IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE

CASE NO.: SC15-

CRIMINAL PROCEDURE RULES COMMITTEE
THREE-YEAR CYCLE REPORT

The Honorable Samantha L. Ward, Chair of the Criminal Procedure Rules Committee ("Committee"), and John F. Harkness, Jr., Executive Director of The Florida Bar, file this three-year cycle report under Florida Rule of Judicial Administration 2.140(b). All rule and form amendments have been approved by the full Committee and, as required by Rule 2.140, reviewed by The Florida Bar Board of Governors. The voting records of the Committee and the Board of Governors are attached as Appendix A.

The amendments were published in The Florida Bar *News* July 15, 2014 and were posted on The Florida Bar's website. (*See* Appendix D.) Comments were received from Maria Aguila, Director, Judicial Staff Attorneys, Duval County; Blaise Trettis, Public Defender, 18th Judicial Circuit; Julianne Holt, President, Florida Public Defender Association; Luke Newman and Bill Ponall, Co-Chairs of the Rules Committee, Florida Association of Criminal Defense Lawyers; Carlos J. Martinez, Public Defender, 11th Judicial Circuit; and the Criminal Court Steering Committee ("CCSC"). (*See* Appendix F.) Mr. Martinez's comments included a statement of interest from Catholic Legal Services, Archdiocese of Miami, Inc.; Americans for Immigrant Justice; Ave Maria School of Law, Asylum and Immigrant Rights Law Clinic; St. Thomas University School of Law, Immigration Clinic; University of Miami College of Law, Immigration Clinic; and the American Immigration Lawyers Association. (*See* Appendix F-15–F-17.)

MINIMIZATION OF THE FILING OF SENSITIVE INFORMATION

In response to the Court's request, in SC08-2443, *In re Implementation of Committee on Privacy and Court Records Recommendations—Amendments to the Florida Rules of Civil Procedure, the Florida Rules of Judicial Administration, the Florida Rules of Criminal Procedure, the Florida Probate Rules, the Florida Small*

Claims Rules, the Florida Rules of Appellate Procedure, and the Florida Family Law Rules of Procedure, 80 So. 3d 317 (Fla. 2012), the Committee reviewed its rules to determine whether the Florida Rules of Criminal Procedure conflict with Florida Rule of Judicial Administration 2.425, Minimization of the Filing of Sensitive Information. There are several instances in which "sensitive information" is required by the rules, but the deletion of the requirement would prevent the efficient administration of justice. For instance, in Rule 3.125, Notice to Appear, the notice to appear requires the defendant's social security number, driver's license number, phone number, and date of birth. Rule 3.851(e)(2)(C)(ii), Collateral Relief After Death Sentence Has Been Imposed and After Direct Appeal, requires the defendant to list the phone number of witnesses who will support the defendant's claim of newly discovered evidence. Rules 3.990, Sentencing Guidelines Scoresheet, 3.991, Sentencing Guidelines Scoresheets (October 1, 1995), and 3.992, Criminal Punishment Code Scoresheet, require the defendant's date of birth. The Committee discussed amending all of these rules, but determined that the information required is used to verify the identity of the defendant and should not be removed. However, this information, considered "sensitive," is also frequently accessed and used by other agencies such as the Department of Corrections. Therefore, in response to the Court's request, the Committee recommends the amendment of Rules 3.281, 3.300, 3.984, and 3.986, as detailed below.

The rule and form amendments are proposed for the following reasons:

RULE 3.112. MINIMUM STANDARDS FOR ATTORNEYS IN CAPITAL CASES

The Committee proposes removing the language prohibiting former prosecuting attorneys, who are otherwise qualified under Florida Rule of Criminal Procedure 3.112, from acting as lead counsel for defendants in death penalty cases. In his request for amendment, Abraham Laeser expressed his concerns with the current rule as follows:

> "[T]he language prevents two categories of persons from being appointed. The first group is those persons, without regard to their actual experience, trial history on capital cases, or level of proficiency—but who have not previously [] acted as 'defense' counsel. They could never be appointed. There are many former prosecutors or appellate counsel who worked for

> the State who would be excluded merely due to their choice of 'sides' during their careers.
>
> The second group is those very skilled and proficient attorneys who had not been previously retained while in private practice of law—in two capital cases. The private retention of counsel in capital cases is very limited; perhaps even rare. The rule excludes them from possible appointment if they should choose to represent someone on an appointed case." (*See* Appendix E-1.)

