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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE --
CAPITAL POST-CONVICTION PUBLIC RECORDS PRODUCTION,
FLORIDA RULE OF CRIMINAL PROCEDURE 3.852

FILED
SID J. WHITE
JUN 13 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

No. 87,688

COMMENTS OF THE CAPITAL COLLATERAL REPRESENTATIVE

The Office of the Capital Collateral Representative (CCR) files these comments in response to the Court's opinion of April 25, 1996, promulgating proposed Rule of Criminal Procedure 3.852. These comments are timely filed within 30 days of the date of publication in *The Florida Bar News* issue dated May 15, 1996.

1. (a) Compliance with this rule will entail additional efforts by lawyers and investigators to meet the newly-established time limits. All of the time limits in the rule contain default provisions, which means that all requests must be made in accordance with rigid time schedules or the rights of clients to public records access will be lost. Complying with these schedules will require intensive labor in a large number of cases beginning on the effective date of the rule. That is so because subdivision (d)(2)(D) makes the time limits applicable to "cases in which a capital

postconviction defendant has a pending rule 3.850/3.851 motion and counsel for the defendant has been designated on the effective date of this rule...". Thereafter, the schedules and default provisions of the Rule apply, requiring CCR to comply with the rule not just as to cases to be filed in the future, but in every case having a Rule 3.850/3.851 motion now pending in circuit court. Meeting these deadlines in all pending cases will require more staff than CCR has now or expects to have.

(b) The Rule governs "all requests for production of public records to which Chapter 119, *Florida Statutes* (1995), applies" in Rule 3.850 and 3.851 capital proceedings.¹ It thereby assumes that jurisdiction over all state agencies can be properly exercised by the trial court, regardless of the agency's location or its prior connection with the case. However, objections on jurisdictional grounds may be raised by state agencies when subjected to hearings and proceedings in the trial court. The decision of this Court in *Hoffman v. State*, 613 So. 2d 405 (Fla. 1993), allowed agencies to be sued in courts where jurisdiction and venue were unquestionably proper. This rule apparently overrules *Hoffman* without expressly saying so and may thereby spawn confusion and more litigation over records disputes formerly governed by *Hoffman*.

2. Rule (b)(3), "Trial Court", does not address the situation in which the judge who entered the judgment and imposed the sentence is no longer available and

¹Rule 3.852(a); *see also* Rules 3.852(i) and (m).

no other judge is yet assigned to rule on a Rule 3.850/3.851 motion, especially if the motion has not yet been filed.

3. Subsection (c)(3) of the Rule requires a request for production upon the custodian designee to be "either by personal service or by certified mail." Presumably personal service means that a CCR employee or a paid process server will have to make personal delivery of the request on the custodian. The travel costs for going to the site of each agency and making personal delivery will be considerable. Costs of return receipt postage will also be high. These are unanticipated and unfunded expenses which CCR will have to pay in order to obtain public records.

4. Subsection (e)(1) ends with a reference to subdivision (d)(4)(B), which does not exist in the Rule.

5. Subsections (e)(1) and (2) should be amended to conform to the language in section 119.07(2)(a), *Florida Statutes* (1995), requiring agencies to specify the statutory basis for any claimed exemption when records are redacted or withheld.² Without such a requirement, the Rule modifies substantive law by relieving agencies

²This statute requires that the person claiming the exemption shall

state the basis of the exemption which he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute, and, if requested by the person seeking the right under this subsection to inspect, examine, or copy the record, he or she shall state in writing and with particularity the reasons for the conclusion that the record is exempt.


of an obligation placed on them when they make less than full disclosure. Stating the exemption's statutory basis would not impose an undue burden on the agency because it must identify the exemption in order to assert it; conversely, the requester is saved the time and effort of having to guess which among several exemptions may apply and researching the applicability of each one.

6. Subsection (e)(4) may prove flawed in practical application because (a) requiring lawyers or investigators to travel to various sites throughout the state to view records within compressed time limits will be extremely costly and time-consuming; (b) in some instances the production of records may be unnecessary if the requester simply waives the review and orders copies of all records; and (c) the requirement that "payment be tendered at the time copies are requested." does not take into account the likelihood that the cost of reproduction might not then be known and, more importantly, that even if the cost is known, state agencies such as CCR do not have the ability to dispense payment except by state warrants or journal transfers, neither of which can be issued contemporaneously with placing an order.

7. The Rule makes no provision for sanctions if agencies fail to respond or to respond on time, except for waiving the right to assert exemptions. Should agencies fail to comply with the time limits, the time for performing all other acts under Rules 3.850/3.851 and this Rule should be tolled until compliance occurs. This avoids the possibility of the Court trying to impose sanctions not authorized by the Legislature while at the same time allowing the court to enforce the right of the capital

post-conviction defendant to public records access necessary for a fair determination of the cause.

I HEREBY CERTIFY that a true copy of the foregoing Comments of the Capital Collateral Representative to In Re: Proposed Rule 3.852 has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 13, 1996.



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