IN THE SUPREME COURT OF FLORIDA

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

THREE-YEAR CYCLE REPORT OF THE CRIMINAL PROCEDURE RULES COMMITTEE

Honorable Donald E. Scagnione, Chair, Florida Criminal Procedure Rules Committee ("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 List of Rules (*see* Appendix A).

The proposed amendments were published for comment in the July 1, 2011, The Florida Bar *News* (*see* Appendix D) and posted on the Bar's website. One comment with several concerns was filed by Assistant Public Defender John Eddy Morrison, Eleventh Judicial Circuit. *See* Appendix F. These comments were addressed by the Committee at or subsequent to the September meeting. As a result of Mr. Morrison's concerns, two proposed rule amendments were withdrawn and additional amendments were made to two other rules. These changes were approved by the Board of Governors. The second set of votes for these new amendments are also noted in the List of Rules.

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

RULE 3.111. PROVIDING COUNSEL TO INDIGENTS

This matter was referred to the Committee by Judge Thomas Barber, who suggested that subdivision (d) of this rule be updated to conform to *Iowa v. Tovar*, 541 U.S. 77, 124 S.Ct. 1379, 158 L.Ed.2d 209 (2004). Appendix E - 1. The judge believes that a distinction needs to be made between waiver of counsel inquiries at the time a plea is entered as distinct from those at trials. Specifically, there should

not be a mandate that a trial judge discuss the disadvantages and dangers of self-representation with an accused at the plea stage of the proceedings.

To accomplish this concern, the Committee deleted the last sentence.

Mr. Morrison's Comment urged the Committee to reevaluate this rule because "[t]he rule as it presently exists comforms with *Tovar*'s admonition" (emphasis supplied). Appendix F – 3. "Additionally, even if *Tovar* had overruled *Faretta*, Florida should not feel compelled [to] 'conform' to *Tovar* and race to the bottom in the protection of its citizens' constitutional rights." (*Id.*)

Upon second review of this rule and the pertinent cases, the Committee agreed with the Commenter and voted, 28-0, to withdraw the proposed amendment; the Board of Governors agreed.

Subsequently, only a style correction was made in subdivision (b)(1)(B).

RULE 3.125. NOTICE TO APPEAR

To comply with recently amended notice requirements of *Fla. R. Jud. Admin.* 2.540, regarding requests for accommodations by persons with disabilities, the form in subdivision (*l*) is revised to include the following statement in bold face, 14-point Times New Roman or Courier font:

> If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact [identify applicable court personnel by name, address, and telephone number] at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711.

RULE 3.140. INDICTMENTS; INFORMATIONS

In case *In re Amendment to the Florida Rules of Judicial Administration – Reorganization of the Rules*, 939 So. 2d 966, 967 (Fla. 2006), the Court adopted the proposed reorganization of the Rules of Judicial Administration upon the out-of-cycle petition of that committee. In footnote 2 of the opinion, the court stated:

> The Committee advises that renumbered rules 2.265, Municipal Ordinance Violations, located in Part II, and 2.555, Initiation of

> Criminal Proceedings, located in Part V, might be more appropriately located in the Rules of Criminal Procedure. However, the Committee recommends that these rules remain in the Rules of Judicial Administration as reorganized until the matter can be considered by the Criminal Procedure Rules Committee. Consistent with the Committee's recommendation, we refer the issue of the proper placement of these rules to the Criminal Procedure Rules Committee.

The majority of *Rule* 2.265, and *Rule* 2.555, as related to the prosecution of municipal ordinances, do not belong in the Rules of Criminal Procedure. The Committee proposes that an amendment to the caption in municipal ordinance cases be included in *Rule* 3.140(c).

Commenter, Mr. Morrison, requested that the Committee consider adding a county ordinance violation option in the case style. The Committee accepted this suggestion by a vote of 28-0; the Board of Governors approved this additional amendment. Appendix D - 2.

RULE 3.170. PLEAS

This matter was considered by the Committee based on the recommendation of the District Court of Appeal Performance and Accountability Commission through a joint postconviction workgroup chaired by Judge Chris W. Altenbernd. Appendix E - 7. As explained in *Williams v. State*, 959 So. 2d 830, 831–833 (Fla. 4th DCA 2007), Judge Martha Warner states, in pertinent part:

> I have come to the conclusion that Florida Rule of Criminal Procedure 3.170(*l*) has not achieved its intended purpose of *resolving* issues at the trial level. Instead, it *creates* issues and expense. . . . At the Fourth District, we are seeing more and more cases where the defendant files a motion to withdraw a plea after sentencing occurs, vaguely indicating coercion by counsel or misrepresentation as to the sentence, even though these matters were fully reviewed at sentencing. . . . As far as I can tell, many defendants are abusing the use of rule 3.170(*l*).
>
> If I were writing on a clean slate, I would conclude that a motion to withdraw the plea after sentencing is not a critical stage of the proceedings, as the defendant has already pled and been sentenced. Therefore, the "proceedings" are in fact at an end with sentencing. Rule 3.170(*l*) is a collateral, judicially-created proceeding

> which is not essential to due process. I fully concur with the workgroup's recommendation to delete this rule. It has proved costly with little, if any, benefit.

