IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CIVIL PROCEDURE, FLORIDA RULES OF JUDICIAL ADMINISTRATION, FLORIDA RULES OF CRIMINAL PROCEDURE, FLORIDA PROBATE RULES, FLORIDA SMALL CLAIMS RULES, FLORIDA RULES OF JUVENILE PROCEDURE, FLORIDA RULES OF APPELLATE PROCEDURE, FLORIDA FAMILY LAW RULES OF PROCEDURE — ELECTRONIC FILING

CASE NO. SC11-399

RESPONSE OF THE CRIMINAL PROCEDURE RULES COMMITTEE TO COMMENTS OF INTERESTED PERSONS

The Criminal Procedure Rules Committee (the CPRC), by and through its Chair, Robert T. Strain, and John F. Harkness, Jr., Executive Director of The Florida Bar, file this response to the comments received from interested persons in this case that were directed to proposed Rule 3.030(c).

As a full and active participant in the ad hoc committee of representatives of all the rules committees that shared in the filing of the Joint Out-of-Cycle Report (the Joint Report), the CPRC was duly informed and well aware of the proposals of its fellow rules committees.

The CPRC recognized, importantly, that the Rules of Judicial Administration Committee (RJA) planned to and in fact proposed the following in the list of exceptions that describe the paper documents permitted to be manually submitted to the clerk for filing:

Rule 2.525(d)

(d) ~~Service.~~Exceptions. Paper documents or other submissions may be manually submitted to the clerk for filing:

...

(7) when the document is required by any statute or other rule of procedure to be an original document, including surety bonds, criminal plea agreements, documents required to be notarized, etc;

(Pages 6 and 7; Joint Report).

The CPRC was similarly aware that other committees were proposing a limited number of paper documents for filing and retention by the clerks. For example, see the Probate Rules Committee's proposed Rule 5.043 regarding retention by the clerks of deposited wills and codicils (Joint Report Appendix C-31) and to that committee's comments in the Joint Report that express concerns about the handling of multiple original documents. Those concerns involve issues of authenticity and independent evidentiary value in probate proceedings for its list of relevant original documents. (Pages 15-17; Joint Report).

The filed comments are largely addressed to and critical of proposed Rule 3.030(c) regarding the submission of certain original paper documents. But the comments seem to largely ignore proposed Rule 3.030(b) regarding mandatory electronic filing and the qualifying provisions of Rule 3.030(c) regarding the proposed prosecuting authority's procedure for determining which original documents they decide to retain after receipt, scanning, and delivery by the clerks. Similarly, the comments critical of proposed Rule 3.030(c) ignore the compelling reason why so many original and sworn documents have historically been used in criminal courts. Repeatedly, the statutes and rules of court refer to the filing of sworn documents being subject to the penalties of perjury.

It is the prosecutors of this state that handle perjury prosecutions, not only in criminal cases but also those referred to them from the civil courts. The relevant perjury statute, § 92.525, Fla. Stat., provides:

> 92.525. Verification of documents; perjury by false written declaration, penalty
>
> (1) When it is authorized or required by law, by rule of an administrative agency, or by rule or order of court that a document be verified by a person, the verification may be accomplished in the following manner:
>
> (a) Under oath or affirmation taken or administered before an officer authorized under s. 92.50 to administer oaths; or
>
> (b) By the signing of the written declaration prescribed in subsection (2).

(2) A written declaration means the following statement: "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true," followed by the signature of the person making the declaration, except when a verification on information or belief is permitted by law, in which case the words "to the best of my knowledge and belief" may be added. The written declaration shall be printed or typed at the end of or immediately below the document being verified and above the signature of the person making the declaration.

(3) A person who knowingly makes a false declaration under subsection (2) is guilty of the crime of perjury by false written declaration, a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(4) As used in this section:

(a) The term "administrative agency" means any department or agency of the state or any county, municipality, special district, or other political subdivision.

(b) The term "document" means any writing including, without limitation, any form, application, claim, notice, tax return, inventory, affidavit, pleading, or paper.

(c) The requirement that a document be verified means that the document must be signed or executed by a person and that the person must state under oath or affirm that the facts or matters stated or recited in the document are true, or words of that import or effect.

Prosecutions of perjury under this statute, of course, are covered by Florida's best evidence rule as provided in § 90.952, Fla. Stat. That law provides that "except as otherwise provided by statute, an original writing, recording, or photograph is required in order to prove the contents of the writing, recording, or photograph." The admissibility of a duplicate of the writing is not allowed under § 90.953(2), Fla. Stat., when "a genuine question is raised about the authenticity of the original or any other document or writing." As noted by the CPRC's defense attorney members in this process, they occasionally raise questions about the authenticity of written documents.

