

**IN THE SUPREME COURT OF FLORIDA**  
**CASE NO. SC13-1670**

IN RE: AMENDMENTS TO THE FLORIDA  
RULES OF JUDICIAL ADMINISTRATION  
AND THE FLORIDA RULES OF  
APPELLATE PROCEDURE.

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**COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION**

The Florida Public Defender Association, Inc., (FPDA) offers the following comments on the proposed amendments to Florida Rules of Judicial Administration 2.205(b)(5) and 2.210(b)(4), and Florida Rule of Appellate Procedure 9.340(a).

The FPDA comprises nineteen of the state's twenty elected public defenders and hundreds of attorney assistants. These attorneys represent indigent clients in criminal and sexual predator commitment proceedings at every level of the Florida court system. More specifically, the public defenders and their appellate assistants in the Second, Seventh, Tenth, Eleventh, and Fifteenth Circuits represent thousands of clients annually in Florida's appellate courts. Their experience gives the FPDA particular insight into these proposals.

The FPDA is concerned that these amendments were adopted in haste. The result appears to be the adoption of the legislative language without sufficient consideration of either the wisdom of these provisions or how the new rules would interact with the existing rules of appellate procedure.

Chapter 2013-25, Laws of Florida, abolished the terms of court and thoroughly scrubbed the Florida Statutes of any such mention. That law simultaneously imposed a 120-day limit on appellate courts recalling their mandates. In a truncated process, the Appellate and Judicial Administration Rules Committees suggested that this Court adopt the Legislature's statute as rule amendments.

The central question this Court needs to answer, however, is whether that limit is a substantive, jurisdictional limit, in which case this Court would be obliged to follow the Legislature, or whether it is a "procedural statute," improperly attempting to dictate rules of procedure to this Court. *See, e.g., State v. Raymond*, 906 So. 2d 1045, 1048-51 (Fla. 2005). If it is the latter, this Court need not follow the Legislature, and in this instance, should not. In the past, adopting rules without being sure of the constitutional basis has led to untoward results. *See Amendments to the Florida Rules of Workers' Compensation Procedure*, 891 So. 2d 474, 477-78 (Fla. 2004) (this Court determined that it had no authority to issue rules for workers' compensation despite having done for the preceding 27 years).

The proposed amendment would effectively terminate discussions about how the judicial branch should best handle recalling mandates. The Legislature's 120-day limit to withdraw a mandate seems arbitrary. It is 105 days longer than the time to file a motion for rehearing or rehearing *en banc*, 90 days longer than the

time to file a notice of to invoke the discretionary jurisdiction of this Court, and 30 days longer than the time to file a petition for certiorari with the United States Supreme Court. *See* Fla. R. App. P. 9.120(b), 9.330(a); United States Supreme Court Rule 13.1.

The committee report also does not reflect any consideration of another obvious alternative: reestablishing terms of Court. The Legislature specifically allowed for this option. *See* § 43.43, Fla. Stat. (2013). Many businesses and professions use definite time periods as a management tool. Businesses run on quarterly calendars; academic institutions run on semesters. Running the courts on a two-season basis—one stretching from the winter holidays to a summer break, and one running from that summer break back to the winter holidays—remains a viable management strategy. Courts have long used the terms of court to mark the temporary (albeit sometimes indefinite) appointment of County Court judges to fulfill Circuit Court duties and empanel grand juries. *See generally Payret v. Adams*, 500 So. 2d 136, 137-38 (Fla. 1986) (continual reappointment of County Judge to hear Circuit Court cases violated the Florida Constitution); § 905.01(3), Fla. Stat. (2012).

A better-considered rule of procedure would reflect the recognition that recalling a mandate does not occur in a vacuum—it usually occurs in the context of either a motion for rehearing to remedy some injustice or a motion to stay pending

a decision in another court. Two recent cases in which FPDA members were involved illustrate the drawbacks of a uniform 120-day limit.

The first case is *De La Hoz v. Crews*, 123 So. 3d 101 (Fla. 3d DCA 2013). That case involved a criminal defendant whose jury received the erroneous jury instruction condemned by *State v. Montgomery*, 39 So. 3d 252, 256-57 (Fla. 2010). The defendant's appeal was PCA'd on the basis of a simultaneous culpable negligence instruction, a rationale disapproved in *Haygood v. State*, 109 So. 3d 735, 741 (Fla. 2013). Motions for a written opinion or to certify the *Haygood* issue, which was then pending in this Court, were denied, as was a motion to stay or recall the mandate to allow the case to remain in the *Haygood* pipeline. As a result, after the *Haygood* decision, the appellate court had to grant a writ of habeas corpus against itself to allow for a new trial. Obviously, a more elegant solution would have been to withdraw the mandate, but the term of court had already expired. *See* 123 So. 3d at 104.

In such a situation, the 120-day limit could often be too short. Motions for rehearing generally must be filed within 15 days, although a court may consider motions filed within "such other time set by the court." Fla. R. App. P. 9.330(a). The 15-day limit is not jurisdictional. *Zeilke v. State*, 839 So. 2d 911, 913 (Fla. 5th DCA 2003); *Maffea v. Moe*, 483 So. 2d 829, 831 (Fla. 4th DCA 1986). The court system sometimes crawls towards a just resolution of a case. A short, hard

deadline for withdrawing a mandate to prevent injustice does not mesh well with the idea that out-of-time motions for rehearing may be granted where justice requires. Such a rule would also result in a proportional increase in habeas corpus petitions.