(emphasis in original).

The Committee took this opinion into consideration when considering the matter. It agreed and proposes a deletion of subdivision (*l*) and renumbers subdivision (m). It also adds a statutory reference in subdivision (m).

Mr. Morrison commented on this proposal stating that "[e]liminating that subsection does not conform the rule to the case law." Appendix F – 4. He further states that "[i]f Rule 3.170(*l*) were eliminated, the practice Judge Altenbernd was concerned about would continue. The only difference would be increased and unnecessary procedural complexity." (*Id.* at 5.) Mr. Morrison feels that "[w]ithout Rule 3.170(*l*), either the trial court would have to treat motions to withdraw a plea as emergencies to be heard and ruled on very quickly before the filing of the notice of appeal, or, more probably, the appellate court would have to entertain countless motions to relinquish jurisdiction after the notice of appeal was filed. That procedure would be a needless waste of appellate court resources." (*Id.*)

The subcommittee took Mr. Morrison's concerns into consideration as it reevaluated this proposed rule. After some discussion, it was decided that the amendment would remain as proposed.

RULE 3.191. SPEEDY TRIAL

At the request of attorney Michael Catalano (*see* Appendix E - 9), the Committee reviewed this rule in light of *Alonso v. State*, 17 So. 3d 806 (Fla. 3d DCA 2009), concerning clarification of the time period for filing a notice of expiration of speedy trial. The proposal amends subdivision (h) to clarify this time period.

RULE 3.220. DISCOVERY

At the request of a previous chair, the Committee reviewed this rule for changes in style and substance. Subdivision (h)(1) of the rule was amended to add the words "by a pro se litigant" referring to when the court or clerk issues subpoenas.

Commenter Mr. Morrison requested that the attorney representing a defendant also be able to apply to the clerk or court for a subpoena. The Committee reviewed this proposed rule and voted 22-12 to include “or the attorney for any party” in the rule. The Board of Governors also approved this amendment.

Given the Committee vote, the Chair felt it important that the minority report be shared with the Court. Simply put, the minority did not approve the new amendment because “[i]t would permit one side to obtain information vital to their case without imposing any duty to submit mutual witness lists or evidence.” The minority requests that the Court consider adding a sentence like: *The issuance of the subpoena duces tecum under this subdivision will also trigger the reciprocal discovery provisions as provided in rule 3.220(a), Florida Rules of Criminal Procedure, for other forms of obtaining information*. For further explanation of this concern, see Appendix G.

RULE 3.410. JURY REQUEST TO REVIEW EVIDENCE OR FOR ADDITIONAL INSTRUCTIONS

This matter was considered by the committee at the request of Judge James Hankinson (*see* Appendix E - 10). The proposed changes are intended to address two problems. The first problem is that many jurisdictions do not have a court reporter available at trial to prepare a transcript or a transcript is not practically available. In these situations, digital recordings could be used for playback of testimony, but this is not currently allowed by the rules. The second problem is that the rule currently does not allow answers to a jury’s questions to be provided in writing, *see Jones v. State*, 957 So. 2d 115 (Fla. 4th DCA 2007), and it is often easier to write an answer to a jury’s questions than to bring the jury back into the courtroom. Judge Hankinson believes the proposed change is consistent with the procedure in other jurisdictions and that it simply adapts the rule to current practice.

The Committee approved Judge Hankinson’s proposal with a friendly amendment reversing the order of the last two sentences in his proposal. The amendment allows for play back of testimony to the jury and allows the court, in its discretion, to respond in writing to an inquiry without having the jury brought before the court, and specifies procedures for these changes.

RULE 3.590. TIME FOR AND METHOD OF MAKING MOTIONS; PROCEDURE; CUSTODY PENDING HEARING

As editorial amendment for consistency is necessary in subdivision (b).

RULE 3.691. POST-TRIAL RELEASE

At the request of Larry Klein, Esquire, former judge of the District Court of Appeal, Fourth District, the Committee considered an amendment to *Rule* 3.691(c). Appendix E - 12. Mr. Klein pointed out that this rule currently provides for review of an order denying bail on appeal by separate appeal, but Florida Rule of Appellate Procedure 9.140(h)(4) provides for a review by motion. Mr. Klein further noted that the appellate rule controls and, because this apparent conflict between the two rules could mislead practitioners, the committee proposes an amendment that would be consistent with the Florida Rules of Appellate Procedure.

RULE 3.700. SENTENCE DEFINED; PRONOUNCEMENT AND ENTRY; SENTENCING JUDGE

The committee considered this amendment on the request of member Angelica Zayas. Appendix E - 13. Ms. Zayas expressed her concern regarding successor sentencing judges in light of *Kramer v. State*, 970 So. 2d 468, 470 n.1 (Fla. 2d DCA 2007), and *Mobley v. State*, 407 So. 2d 1037 (Fla. 1st DCA 1081).