In a split vote of 19-8, the Committee agreed with Mr. Laeser and proposes removing the word "defense" from Rule 3.112(f)(3). The pertinent part of the sentence would read: "[] as well as prior experience as lead counsel or co-counsel in at least two state or federal cases tried to completion in which the death penalty was sought."

In its comment, the Florida Public Defender Association expressed concerns that there is no "demonstrated need for this amendment in light of the rule's original purpose and its evolution." (*See* Appendix F-24.) The Florida Public Defender Association also expressed concerns that the proposed amendment is contradictory to the "rationale underlying the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases." (*Id.*)

Upon reviewing the comments received, one Committee member raised concerns that the Timely Justice Act of 2013 provides that defense counsel who are found to be ineffective twice are disqualified from representing clients in death penalty cases, but prosecutors who have engaged in misconduct, such as improper argument or failure to disclose *Brady* material, are not similarly held accountable. The Committee member was concerned that this uneven treatment, combined with the Committee's proposed amendment, could affect the quality of attorneys representing defendants in death penalty cases. (*See* Appendix H-15.)

The Committee considered these comments, but still proposes the amendment as the current language prohibits otherwise qualified attorneys from representing defendants, as lead counsel, in death penalty cases. (*See* Appendix H-15.)

In subdivisions (e) and (f), the Committee proposes adding a hyphen to cocounsel rule for consistency within the rules set.

RULE 3.121. ARREST WARRANT

In his request for this amendment, the Honorable O.H. Eaton suggested several updates to the rules on arrest warrants and first appearances (*See* Appendix E-2–E-7.) The Committee considered the request and proposes amendments to Florida Rule of Criminal Procedure 3.121 that would add additional requirements to arrest warrants.

In subdivision (a)(4), the proposed amendment would require a photograph be attached to the arrest warrant, if a photograph can be easily obtained. Many Committee members thought that this would assist in correctly identifying the party for arrest and during first appearance.

In subdivision (a)(7), the proposed amendment adds any "conditions of release" to the arrest warrant. The subdivision would read: "for offenses where a right to bail exists, set the amount of bail or other conditions of release, and the return date." This proposed amendment would provide judges, at first appearance, more information for determining conditions of release or bail. This proposed amendment also rephrases subdivision (a)(7) to provide greater clarity to the reader.

Judge Eaton had several additional suggestions for amending the first appearance process, but the Committee declined to approve the suggested amendments expressing concern that the implementation of some of these suggestions would prove too costly for smaller counties and other suggestions may require statutory amendment prior to rule amendment. (*See* Appendix H-8–H-9 and H-11.)

RULE 3.172. ACCEPTANCE OF GUILTY OR NOLO CONTENDERE PLEA

In its letter dated April 26, 2013, the Court asked the Committee to "consider proposing an amendment to Florida Rule of Criminal Procedure 3.172(c)(8) in light of the Court's recent decision in *Hernandez v. State*," 124 So. 3d 757 (Fla. 2012). (*See* Appendix E-8.)

The Committee reviewed the Court's request and in response proposes many amendments to the rule. The Committee reviewed the plea colloquies of states across the country as well as the Federal plea colloquy. (*See* Appendix G.) Many states use language that a guilty plea "may" lead a defendant to be deported. The Committee had concerns that the use of "may" would not be clear enough to the

defendant. The Committee also considered language that a plea of guilty or nolo contendere "will" subject a defendant to immigration consequences. However, there was concern that the use of "will" does not accurately describe the possible consequences. While the Committee was reviewing this issue, the Third District Court of Appeal issued its decision in *St. Louis v. State*, 134 So. 3d 546 (Fla. 3d DCA 2014), which upheld a colloquy in which the trial court asked the defendant, "[e]ven if this plea were to subject you to deportation, would you still wish to enter into it to close out these charges today?" The Committee proposes adopting this language from *St. Louis*.