The second case is *Mitchell v. State*, 34 Fla. L. Weekly D1794, 2009 WL 2841189 (Fla. 2d DCA Sept. 2, 2009). In that case, the Second DCA followed its own precedent in *Powell v. State*, 969 So. 2d 1060 (Fla. 2d DCA 2007). The case was stayed pending this Court's decision in *Powell v. State*, 998 So. 2d 531 (Fla. 2008), which approved that decision. The state petitioned the United States Supreme Court for certiorari in *Powell*, but did not file a similar petition in *Mitchell*. Instead, the state moved the Second DCA to recall its mandate and stay the case pending final resolution of *Powell*. The Second DCA did so, and resisted reinstating its mandate. 2009 WL 2841189, at \*3-\*6.

That ruling divorced the recall of the mandate from the reason for doing so: the stay. Rule 9.310 requires that the stay be "pending review." The state, however, never sought United States Supreme Court review in Mr. Mitchell's case. Therefore, in *Mitchell* the recall of mandate became, in effect, a stay not authorized by the rules.<sup>1</sup>

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<sup>1</sup> As it turned out, the Second DCA panel denying the motion to reinstate mandate correctly second guessed its own precedent and the precedent from this Court. *See Florida v. Powell*, 559 U.S. 50 (2010). Had that decision gone the

This was a misuse of the authority to recall the mandate. When a district court of appeal issues a decision, the losing party can always seek higher review in this Court and the United States Supreme Court. If a case relied on by a district court of appeal as controlling precedent is pending before this Court, that gives this Court grounds for discretionary review. *See Jollie v. State*, 405 So. 2d 418, 420 (Fla. 1981). Under current law, if review is sought, the decision remains non-final, *see Huff v. State*, 569 So. 2d 1247, 1250 (Fla. 1990), and its authority as precedent is conditional upon denial of review or approval of the decision below. Likewise, if review is not sought, the decision is final and may reliably be considered precedential. But a final opinion with its mandate under recall is a legal enigma.

Worse yet, such a status may not be apparent in the published reporters, leading attorneys and other courts to erroneously rely on the opinion. Even for good lawyers, citing to such an enigmatic but published, final opinion may have negative ethical implications. While perhaps predictive of that panel's view of the law, the opinion can be said to be nothing more than a prohibited, and widely condemned, advisory opinion.

The proposed rule does nothing to solve this problem because it likewise does nothing to tether the recall of a mandate to the underlying stay. The statute, requires that the recall of mandate must be “for the purpose of making the same

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other way, however, Mr. Mitchell would have spent several years in prison in a case in which he very well might have been acquitted without his confession.

accord with law and justice.” § 43.44, Fla. Stat. (2013). That phrase is lifted from this Court’s leading decision, *Chapman v. St. Stephens Protestant Episcopal Church*, 138 So. 630, 632 (Fla. 1932). Despite the interval of years, the current case law maintains that “[a]ppellate courts will not reconsider a previous ruling and recall the mandate unless it is necessary to correct a manifest injustice.” *Vega v. McDonough*, 956 So. 2d 1205, 1206 (Fla. 1st DCA 2007).

There are always cases in this Court or the United States Supreme Court that may have an effect on a multitude of cases. Heretofore, the proper remedy was to seek review in the higher court to place them in the “pipeline” should the result be favorable. Under the proposed rule, however, clever attorneys who receive an unfavorable ruling would be wise to scour this Court’s and the United Supreme Court’s dockets for cases that might affect the outcome in their cases and then simply move to stay the mandates without actually seeking review in the higher court. Given the 120-day time period, the losing party could even do so after the time for seeking such review has expired.

The resulting process would keep the higher court from passing on whether the issue it plans to decide actually appears in the new case. That process would also keep the higher courts from seeing the depth and variety of cases with the same issue.

Thus, the proposed amendments undermine both the integrity of the process

for seeking higher review and the precedential value of appellate opinions. Such a procedure allows recalling mandates where there is no manifest injustice or need to make the court's actions "accord with law and justice." Instead, the proposals reward a party that, by sloth, negligence, or design, has failed to seek discretionary review or U.S. certiorari.

A better rule would require the losing party to not merely move for a recall of the mandate, but also actually seek review in the higher court. That process puts the decision making in the higher court's hands, protects the precedential value of published opinions, and provides the higher court with a better variety of cases so it can issue a more nuanced decision. A better rule would also establish criteria requiring the party to certify that the case involves the exact same issue pending in a higher court, or to subsequently inform a court that has recalled the mandate of a change in the status of the other pending case.

*De La Hoz* and *Mitchell* are only two examples in the FPDA's recent experience. Almost certainly, other appellate attorneys are familiar with variations on these, or other, scenarios that would call into question the wisdom of the proposed amendments. An opportunity for public comments, with a deadline in the middle of the winter holidays, is no substitute for a full discussion by the rules committees. No rule of procedure is perfect, but a full committee process should result in rule amendments that yield fewer unjust and unintended consequences.

Therefore, the FPDA recommends that this Court rescind the proposed amendments it adopted in October. That way, the issue of whether the 120-day limit is jurisdictional or procedural can be litigated, considered and decided by this Court. While awaiting that litigation, this Court should refer this matter to the full Appellate Rules Committee to craft more fully considered amendments that, at the very least, take into account the interplay between recalls of mandates and motions for rehearing and motions to stay. In the interim, this Court could reestablish the terms of court to preserve the *status quo* during the pendency of that litigation and committee process. *State v. Raymond*, 906 So. 2d 1045, 1051 (Fla. 2005) (temporarily readopting rules repealed by the Legislature to allow time for further comment and consideration by the relevant committees).

Respectfully submitted,

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## **CERTIFICATES**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to:

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this 30th day of December, 2013.

I HEREBY CERTIFY that these comments were formatted in 14-point Times New Roman.

/s/ Julianne Holt  
JULIANNE HOLT