

IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: AMENDMENT TO
FLORIDA RULE OF CRIMINAL
PROCEDURE 3.116

Case No: SC23-0803

**COMMENT OF THE FLORIDA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS**

The Florida Association of Criminal Defense Lawyers (FACDL) is a statewide organization of approximately 1,300 criminal defense attorneys. As both privately retained and court-appointed counsel representing criminal defendants, the FACDL membership writes to express its support for the proposed amendment to Fla. R. Crim. P. 3.116.

A. Procedural History

Following the onset of the Covid-19 pandemic, the Florida Supreme Court established the Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19 (Workgroup) “to develop findings and recommendations on the continuation of all court operations and proceedings statewide in a manner that protects health and safety and that addresses each [phase] of the pandemic.” *In re: Workgroup on the Continuity of Court Operations and Proceedings During and After COVID-19*, Fla. Admin.

Order No. AOSC20-28 (April 21, 2020). The Workgroup was also directed to “[i]dentify whether certain proceedings, due to efficiencies beneficial to stakeholders, could continue to be conducted remotely when COVID-19 no longer presents a significant risk to public health and safety,” and the Workgroup was authorized to propose the necessary rule changes.

As a result of the recommendations of the Workgroup, this Court approved an amendment to Fla. Rule of Jud. Admin. 2.530(b)(1). The amended rule, as it now stands, mandates the use of remote proceedings upon motion of a party for non-evidentiary hearings lasting less than 30 minutes in civil cases absent a showing of good cause by the trial court. The current rule explicitly carves out an exception for proceedings in criminal cases. While the use of remote technology became the standard for civil practice, the same benefit was not extended to those involved in the criminal justice system, such as victims, defendants, prosecutors, and defense lawyers. At the same time Rule 2.530(b)(1) was amended, so to was Fla. R. Crim. P. 3.116. While the new version of 3.116 allows a party to request to appear remotely, the trial court retains unfettered discretion on whether to grant the party’s request. The current rule

provides no criteria that the trial judge must consider, allowing for inconsistent application throughout the courts of the State.

From the beginning, FACDL and other stakeholders, such as the Florida Bar Criminal Law Section, expressed concerns about a rule that promotes a lack of uniformity in the criminal justice system. Those concerns have proven to be legitimate. The current version of 3.116 went into effect on October 1, 2022, and since then, the use of remote technology for short non-evidentiary hearings has varied dramatically not just circuit by circuit and county by county, but within a single courthouse as well. For the reasons discussed below, FACDL urges this Court to adopt the proposed amendment to 3.116.

B. Uniformity

Rules of procedure are meant to be applied uniformly across the state. *See Tortura & Company, Inc. v. Williams*, 754 So. 2d 671, 681 (Fla. 2020)(finding that the application of harmless error to circumvent the requirements of the procedural rule requiring judicial approval for amendment...“does little to support uniform application of our procedural rules...”) Unfortunately, the simple truth is that 3.116 is being applied in dramatically different ways in the courthouses of this state. This is due in large part to the fact that the

current version of 3.116 does not support or promote uniform application of the use of remote appearance technology in criminal cases. While there are some judges in Florida that have embraced its use, there are others who have wholly abandoned it. Because individual trial court judges have unlimited authority to deny remote appearances, criminal defendants, victims, witnesses, and attorneys are subject to a myriad of different applications of the current rule.

The new rule relating to remote appearance in civil proceedings, on the other hand, has proven effective in creating a uniform method of civil practice throughout the entire state. By adopting the same language as its civil counterpart, the criminal justice system could similarly enjoy the benefit of a uniform application of this procedural rule.

C. Time management and efficiency

Perhaps the most compelling argument for adoption of the proposed amendment to 3.116 is that it would allow for a more effective and efficient use of time and resources. This benefit would apply not just to criminal defense attorney and defendants – the same would be true for the judiciary, prosecutors, victims, witnesses, and law enforcement.

Throughout the life of a criminal case, there are a significant number of ministerial hearings that do not implicate any party's rights under the constitution. Some examples of these are motions to continue, motions to compel discovery, hearings on petitions to seal or expunge criminal history, and scheduling conferences. These hearings are usually very short, and in some cases are handled in less than a minute. But that one-minute in a courtroom in front of the judge is not truly representative of how much goes in to attending one of these hearings in person.

The parties in a criminal case have to travel to the courthouse, which in some cities in our state could take an hour each way. They need to search for parking and wait in security lines. Defendants and victims have to take time off of work, pay for gas, and organize childcare. The lead-up time to provide the court with a progress report or to advise the court when a deposition is scheduled is out of proportion to the actual time spent on the record addressing the case. Notably, parties to a civil case are not asked to do the same. Time spent in court waiting for a case to be called is not an efficient use of attorney time. If a lawyer had the ability to attend to these brief hearings remotely then they could simultaneously be at their desk

working on the very same cases that the judges want to move forward.

