

IN THE SUPREME COURT OF THE STATE OF FLORIDA

**IN RE: AMENDMENTS TO FLORIDA
RULES OF CRIMINAL PROCEDURE
3.132**

CASE NO.: SC24-0883

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

The Florida Association of Criminal Defense Lawyers (FACDL) opposes this proposed amendment to Florida Rule of Criminal Procedure 3.132, Florida’s pretrial detention rule. FACDL is a not-for-profit corporation made up of roughly 1,000 members who are privately retained and court-appointed counsel representing criminal defendants across the state. FACDL recognizes that rule 3.132 is due for an update, but urges this Court not to adopt the CCSC’s proposal in its entirety.

I. SUBSECTIONS (i) AND (1)(2) - A PRETRIAL DETENTION ORDER MAY BE BASED SOLELY ON HEARSAY EVIDENCE WITH NO RIGHT TO CONFRONTATION

As observed by the Florida Public Defender’s Association in its comments filed in this case, CCSC’s proposal is internally inconsistent as it relates to hearsay evidence and a defendant’s confrontation rights. Subsection (i), as proposed, states: “Hearsay is admissible and there is *no right to confrontation.*” However, proposed

subsection (h), titled “Rights at Hearing,” states the opposite: “The defendant is *entitled* to representation of counsel, to present witnesses and evidence, *and to cross-examine witnesses at the detention hearing.*”

In addition to being internally inconsistent, proposed subsection (l)(2), which states that “[t]he order may be based solely on hearsay,” all but renders subsection (h) meaningless. In order for a criminal defendant to exercise their right to cross-examination afforded them in section 907.041(5)(j) and proposed subsection (h), there has to be a witness to cross-examine. However, under the proposal, there is no need for the state to ever call a witness at a pretrial detention hearing. All the prosecutor needs to do at the hearing is introduce a copy of the arrest report, and an arrest report cannot be cross-examined.

Courts have long recognized the importance of cross-examination and the role it plays in assuring the veracity of the statements being introduced. In *Conner v. State*, 748 So. 2d 950 (Fla. 1999), the Florida Supreme Court wrote that “...a hearsay statement that is not ‘firmly rooted’ is ‘*presumptively unreliable* and inadmissible for Confrontation Clause purposes.” (emphasis in

original)(quoting *Idaho v. Wright*, 497 U.S. 805, 818, 110 S.Ct. 3139, 111 L.Ed. 638 (1990). Denying a defendant the opportunity to cross-examine witnesses “calls into question the ultimate ‘integrity of the fact-finding process.’” *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S. Ct. 1038 (1973)). While FACDL recognizes that the Confrontation Clause applies to criminal trials, not necessarily pre-trial detention hearings, evidence that is *presumptively unreliable* should not serve as the sole basis for depriving a criminal defendant of their constitutional right to release pending trial. *See Bernhardt v. State*, 288 So. 2d 490, 497 (Fla. 1974)(“Yet until the accused is proved guilty we are loathe to incarcerate him because of the possibility of thereby punishing an innocent man.”)(quoting *In re Matter of Whitney*, 421 F.2d 337 (C.C.A. 1, 1970).

II. SUBDIVISION (k) - THE BURDEN OF PROOF SHOULD REMAIN PROOF BEYOND A REASONABLE DOUBT.

The current version of 3.132(c)(1) requires the state to prove the need for pretrial detention beyond a reasonable doubt. While recognizing that this Court has the exclusive authority to determine the appropriate burden of proof, CCSC takes the position that the Court should defer to the legislature on this issue. The main

argument put forth is that there would be some benefit in 3.132 and Section 903.0471 both using a “substantial probability” standard. FACDL does not believe that this is a compelling reason to change the standard of proof in detention hearings that has been used for well over a decade. Just because the legislature wrote its statutory amendment before this Court could amend the rule does not mean the Court should simply follow suit.