Nevertheless, the CPRC noted in its Joint Report comments, at pages 11 and 12, that:

> The proposed amendments are to make the rule consistent with the proposed amendments to Rule 2.525, which requires all court records to be e-filed, but then allows certain documents to be filed in paper form. While certain documents are allowed to be filed with the clerks in paper format, it is not mandatory. In reviewing the federal criminal rules for the Middle and Southern Districts of Florida, it was determined that certain documents are required to be filed with the federal clerks in paper format and not electronically. The committee determined that the criminal rules should likewise require certain documents to be filed in the conventional format. Following the discretion that Rule 2.525 allows for filing "original documents," the proposed amendments to Rule 3.030(c) defines "original documents" and requires them to be filed in paper format with the clerk.

To accommodate future perjury prosecutions and in an effort to minimize the number of original documents maintained by the clerks, the CPRC therefore proposed the additional provisions in Rule 3.030(c) to require prosecuting authorities to determine which originals they, and not the clerks, keep for future use. The proposed Rule 3.030(c) specifically says "[o]riginal charging documents must be kept by the clerk in accordance with the Florida Rules of Judicial Administration. All other original documents filed in paper format must be scanned by the clerk and provided to the prosecuting authority to determine whether or not the original is kept."

Under proposed Rule 3.030(c), therefore, the clerks will retain only the original charging documents in criminal cases as required by rule and long-existing practice. As many practitioners know, this is similar to the current federal electronic filing practice in the Middle District of Florida. Electronic filing of new cases only started as a pilot project in the Southern District of Florida on January 1, 2010. Again, as to proposed Rule 3.030(c), all the other original documents would be initially filed, scanned by the clerks and turned over to the state attorneys' offices. The proposal by the CPRC consequently places the burden on the prosecutors' offices for deciding which originals the prosecutors decide to keep and maintain. This part of the proposed rule change is akin to creating a chain of custody from the

filer to the clerk and then to the prosecutors that attempts to maintain the integrity of future perjury prosecutions on those original documents, which can be completely traced from filing to their maintenance by the prosecutors. As noted in the CPRC's Joint Report comments, at page 11, it is proposed that only charging documents should be retained by the clerk as they are a neutral party to any future challenges.

Additionally, in addressing the concerns expressed in the various comments, the following analysis compares the paper document exceptions in proposed Rule 2.525(d)(7) with those identified in the first part of proposed Rule 3.030(c). The originals that are proposed to be filed with the clerk in paper format in Rule 3.030(c) are:

1. Charging documents – covered by the exception under *Fla. R. Jud. Admin.* 2.525(d)(7) as a document required to be an original by other rule or as a document required to be notarized. See analysis below for indictments, informations, and Notices to Appear. See also, for example, § 948.06(1), Fla. Stat., which requires that violation of probation proceedings be initiated with sworn affidavits.

2. Indictments – covered by the exception under Rule 2.525(d)(7), as a document required to be an original by other rule. Rule 3.140(l) requires that all indictments and informations shall be in the custody of the clerk until the defendant is in custody or released after arrest.

3. Informations – covered by the exception under Rule 2.525(d)(7), as a document required to be notarized, and by the exception under Rule 2.525(d)(7) as a document required to be an original by other rule. Rule 3.140(g) requires that informations be signed by the state attorney or an assistant state attorney under oath and Rule 3.140(l) requires that all indictments and informations shall be in the custody of the clerk until the defendant is in custody or released after arrest.

4. Petitions – The CPRC used this term to describe all types of requests to the court that are presented in either motion or petition form. Thus, many would be covered by the exception

under Rule 2.525(d)(7) as a document required to be an original by other rule or as a document required to be notarized. Examples: written waivers of jury trial under Rule 3.260; under Rule 3.851(e)(1), capital postconviction motions must be filed under oath by the prisoner.

5. Affidavits – covered by the exception under Rule 2.525(d)(7) as a document required to be notarized. Examples: Affidavits of Insolvency as required by § 27.52, Fla. Stat., and Rule 3.111(b)(5)(C); affidavits by the movant that must accompany motions for a change in venue under Rule 3.240(b); affidavits required to be filed with petitions to seal or expunge under Rule 3.692(a).

6. Plea agreements – covered by the exception under Rule 2.525(d)(7), as a document required to be an original by other rule. Example: under Rule 3.160(e), when a defendant waives the appointment of counsel, a written waiver must be executed and filed with the clerk before a court may accept a plea at arraignment or thereafter.