In subdivision (c), the Committee's proposed amendments remove "shall" and require that the "determination of voluntariness" must be "on the record." Additionally in subdivision (c), the Committee's proposed amendments substitute "must" in place of "should." The proposed amendments in new subdivisions 3.172(c)(8)(A)–(c)(8)(E) explain that immigration consequences are not restricted to deportation; require that the court offer the defendant additional time to consult his or her counsel to gather more information on possible immigration consequences; ensure that the defendant has discussed the possible immigration consequences with his or her counsel; and prohibit the trial court from requiring the defendant to disclose his or her legal status. Subdivisions (c)(1)–(c)(10) have new proposed titles to provide greater clarity to the reader. The Committee proposes a committee note to reference the case law that precipitated the new amendments. These proposed amendments are gathered from the colloquies of several states and the Committee believes that the proposed amendments are a thorough and accurate reflection of the law.

The Committee received comments on the proposed amendments to Rule 3.172(c) from Blaise Trettis, Public Defender, 18th Judicial Circuit; Julianne Holt, President, Florida Public Defender Association; Luke Newman and Bill Ponall, Co-Chairs of the Rules Committee, Florida Association of Criminal Defense Lawyers; and Carlos J. Martinez, Public Defender, 11th Judicial Circuit. (*See* Appendix F.) Mr. Martinez's comments included a statement of interest from Catholic Legal Services, Archdiocese of Miami, Inc.; Americans for Immigrant Justice; Ave Maria School of Law, Asylum and Immigrant Rights Law Clinic; St. Thomas University School of Law, Immigration Clinic; University of Miami College of Law, Immigration Clinic; and the American Immigration Lawyers Association. (*See* Appendix F-15–F-17.)

In its comments, the Florida Association of Criminal Defense Lawyers expressed concern that deletion of the term "shall" in Rule 3.172(c) could lead to

courts "engag[ing] in two undesirable/unconstitutional practices. The first practice could be for pleas to move forward without defendants being personally addressed by the trial court. The second practice could be for pleas to move forward without a full determination of the defendant's understanding." (*See* Appendix F-18.) This was not the Committee's intent and in response the Committee proposes rewording the sentence to make it clear that the trial judge must address each defendant personally and must determine voluntariness on the record.

In its comment, the Florida Public Defender Association raised a concern whether the proposed amendments to Rule 3.172(c)(8)(D) were "designed solely to produce waivers of otherwise meritorious [Ineffective Assistance of Counsel] IAC Claims." (*See* Appendix F-30.) Carlos J. Martinez, Public Defender, 11th Judicial Circuit, was also concerned with this subdivision and in his comment he expressed that

> "this part of the colloquy would have various harmful consequences, including: 1) discouraging defense attorneys from learning immigration law—or consulting counsel with expertise in immigration law—in order to provide competent legal advice; 2) placing clients in the impossible situation of answering an unknowable hypothetical question; 3) unduly persuading a defendant to reject an otherwise reasonable plea and proceed to trial in a case where the chance of acquittal is dubious; and 4) creating an ethical conflict of interest for defense attorneys." (*See* Appendix F-11.)

Blaise Trettis, Public Defender, 18th Judicial Circuit, expressed concerns that the proposed amendments to Rule 3.172(c)(8) are too broad and "will lead to the filing of many post conviction motions to vacate convictions claiming that defense counsel was ineffective for not providing the expert immigration legal advice." (*See* Appendix F-3.) Mr. Trettis argues that the amendments should "limit the court's warning to the deportation consequence of a plea of guilty or no contest" and should not include additional immigration consequences. (*Id.*)

The Committee believes that its proposed amendments state the law correctly, detail the possible immigration consequences, and are not intended to waive any ineffective assistance of counsel claim, but instead assist the trial judge in determining the voluntary nature of the plea. (*See* Appendix H-9–H-10, H-12–H-13, and H-15–H-17.)

RULE 3.192. MOTIONS FOR REHEARING

The Committee proposes adding a reference to Florida Rule of Criminal Procedure 3.801, Correction of Jail Credit, to the list of exceptions in the second to the last sentence of Rule 3.192 as motions under Rule 3.801 can be considered postconviction motions and thus should not be appealable through motions for rehearing. Additionally, the Committee proposes removing the hyphen from "postconviction" for consistency with the rest of the rules set. The specific proposed sentence within the rule would then read as follows: "[t]his rule shall not apply to postconviction proceedings pursuant to rule 3.800(a), 3.801, 3.850, 3.851, or 3.853."

