

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CRIMINAL
PROCEDURE**

CASE NUMBER: SC02-230

**SUPPLEMENTAL REPORT OF
THE FLORIDA BAR CRIMINAL PROCEDURE RULES COMMITTEE**

John F. Harkness, Jr., Executive Director of The Florida Bar, and the Honorable Kevin Emas, Chair of The Florida Bar Criminal Procedure Rules Committee, file this Supplemental Report regarding proposed amendments to *Fla. R. Crim. P.* 3.111 and proposed new *Form* 3.994.

In a letter dated May 13, 2002, the Court requested that this committee consider all of the issues raised in Judge O. H. Eaton's letter of September 12, 2000, as they relate to the proposed amendment to *Rule* 3.111 and proposed new *Form* 3.994.

Upon receiving that letter, former Chair Raymond Rafool II referred the matter back to the subcommittee for further consideration and action. The subcommittee held several meetings to consider the issues raised by the Court and a revised proposal was presented to the full committee on June 21, 2002. On that date the committee, by a vote of 21 to 7, approved the proposed amendments to *Rule* 3.111 and by a vote of 21-4, approved the proposed *Form* 3.994. Due to time constraints, these amendments were not considered by The Florida Bar Board of Governors.

In revising the proposed rules, the subcommittee and full committee considered a broad range of issues, giving special attention to the concerns raised by Judge Eaton in his letter of September 12, 2000. Judge Eaton delineated four specific areas:

1. The practice of the State announcing it does not seek incarceration of a defendant who is in custody, the court discharging the Public Defender and continuing the case for a later date.

The proposed amended rule addresses this in two ways. First, it requires that an order of no incarceration be filed at least 15 days before trial, thereby preventing the court from discharging court-appointed counsel on the day of trial. Second, the rule now provides that an order of no incarceration prohibits a defendant from being held pending trial without counsel. Therefore, the court may not enter an order of no incarceration and discharge the public defender unless the court also enters an order releasing the defendant from custody pending trial. If the court determines that a defendant should not be released (without posting a bond) pending trial, this rule ensures that an indigent defendant who is in custody awaiting trial will have the benefit of appointed counsel.

2. The practice of the State Attorney passing out plea agreement forms just prior to arraignment thereby precluding indigent defendants from receiving advice of counsel, especially in weak cases.

The subcommittee and committee do not believe that this is a common practice throughout the state or a concern to be addressed by changes to this rule. A defendant's eligibility for the services of the public defender is generally determined at the first appearance hearing pursuant to *Rule 3.111(a)*. If the public defender is not appointed at the first appearance (either because the defendant does not qualify financially or because the court enters an order of no incarceration), then the prosecutor is free to speak with the defendant at or prior to the arraignment and to extend plea offers at that time.

If the public defender has been appointed to represent the defendant, the prosecutor is prohibited from having direct contact with the defendant, and can extend plea offers only through counsel. See *R. Regulating Fla. Bar 4-4.2*. Even when communicating with a defendant who is not represented by court-appointed counsel, the prosecutor is under a duty not to give legal advice and must act to ensure that the unrepresented defendant does not misunderstand the prosecutor's role in the process. *Rule 4-4.3*. To the extent such abuses occur, the committee believes they can be addressed and controlled on a local basis by the individual trial court judges.

3. The practice in some courts of placing a defendant on probation after the state announces its intention not to incarcerate the defendant, and then sentencing the defendant to jail for a violation of probation.

The proposed amended rule, and the proposed new form, address this concern by specifically providing that the court will not sentence the defendant to incarceration upon a violation of probation, if the defendant was initially placed on probation following the entry of an order of no incarceration. The rule, as proposed, comports with the recent caselaw in this area. See *Alabama v. Shelton*, 122 S. Ct. 1764 (2002); *Tur v. State*, 797 So. 2d 4 (Fla. 3d DCA 2001); *Harris v. State*, 773 So. 2d 627 (Fla. 4th DCA 2000).

4. The issue of whether the Public Defender should be discharged merely upon the notification that the State Attorney is not seeking incarceration.

The proposed amendment to *Rule* 3.111, and proposed new *Form* 3.994, specifically give the trial court the discretion not to discharge court-appointed counsel even if a court determines that it will not incarcerate the defendant following a plea or a finding of guilt. This revision clarifies that it is ultimately the trial court's determination whether to discharge defendant's counsel and whether the defendant faces incarceration at the conclusion of the case. The proposed rule implicitly recognizes that situations may arise in which due process concerns justify court-appointed counsel's continued representation of the defendant, consistent with this Court's pronouncement in *State v. Ull*, 642 So. 2d 721 (Fla. 1994). The Court in *Ull* delineated several factors to be considered in making this determination; those factors are set forth in the committee notes to the proposed rule.

The committee respectfully requests that the court adopt these proposed amendments to the Florida Rules of Criminal Procedure.