave., Seminole, Florida 33772-7117, and Nancy Daniels, Public Defender's Office, 301 South Monroe Street # 401, Tallahassee, Florida 32301-1803, on ____________________________, 2009.

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Jodi Jennings
Staff Liaison, Criminal Procedure Rules Committee