

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE
FLORIDA RULES OF CRIMINAL
PROCEDURE

CASE NO:

BIENNIAL CYCLE REPORT OF THE
CRIMINAL PROCEDURE RULES COMMITTEE

John F. Harkness, Jr., Executive Director of The Florida Bar, and George Euripedes Tragos, Chair of the Criminal Procedure Rules Committee (hereinafter ~~the~~ ~~committee~~), file this biennial cycle report under Florida Rules of Judicial Administration 2.130(c). Amendments to rules 3.170, 3.180, 3.213, and 3.640 are proposed in this report.

Notice of the proposed two-year-cycle amendments were published in the November 1, 2005, issue of The Florida Bar News, see Appendix F, and on the Bar's website at www.floridabar.org. No comments were received in response to the notice.

A legislative format of the proposed amendments is attached as Appendix B, and a two-column chart that includes the reasons for the changes is attached as Appendix C. Committee meeting minutes related to the proposals are attached As Appendix D, and materials considered by the committee are attached as Appendix E.

The proposed amendments have been reviewed by The Florida Bar Board of Governors as required by Rule 2.130(c)(3). The board approved the proposed amendments unanimously (33-0) without comment. A table of contents containing the voting records of the board and the committee is attached as Appendix A.

THE COMMITTEE'S PROPOSED AMENDMENTS

1. Rule 3.170. PLEAS

On October 9, 2003, Ms. Howardene Garrett, a member of the committee, wrote a letter to The Honorable Olin Shiholser, who was the 2003-2004 chair of the committee. A copy of her letter is provided in Appendix E, page 3. Ms. Garrett's letter discussed the opinion in *Pope v. State*, 857 So. 2d 271 (Fla. 2003) and the need to amend rule 3.170(f) to specify that a defendant can withdraw a no contest plea before sentencing. In contrast to subdivision (f), subdivision (l) of that rule authorizes withdrawal of no contest pleas after sentencing. Although the *Pope* opinion holds that no contest pleas can be withdrawn before sentencing, it notes that subdivision (f) fails to mention those pleas.

The subcommittee assigned to consider Ms. Garrett's letter agreed that omission of no contest pleas was an oversight of the drafters of subdivision (f) and recommended amending the rule to specifically include no contest pleas. See Appendix E, pages 6 and 7. The committee agreed with the subcommittee recommendation without dissent. See Appendix D, page 1.

2. Rule 3.180. PRESENCE OF DEFENDANT.

On September 8, 2003, Mr. Jerome Latimer, a member of the committee, suggested to the chair of the committee that rule 3.180(c) needs to be revised to accurately reflect the case law as stated in *Capuzzo v. State*, 596 So. 2d 438 (Fla. 1992). See Appendix E, page 8. That opinion allows sentencing to proceed to conclusion when defendants absent themselves. The subcommittee assigned to review 3.180 and *Capuzzo* recommended the addition of a new subdivision (c)(2) to allow the sentencing stage to continue when defendants absent themselves. The addition of a number ((c)(1)) and a title (Trial.) for the first paragraph was a necessary part of the recommendation. See Appendix E, pages 9 through 11. The committee considered the subcommittee report and approved the changes by a vote of 26 to 1. See Appendix D, page 3.

The subcommittee also recommended amending the current wording of 3.180(c) to substitute "may" for "shall" to provide for discretion in continuing trials in defendant's absence. This recommendation was rejected by a vote of 13 to 15. See

3. Rule 3.213. CONTINUING INCOMPETENCY TO PROCEED, EXCEPT INCOMPETENCY TO PROCEED WITH SENTENCING: DISPOSITION.

On August 5, 2004, the 2004-2005 chair, The Honorable Thomas Bateman, requested review of rule 3.213 in light of *Byrd v. State*, 834 So. 2d 872 (Fla. 1st DCA 2003). See Appendix E, page 12. Rule 3.213(a) currently provides for dismissal of a case after five years of continued incompetence. The opinion suggests the need for amending the rule to provide separately for dismissal of cases when the defendant is incompetent because of mental retardation or autism. The reason for providing a separate provision is that mental retardation and autism cannot be cured whereas incompetence because of mental illness may be cured.

The subcommittee considered a draft of proposed amendments prepared by committee member Carolyn Snurkowski and, agreeing with that draft, handed out its report at the June 2005 committee meeting recommending those changes. See Appendix E, pages 14 through 18. The committee waived its normal 10-day notice rule for considering subcommittee reports, and the amendments were approved without dissent.

4. Rule 3.640. EFFECT OF GRANTING NEW TRIAL.

On August 21, 2004, the 2004-2005 chair, The Honorable Thomas Bateman, requested review of rule 3.640(b) in light of *Billie v. State*, 881 So. 2d 637 (Fla. 3d DCA 2004). See Appendix E, pages 19 through 23. Rule 3.640(b) currently provides a rule of evidence concerning former testimony. It is based on statutes that have been repealed, and the Florida Evidence Code now provides rules regarding that evidence. The opinion suggests the need for repealing or revising 3.640(b) to avoid any conflicts with the code.

The assigned subcommittee filed its report recommending repeal of subdivision (b). See Appendix E, page 25. That report concludes that in addition to being in conflict with the code, it “seems totally superfluous given the decision in *Crawford v Washington*, 541 U.S. 36 (2004),” which “held that the Confrontation Clause of the Sixth Amendment excludes from evidence *any* prior testimonial statement unless the witness is first found to be unavailable.” Appendix E, page 25. Rather than needlessly

amending the subdivision to conform to the code and to *Crawford*, the subcommittee recommended removing the subdivision to avoid the potential for future conflicts. Appendix E, page 26.

The committee considered the subcommittee's recommendation at its June 2005 meeting. The recommendation was approved without dissent.

Respectfully submitted on January 31, 2006.

John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, Florida 32399-2300
850-561-5600
Florida Bar Number: 123390

George Euripedes Tragos
2005-2006 Chair of Criminal
Procedure Rules Committee
600 Cleveland Street, Suite 700
Clearwater, Florida 33755-4158
727-441-9030
Florida Bar Number: 184830