RULE 3.212. COMPETENCE TO PROCEED: HEARING AND DISPOSITION

The Honorable Mike Murphy of the Ninth Judicial Circuit requested that Florida Rule of Criminal Procedure 3.212(d), Release on Finding of Incompetence, be amended to address concerns that subdivision (d) has no repeat clause to allow for the repeated process of re-examination, and the setting of the same or new conditional release conditions, on a yearly basis or until competency is restored. (*See* Appendix E-11–E-13.) The inability of this procedure to be repeated does not allow the court to retain jurisdiction in cases in which the defendant is not mentally competent to stand trial yet does not meet the criteria for commitment. The Committee agreed that there was a gap in the rule and proposes that the phrase "for a period not to exceed 1 year" be removed from the first sentence which would now read: "[i]f the court decides that a defendant is not mentally competent to proceed but does not meet the criteria for commitment, the defendant may be released on appropriate release conditions." This would allow the court to retain jurisdiction, re-examine the defendant on a yearly basis, and determine any necessary release conditions in this situation. (*See* Appendix H-10–H-11.)

RULE 3.220. DISCOVERY

The Committee proposes removing the exception for subpoena duces tecum from Florida Rule of Criminal Procedure 3.220(h). The Committee received a request for this amendment from James Marion Moorman, former Public Defender of the Tenth Judicial Circuit, concerning the inclusion of "subpoena duces tecum" within Rule 3.220(h)(1), Discover Depositions; Generally. (*See* Appendix E-14–E-15.) Mr. Moorman expressed confusion with the use of a double negative and asked whether the rule should be amended to be the same for the criminal rules and

the civil rules. Removing "(except a subpoena duces tecum)" from the rule would allow criminal defense attorneys to have the same subpoena power that civil attorneys currently have. The Committee felt the distinction between civil practitioners and criminal practitioners, in this regard, was not substantive and that the rule should be amended to remove the distinction. (*See* Appendix H-1–H-6.) The Committee also proposes punctuation corrections in subdivisions (b)(1)(J)–(b)(1)(L).

RULE 3.281. LIST OF PROSPECTIVE JURORS

The Committee proposes amending Florida Rule of Criminal Procedure 3.281 to conform to Florida Rule of Judicial Administration 2.425, Minimization of the Filing of Sensitive Information. Rule 3.9855, Juror Voir Dire Questionnaire, asks for information considered "sensitive," such as date of birth. The proposed amendment removes the obligation for the clerk to furnish the questionnaire to anyone who asks. To accomplish this, the Committee proposes removing "together with copies of all jury questionnaires returned by prospective jurors" from the end of the rule's single sentence.

RULE 3.300. VOIR DIRE EXAMINATION, OATH, AND EXCUSING OF MEMBER

The Committee proposes adding new subdivision (d) to Florida Rule of Criminal Procedure 3.300 to address juror voir dire questionnaires. The proposed amendment conforms the rule to Florida Rule of Judicial Administration 2.425, Minimization of the Filing of Sensitive Information, and requires that juror voir dire questionnaires be filed under seal. The new subdivision provides that the judge must provide the questionnaires to the prosecution and defense, on request. (*See* Appendix H-14.) Originally, the Committee's amendment permitted "any party" to request the questionnaires. In her comment, Maria Aguila, Director of Judicial Staff Attorneys of the Fourth Judicial Circuit, suggested that this language was overly broad and could allow the questionnaires to be requested by third-party intervenors. (*See* Appendix F-1.) The Committee reviewed her comment and agreed that the original language was not specific enough and now proposes that "prosecution and defense" should be substituted for "any party." (*See* Appendix H-16.)

The complete proposed subdivision reads: "Juror Voir Dire Questionnaires. To protect sensitive information and preserve original content juror voir dire questionnaires must be filed under seal. Upon request, the trial judge must provide

the questionnaires to the prosecution and defense. Personal information of prospective jurors must not be released by the prosecution and defense except as set forth in Florida Rules of Judicial Administration 2.425."