The CCSC argues that the same standard of proof should not be required for jury trials and pretrial detention hearings, but no authority is offered in support of this position. Rather, the only case law cited by the CCSC as to this point is *State v. Arthur*, 390 So. 2d 717 (Fla. 1980), and *Arthur* actually holds the opposite:

The State’s burden, in order to foreclose bail as a matter of right, is to present some further evidence which, viewed in the light most favorable to the state, would be legally sufficient to sustain a jury verdict of guilty.

Id. at 720. Amending 3.132 by reducing the State’s burden of proof to a “substantial probability” would not be consistent with the holding in *Arthur*. FACDL recognizes that proof beyond a reasonable doubt is a high burden. If prosecutors around the State choose to rely solely on arrest reports and hearsay at pretrial detention

hearings (as CCSC's proposal would allow), it very well may be difficult for the prosecution to prove the need for detention beyond a reasonable doubt. After all, as discussed earlier, hearsay evidence is presumptively unreliable. However, the rule should not be amended simply to make it easier for the state to hold a defendant in pretrial detention. Rather, the rule should give the appropriate respect to a defendant's constitutional right to pretrial release.

FACDL would echo FPDA's point that the language "substantial probability" has been in Section 907.041 for decades, while 3.132 has contained a "beyond a reasonable doubt" requirement since 2009. This discrepancy between the statute and the rule has not resulted in confusion in the courts or endless appellate litigation. The rule as it is currently written could not be any clearer. However, it is CCSC's desire to wholly omit a burden of proof from 3.132, and that is what will lead to confusion and litigation. This Court should not simply delegate its authority to determine burdens of proof to the legislature. By doing so, the Court would be redefining the powers of the legislature, and allowing the legislature free reign to change the burden of proof for pretrial detention hearings during each legislative session.

III. SUBDIVISIONS (f)(3) AND (f)(5) – REMOVING THE REQUIREMENT THAT THE STATE MAKE A SHOWING OF EXIGENT CIRCUMSTANCES IN ORDER TO DETAIN A DEFENDANT BEFORE A MOTION FOR PRETRIAL DETENTION IS FILED

Under the current version of Rule 3.132(a), if the prosecutor does not file a pretrial detention motion at first appearance, but announces their intention to do so, a defendant can only be held in custody if (1) the State makes a showing of probable cause that the defendant committed the offense, and (2) the State makes a showing that exigent circumstances justify continued detention. The CCSC has asked this Court to abolish the exigent circumstances requirement because “it is not clear what is meant by ‘exigent circumstances,’” and “it is unclear how the judge is supposed to determine whether exigent circumstances exist.”

FACDL respectfully disagrees with the CCSC’s suggestion that the exigent circumstances requirement should be stricken. “Exigent circumstances” are situations where inevitable delay calls for action. *See U.S. v. Burgos*, 720 F.2d 1520, 1525 (11th Cir. 1983). This concept appears to be fairly straightforward in the context of pretrial detention: the State needs more time to

file the appropriate motion (the delay), but the defendant should not be let out until the motion is filed because they appear to meet the criteria for pretrial detention (the call for action). The current version of the rule only requires the State to give the court a basic explanation of why the defendant should remain in custody while they file the pretrial detention motion. A criminal defendant enjoys a constitutional right to release. If that right is going to be taken away while waiting for the State to file paperwork, it is reasonable to require that they are able to provide some sort of explanation to the court about why detention is necessary during that time.

As to the CCSC's second concern about judges being able to determine whether exigent circumstances exist, Section 907.041 provides plenty of guidance. Things like a previous violation of release conditions, an extensive criminal history, prior failures to appear, or previous flight to avoid prosecution, would all reasonably qualify as exigent circumstances. Practically speaking, this information is available to the prosecutor and the judge at first appearance.

FACDL does not believe there is a need to remove the exigent circumstances requirement from the rule.