These issues can be compounded when an attorney – whether that be a private criminal attorney or a statewide prosecutor – has multiple hearings scheduled in different courthouses at the same time. It used to be true that “you can’t be in two places at once,” but that is no longer the case. Through the use of remote appearance technology, attorneys could appear before judges in multiple counties on the same morning. Judges would not find themselves waiting on lawyers to travel from one place to the other, or having a coverage attorney appear before them who is less knowledgeable about the case. If the attorney of record cannot physically make it to the courthouse because of a scheduling conflict, or the court has questions that the covering attorney cannot answer, odds are that the case will get reset, and the same wheels have to spin all over again.

Also, there is now discussion about the possibility of consolidating certain judicial circuits around the state. While that discussion is in its infancy and it is unclear what the ultimate outcome of the proposal will be, it is something that this Court should

consider when determine whether to amend this rule. If the day comes when a lawyer in Key West will have to appear before a judge in Miami, or a lawyer in Pensacola will have to appear before a judge in Panama City, remote technology for these short hearings is the only practical solution. However, the current version of 3.116 would allow a judge, for whatever reason, to force the parties to make the trip. At the same time, the current rule provides no meaningful mechanism for review of an order denying a request for remote appearance.

Finally, the burden on the court system itself is also disproportionate to the actual time spent on the record for these brief hearings. Every time a case is called in court there are a host of people that must be present: the judge, the defense attorney, the prosecutor, a clerk, a deputy, and a court reporter (or someone manning the digital recording system in the courthouse). If a defendant is in custody, then they have to be transported from the jail, supervised in the courthouse, and transported back to the jail. All of this takes time. All of this costs money. Through the use of remote appearance technology, an already stressed system could dramatically increase efficiency and conserve its limited resources.

D. Access to the courts

One of the greatest benefits of remote appearance technology is its ability to increase access to the courts. Our courtrooms are public forums, open to everyone. This transparency is important in maintaining the public confidence in our criminal justice system. Remote appearance technology will make it easier for defendants, witnesses, family members, victims, and members of the general public to see our constitution at work.

Additionally, the state's constitution and laws recognize the unique rights that victims have in criminal cases. They have the right to be informed, to be involved, and to be present for hearings in their cases. Unfortunately, as previously discussed, getting to court can be a long, difficult, and potentially costly experience. Not only does remote technology make it easier for a victim to be present at a hearing, but it also means that they do not have to be in the same room as the defendant in their case. It would eliminate concerns relating to witness intimidation and re-traumatization of the victim. If remote appearance technology was regularly used for short non-evidentiary hearings, there would be an increase in the number of victims staying informed about, and involved in, their cases.

E. Remote appearance technology has a track record of success

The proposal before this Court is not a novel idea. Rather, it merely seeks to mirror the procedural practice already used in civil cases and family law cases. Attorneys, litigants, clerks of court, and judges have proven that remote appearance technology can be implemented successfully and that it is a useful tool in maximizing time and efficiency. Attorneys across the state have proven that they understand that appearing before a judge remotely is no different than appearing before the judge in court. There is no reason to believe that criminal law attorneys will not practice in the same professional manner as their civil colleagues. Moreover, there are jurisdictions within Florida that have embraced a hybrid model that allows the courtroom to function as both a physical and remote space. Adoption of this rule will result in this model becoming the norm. In doing so, the criminal court system will enjoy the efficiency of the remote hearing system, while not foreclosing the option to appear in person.

The amendment to 3.116, just like its civil counterpart, still affords the trial judges the ability to deny a request for remote appearance for good cause. For example, if an attorney acts improperly during a remote appearance, the trial judge could require

the attorney's physical presence in court at the next setting. Similarly, a judge could require the parties to be physically present at a docket where trial dates and times are being selected and it is the defendant's last chance to accept a plea deal. This proposal does not take power away from the judiciary; it creates uniformity. The proposed rule can be applied in criminal cases in the exact same manner that the judges have been applying it in civil cases for several years.

F. Conclusion

Based upon the foregoing arguments, FACDL and its membership urge this Court to adopt the proposed amendment to Fla. R. Crim. P. 3.116.

Respectfully submitted,

/s/ Jason Cromey, Esq.
JASON CROMEY, ESQ.
Florida Bar No: 15955
Florida Association of Criminal
Defense Lawyers
Rules Committee Co-Chair
101 S. Jefferson St.
Pensacola, Florida 32502
jason@cromeylaw.com
Ph: (850) 483-1689

CERTIFICATE OF SERVICE

COMES NOW the undersigned attorney, and hereby certifies that the above comment has been electronically served on all parties on the e-service list on this the 5th day of September, 2023.

/s/ Jason Cromey, Esq.
JASON CROMEY, ESQ.

CERTIFICATE OF COMPLIANCE

I certify that the comment of the Florida Association of Criminal Defense Lawyers was prepared in compliance with the font requirements of Fla. R. Crim. P. 9.045.

/s/ Jason Cromey, Esq.
JASON CROMEY, ESQ.
Florida Bar No: 15955
Florida Association of Criminal
Defense Lawyers
Rules Committee Co-Chair
101 S. Jefferson St.
Pensacola, Florida 32502
jason@cromeylaw.com
Ph: (850) 483-1689