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

The proposed amendments to Florida Rule of Criminal Procedure 3.410 label, as subdivision (a), the current rule with merely a grammatical change. The proposed amendments also create new subdivisions (b)(1)–(b)(3) and (c) to delineate the requirements of the "play back" rule. The proposed amendments clarify the process for situations in which the trial judge must deny juror requests for trial testimony transcripts, but can grant requests to have testimony read or played back. These proposed amendments will conform Rule 3.410 to the Court's opinion in *Hazuri v. State*, 91 So. 3d 836 (Fla. 2012). (*See* Appendix H-7–H-8.)

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

Pamela Masters, Clerk of the Fifth District Court of Appeal, suggested that the language in Florida Rule of Criminal Procedure 3.590 was not clear and should be amended as "determining whether we have jurisdiction is the most important and fundamental thing we do." (*See* Appendix E-19.) The Committee agreed and proposes amending Rule 3.590(a) to specify that motions for new trial or in arrest of judgment may be made "either orally in open court or in writing and filed with the clerk's office." (*See* Appendix H-6–H-7.)

The subdivision (a) is rearranged for greater clarity to the reader; the proposed amendments to the first sentence read: "[i]n cases in which the state does not seek the death penalty, a motion for new trial or in arrest of judgment, or both may be made, either orally in open court or in writing and filed with the clerk's office, within 10 days after the rendition of the verdict or the finding of the court."

RULE 3.984. APPLICATION FOR CRIMINAL INDIGENT STATUS

To conform to the minimization requirements in Florida Rule of Judicial Administration 2.425, the Committee proposes amending Florida Rule of Criminal Procedure 3.984 to only require the last four digits of a driver's license or ID number. Originally, the Committee proposed deleting the phone number requirement to conform to Rule 2.425, but the Florida Public Defender Association

commented that the phone number on the application for criminal indigent status is used by public defenders, who are "blanket appointed," to contact their clients. (*See* Appendix F-31.) In response, the Committee proposes leaving the phone number requirement intact, but realizes that it does not conform to Rule 2.425(a)(3)(E). (*See* Appendix H-16.) The Committee considered removing the birth date requirement in Rule 3.984, but prior to publication, the Committee received comment that clerks of court use this information for verification purposes and that agencies, such as the Department of Corrections, also access these records and use the date of birth for verification purposes. Therefore Committee proposes leaving the birth date requirement, but realizes that it does not conform to Rule 2.425(a)(2). In SC14-1530, currently pending before the Court, the Committee has requested amendment of the same rule to remove the attestation clause. Editorial amendments are proposed for grammatical purposes and for consistency throughout the rules set.

RULE 3.985. STANDARD JURY INSTRUCTIONS

The website address in the first sentence is incorrect and the Committee proposes its deletion. In its place, the Committee proposes adding the website address to the Supreme Court's home page: www.floridasupremecourt.org. This is purely an editorial amendment. The Committee and the Board of Governors were notified of the proposed editorial amendment.

RULE 3.986. FORMS RELATED TO JUDGMENT AND SENTENCE

To conform to the minimization requirements in Florida Rule of Judicial Administration 2.425, the Committee proposes amending Florida Rule of Criminal Procedure 3.986(g), Form for Restitution Order, to limit the victim's phone number requirement to clarify that the victim's phone number is not needed, and instead the phone number of the prosecuting attorney, victim's attorney, or victim advocate should be included in the restitution order. Additional editorial amendments are proposed throughout this rule for consistency with the rest of the rules set.

COMMENTS OF THE CRIMINAL COURT STEERING COMMITTEE

After publication of the Committee's proposed cycle amendments, the CCSC asked if the Committee would reconsider its published amendments to Florida Rules of Criminal Procedure 3.851(c)(4) and 3.852(f)(2) as the Committee's proposed amendments were very similar to those proposed by CCSC and approved by the Court in SC13-2381, *In re Amendments to the Florida Rules*

of Judicial Administration, the Florida Rules of Criminal Procedure, and the Florida Rules of Appellate Procedure—Capital Postconviction Rules, 148 So. 3d 1171 (Fla. 2014). As the effect of CCSC's approved amendments is similar to the amendments published by the Committee, the Committee voted to withdraw its proposed amendments to Rule 3.851(c)(4) and Rule 3.852(f)(2).

WHEREFORE, 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 February 2, 2015.

/s/ Hon. Samantha L. Ward

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CERTIFICATE OF SERVICE

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CERTIFICATE OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court—State* (2014 Revised Edition).

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

/s/ Heather S. Telfer
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