On initial review, it was believed that in footnote 1 of *Kramer* (970 So. 2d at 469), the court noted that it reversed the sentence because the word "necessary" was in *Rule* 3.700. The court questioned whether the rule establishes the best policy for sentencing, or whether a defendant who wants to ensure that a specific judge will preside at sentencing following a plea should be required to condition the plea on that right. *Id.* In footnote 2, the court raised the issue of whether a contemporaneous objection to a successor judge should be required, rather than mere preservation of the issue under *Rule* 3.800(b). *Id.*

In *Mobley v. State*, the appellant similarly challenged his sentencing by a judge other than the judge who accepted his plea. The sentencing judge had made himself familiar with the case file. The appellant did not show that he had been prejudiced by the substitution. *Mobley* suggests that in applying *Rule* 3.700, courts should consider distinctions between pleas and trials, the demonstration of prejudice, and a requisite showing of emergency. (*Mobley*, 407 So. 2d at 1038.)

An amendment to *Rule* 3.700(c)(1) was initially drafted and approved by the Committee and the Board of Governors. The amendment would provide that when a defendant enters a plea of guilty or nolo contendere and wants the judge who presided at the plea hearing to pass sentencing, the plea must be conditioned on such a right, or a successor judge may pass sentence without a showing of

necessity. The amendment also required a successor judge to become acquainted with the case.

Mr. Morrison, in his Comment, stated that the proposed amendment "is far broader than resentencings where judicial discretion is either nonexistent or exercised to impose a bottom-of-the-guidelines sentence." Appendix F – 6. The Committee had effectively "remove[d] the requirement to show necessity for resentencing by a successful judge." *Id*.

The CPRC subcommittee took Mr. Morrison's concerns into consideration and then proposed to the full Committee a retraction of the proposed amendment. This retraction was accepted by the Committee with a vote of 31-3 and was then accepted by the Board of Governors. Therefore, no rule amendment is being proposed at this time.

RULE 3.800. CORRECTION, REDUCTION, AND MODIFICATION OF SENTENCES

Subdivision (a) was amended in response to *Saintelien v. State*, 990 So. 2d 494, 497 (Fla. 2008), in which the Court held that "a defendant may seek correction of an allegedly erroneous sexual predator designation by filing a rule 3.800(a) motion to correct an illegal sentence in criminal court. [Citations omitted.] However, because *Rule* 3.800(a) is intended to correct errors that are apparent on the face of the record, we limit our holding to cases where it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator." In footnote 4 of the opinion, the Court referred the issue to the Committee to consider whether the rule should be amended. *Id*. The amendment adds language stating that a defendant may seek correction of an allegedly erroneous sexual predator designation under the rule only when it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator.

RULE 3.851. COLLATERAL RELIEF AFER DEATH SENTENCE HAS BEEN IMPOSED AND AFFIRMED ON DIRECT APPEAL

This matter was referred to the committee by member Robert Strain for consideration of whether expert reports should be filed and maintained under seal in the court file, as are mental health reports under other sections of the criminal rules. The concern is that mental health reports and evaluations prepared for or

provided during capital postconviction litigation were made public once the documents were provided to the court.

The committee considered the right to privacy generally afforded mental health records against the right to public access to judicial records and concluded that the expert testimony presented at any hearing pursuant to the rule would become public record once presented, but that certain expert reports should be maintained under seal in the court file. The amendments provide for certain reports to be maintained under seal in the court file.

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 ______, 2012.

/s/ Donald E. Scaglione
Donald E. Scaglione, Chair
Criminal Procedure Rules Committee
Hernando County Courthouse
20 N. Main Street, Room 359
Brooksville, FL 34601-2817
352/754-4295
Florida Bar No. 547141

/s/ John F. Harkness, Jr.
John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
850/561-5600
Florida Bar No. 123390

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail, on January ____, 2012, to:

Judge Chris W. Altenbernd
Second District Court of Appeal
1700 N. Tampa Street, Ste. 300
Tampa, FL 33602-2648

Judge Thomas P. Barber
801 E. Twiggs Street, Ste. 317
Tampa, FL 33602-3515

Michael A. Catalano
1531 N.W. 13th Court
Miami, FL 33125-1605

Judge James C. Hankinson
365F Leon County Courthouse
301 S. Monroe Street
Tallahassee, FL 32301-1861

Larry A. Klein
Holland & Knight
222 Lakeview Avenue, Ste. 1000
West Palm Beach, FL 33401-6148

John Eddy Morrison
Office of the Public Defender, 11th Circuit
1320 N.W. 14th Street
Miami, FL 33125-1609

Robert T. Strain
Capital Collateral Regional Counsel
3801 Corporex Park Drive, Ste. 210
Tampa, FL 33619-1136

Angelina D. Zayas
State Attorney's Office
1350 N.W. 12th Avenue
Miami, FL 33136-2102

CERTIFICATION OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court – State* (2011, *revised ed.*).

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

/s/ Krys Godwin ____________
Krys Godwin, Staff Liaison
Criminal Procedure Rules Committee
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
Florida Bar No. 2305