7. Documents filed under seal – covered by the exception under Rule 2.525(d)(7) as a document required to be an original by other rule. Example: under Rule 3.140(a)(2) an optional handling of indictments for offenses not triable in the circuit courts must be certified by the clerk and filed in the records of the county court.

8. Ex parte documents – covered by the exception under Rule 2.525(d)(7), as documents required to be an original by other rule. Despite their increasing rarity, criminal courts still deal with in camera and ex parte proceedings and evidence. See for example, Rule 3.220(m) regarding certain discovery disclosures and pre-trial depositions.

9. Any documents which are required to be sworn or notarized – covered by the exception under Rule 2.525(d)(7), as documents required to be notarized. Examples: Under Rule 3.125(d) and (e),

> Notices to Appear must be sworn to by the arresting officer and filed with the clerk; under Rule 3.190(c), motions to dismiss must be sworn to by defendants; under Rule 2.330(c)(3), motions to disqualify a trial judge must be sworn to by the party signing the motion or by a separate affidavit.

In sum, each of the original documents listed in proposed Rule 3.030(c) is covered by at least one of the paper document exceptions listed in proposed Rule 2.525(d)(7). Once filed, it is further proposed under Rule 3.030(c) that only the original charging documents must be kept by the clerk. All other original documents filed in paper format are to be scanned by the clerk and thereafter provided to the prosecuting authority. The prosecutors then determine whether or not any of those originals are kept by them as the prosecuting authority for future perjury prosecutions or other reasons. The CPRC therefore respectfully suggests that the comments critical of Rule 3.030(c) were based on a narrow or partial reading of the proposed rule while ignoring the effect of the paper document exceptions listed in RJA's proposed Rule 2.525(d)(7). Combined with the impact of the perjury and best evidence statutes, the CPRC feels that the proposed changes to Rule 3.030 reflect a proper balancing of paper filing and e-filing as the state courts move to full electronic systems.

Respectfully submitted on this 23rd day of May, 2011, by

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent, via U.S. Mail, to John Granville Crabtree, Chair, Appellate Court Rules Committee, 240 Crandon Blvd., Suite 234, Key Biscayne, FL 33149-1624; Katherine E. Giddings, Chair, Rules of Judicial Administration Committee, 106 E. College Avenue, Suite 1200, Tallahassee, FL 32301-7741; William W. Booth, Chair, Juvenile Court Rules Committee, 423 Fern Street, Suite 200, West Palm Beach, FL 33401-5839; Donald E. Christopher, Chair, Civil Procedure Rules Committee, P.O. Box 1549, Orlando, FL 32802-1549; Steven P. Combs, Chair, Family Law Rules Committee, 3217 Atlantic Blvd., Jacksonville, FL 32207-8901; Michele A. Cavallaro, Chair, Small Claims Rules Committee, 6600 N. Andrews Ave., Suite 300, Ft. Lauderdale, FL 33309-2189; Jeffrey S. Goethe, Chair, Florida Probate Rules Committee, 3119 Manatee Ave. W., Bradenton, FL 34205-3350; Robert Eschenfelder, Manatee County Attorney's Office, 1112 Manatee Ave. W., Suite 969, Bradenton, FL 34205-7804; John J. Anastasio, Chair, Traffic Court Rules Committee, 3601 SE Ocean Blvd., Ste 203, Stuart, FL 34996-6737; Justice Ricky Polston, Liaison for the Rules of Judicial Administration Committee, Justice Barbara J. Pariente, Liaison to the Appellate Court Technology Committee and Florida Courts Technology Commission, Deborah Meyer, Director, Central Staff, at the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; Kenneth A. Kent, Executive Director, Florida Association of Court Clerks & Comptrollers, 3544 Maclay Blvd., Tallahassee, Florida 32312; Judge Judith L. Kreeger, Chair, Florida Courts Technology Commission, Office of the State Courts Administrator, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida 32399-1900; R.B. "Chip" Shore, Manatee County Clerk of the Circuit Court and Comptroller, P.O. Box 15400, Bradenton, Florida 34206; Teresa L. Prince and Edward A. Dion, Nabors, Giblin & Nickerson, P.A., 2502 Rocky Point Dr., Suite 1060, Tampa, Florida 33607 and P. Dewitt Cason, Clerk, Columbia County, P.O. Box 180519, Tallahassee, Florida 32318, this 23rd day of May, 2011.

/s/ Krys Godwin

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