IV. SUBDIVISION (e) – REQUIRING THAT A DEFENDANT SHOW GOOD CAUSE FOR A CONTINUANCE.

As noted by the CCSC, the current versions of rule 3.132 and section 907.041 do not require a defendant to show good cause for a continuance of the pretrial detention hearing. However, the CCSC proposal creates such a requirement. The motivation for this change is concern over logistical issues for the state in presenting its motion for pretrial detention. The CCSC proposal already makes it much easier for the state to prove a need for pretrial detention: hearsay is admissible, hearsay alone is sufficient to support a pretrial detention order, and witnesses would be able to appear remotely. The logistical burden on the state is minimal considering that all they have to do at the hearing is introduce affidavits or have a witness appear by Zoom.

Additionally, the phrase “good cause” provides trial courts with limited guidance on when to grant or deny a defense continuance. It should not be lost on this Court that it is the defendant who will be sitting in jail during the continuance period they ask for. It is the

defendant who is fighting for their freedom pending trial. While they remain in custody, there are no concerns about the safety of the community or guaranteeing the defendant's presence in court. A defendant may believe, for example, that securing the presence of a character witness is important in defending against pretrial detention, and the trial court could disagree. These sorts of disagreements would likely result in the filing of habeas petitions challenging the pretrial detention orders. This potential litigation would be time consuming and unnecessary.

A defendant fighting for their freedom pending trial should be afforded the opportunity to do all that they believe is necessary to do so, especially if they are willing to remain in custody during that time. FACDL does not believe that a good cause requirement should be written into the rule.

V. SUBSECTION (f)(5) – REMOVING THE GOOD CAUSE REQUIREMENT WHEN THE STATE SEEKS A CHANGE IN DETENTION STATUS FOR OUT-OF-CUSTODY DEFENDANTS.

The CCSC asks this Court to include the following language in (f)(5): “For a defendant out of custody, if the state is pursuing pretrial detention under section 907.041, Florida Statutes, the state does not

need to show good cause as required by rule 3.131(d).” The point of adding this language is an attempt to create a way around current Florida precedent that requires a good cause showing when the State attempts to change the custody status of an out-of-custody defendant. *See Bush v. State*, 74 So. 3d 130, 133 (Fla. 1st DCA 2011)(“To satisfy the ‘good cause’ requirement in this rule, the prosecution must present evidence of a change in circumstances or information not made known to the first appearance judge.”) FACDL does not believe that including this new language would defeat the reasoning in *Bush* and similar cases: “The fallacy in the state’s argument is that it assumes that rules 3.131(d) and 3.132(b) are always mutually exclusive. That is not the case...To put this another way, a motion for pretrial detention filed after the entry of an order setting bail *is also a motion to modify bail.*” *Id.* (emphasis added).

While the CCSC majority disagrees with the holdings of Florida’s appellate courts on this issue, it does not provide an explanation as to why a good cause showing creates an unfair challenge or burden for the state. On the other hand, there is a compelling argument to keep a good cause requirement. In general, a defendant who posts bail knows that they will not lose the premium on a surety bond, they

can continue to work, to pay their bills, and to raise their children while their case is pending, so long as they comply with their release conditions. If the state is no longer required to show a change in circumstance or new information, the defendant must now live with the possibility that a prosecutor could have them taken into custody at any point.

Without a good cause requirement, motions for pretrial detention could also be abused. For example, if an out-of-custody defendant rejects the state's plea offer, the prosecutor could file a motion for pretrial detention months into the case, in an attempt to induce that defendant to plea. This possibility of gamesmanship is reason enough to keep a good cause requirement in the rule.

VI. CONCLUSION

Based upon the foregoing arguments and authorities, FACDL urges this Court not to adopt the CCSC's proposed amendment in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

COMES NOW the undersigned attorney, and hereby certifies that the above comment has been electronically served on Judge Joseph A. Bulone, Committee Chair, 14250 49th Street North, Chamber 12, Clearwater, Florida, 33762, jbulone@jud6.org, and Bart Schneider, OSCA Staff Liaison to the Committee, 500 S. Duval Street, Tallahassee, Florida 32399, schneidb@flcourts.org, on this the 3rd day of September, 2024.

/s/ Jason Cromeey
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