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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 87,688

IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE--CAPITAL POSTCONVICTION PUBLIC RECORDS PRODUCTION

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RESPONSE OF FIRST AMENDMENT FOUNDATION

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The First Amendment Foundation is a not-for-profit organization whose mission is to protect citizens' access rights to public records. It files this comment to proposed Florida Rule of Criminal Procedure 3.852 (hereinafter "Proposed Rule 3.852"), because of its concern that the proposed rule will violate the separation of powers doctrine by essentially rewriting the duties of non-judicial state agencies under the Public Records Act, Chapter 119, Florida Statutes (1995).

Article I, Section 24 of the Florida Constitution, reserves exclusively to the Florida Legislature the power to enact substantive revisions relating to access to non-judicial public records. While this Court clearly has the authority to promulgate rules regulating the administration of its judicial processes and the adjudication of public records cases, the separation of powers doctrine stands as a barrier to the judicial enactment of rules which substantively affect the rights of individuals to receive public records from non-judicial agencies.

Thus, the First Amendment Foundation respectfully submits that this Court should not adopt Proposed Rule 3.852 for two specific reasons: First, Proposed Rule 3.852 would violate the separation of powers doctrine. Second, Proposed Rule 3.852 would profoundly alter well-established rights afforded by the Public Records Act for a small class of individuals, i.e., capital postconviction defendants.

Specifically, Proposed Rule 3.852 would restrict the ability of capital postconviction defendants to obtain public records in a manner that is inconsistent with the Public Records Act. Foe example, Proposed Rule 3.852 would place temporal and procedural limitations on these individuals' access to public records. Proposed Rule 3.852 would also juxtapose the burden of establishing entitlement to the public records by placing the onus on the requestor, rather than the public agency. Finally, Proposed Rule 3.852 would allow delays in the production of records and provide only for hearings on an "expedited basis" despite the right to an "immediate" hearing afforded by Chapter 119.

I. Rule 3.852 Would Violate this Court's Tradition of Zealously Preserving Separation of Powers in Public Records Cases

The drafters of the Florida Constitution expressly emphasized the importance of the separation of powers doctrine in Article II, Section 3 of the Constitution:

> The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.

See also Locke v. Hawkes, 595 So. 2d 32, 34-35 (Fla. 1992). This Court has specifically addressed the separation of powers doctrine in the context of access to government records and has exerted special care to ensure that one governmental branch does not usurp another's prerogatives.

For example, in The Florida Bar, 398 So. 2d 446 (Fla. 1981) (per curiam), this Court held the Public Records Act inapplicable to the Florida Bar's investigative files relating to the unauthorized practice of law. Characterizing this as a purely judicial function, this Court held that "[n]either the legislature nor the governor can control" those investigative files. Id. at 447; see also Locke, 595 So. 2d at 35.

More recently, this Court held Chapter 119 inapplicable to judicial records when the clerks of court were "acting under the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts." Times Publishing Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995). Thus, Section 119.12, Florida Statutes (1995), which required an agency to pay attorney's fees for withholding public records, did not apply to a clerk who unlawfully withheld judicial records. Id.; see also Johnson v. State, 336 So. 2d 93, 95 (Fla. 1976) (legislature may not regulate judicial destruction of court records in an expunction statute).

Similarly, the separation of powers doctrine requires the judiciary to withhold its decision when making certain determinations relating to certain executive branch records. Thus, in Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993), this Court held the Public Records Act inapplicable to the Clemency Board:

> [W]e find that the Parole Commission is entitled in these circumstances to a writ of prohibition. To hold otherwise would allow the Legislature and the judiciary

to encroach upon executive powers expressly granted by our constitution to the Governor and Cabinet.

Id. at 157 (footnote and citations omitted).

Lockett and Locke recognized the need for special solicitude to prevent encroachment by one governmental branch on another's duties. Locke, 595 So. 2d at 35 (citing Moffitt v. Willis, 459 So. 2d 1018 (Fla. 1984) and McPherson v. Flynn, 397 So. 2d 665 (Fla. 1981)). This is particularly true with respect to public records because the Florida Constitution was amended in 1993 to confer upon the Legislature the specific duty to make laws relating to the enforcement of public records requests.

Article I, Section 24 confers directly on the Legislature the power to regulate access to non-judicial records:

> (a) Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by the constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board and commissioner entity created pursuant to law or this Constitution.
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> (c) . . . The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal and disposition of records made by this section, except that each house of the legislature may adopt rules government the enforcement of this section in relation to records of the legislative branch.

(emphasis added).

Thus, the Legislature has the duty to enact substantive laws relating to the enforcement of the Article I, Section 24. This Court, on the other hand, has the power to administer the judicial system, including the establishment of rules of practice and procedure. Johnson, 336 So. 2d at 95. Thus, to the extent that Proposed Rule 3.852 effects substantive changes in the Public Records Act, it would violate the separation of powers doctrine.

II. Proposed Rule 3.852 Would Effect Substantive Changes to the Public Records Act

Proposed Rule 3.852 would redefine the public records access rights of capital postconviction defendants in several ways. First, Proposed Rule 3.852 would impose limitations on an individual's access to public records by creating time limits heretofore unknown in public records jurisprudence or Chapter 119. Pursuant to Sections (c)(1), (d)(2), and (g), a capital postconviction defendant would waive his or her right to access public records if the request were not made within certain enumerated time periods.[1] If a timely request does not meet with compliance, a capital postconviction defendant would also waive

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[1] Specifically, a capital postconviction defendant would be required to file and serve any public records request for law enforcement agencies in the circuit of conviction, the prosecuting state attorney's office, the medical examiner's office, the attorney general and the Department of Corrections no more than thirty (30) days after counsel is designated pursuant to Florida Rule of Criminal Procedure 3.851(3). All other public records would have to be requested within one hundred and twenty (120) days and any supplemental requests would have to be made no later than ninety (90) days after the initial production of records. See Proposed Rule 3.852(d).

his or her access rights by failing to move to compel production of the records within the time allowed pursuant to Sections (f) and (g) of Proposed Rule 3.852. Given the absence of any waiver provisions in the Public Records Act, Proposed Rule 3.852 would certainly effect a substantive change in this regard.[2] Indeed, inaction has never been recognized as a waiver of one's statutory or constitutional rights of access to public records.

Second, Section (d) of Proposed Rule 3.852 would require that the capital postconviction defendant file and serve a written request on various entities which provides the following types of information: name, identifying number, date or birth, types of records, dates and recipients of prior requests, the trial court, case number, name and addresses of all counsel of record, and instructions regarding the service of objections to the request. Compare these procedural requirements to the Public Records Act, which never conditions inspection of public records on any requirement that the person seeking inspection disclose personal background information. See, e.g., Bevan v. Wanicka, 505 So. 2d 1116, 1118 (Fla. 2d DCA 1987). Nor does the Public Records Act even require that a request be in writing.

Third, Section (d)(3)(B) of Proposed Rule 3.852 suggests that a capital postconviction defendant will be burdened with a particularity requirement in requesting the public records. However, a records custodian may not deny a request to inspect

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[2] Proposed Rule 3.852 does not address access to records in federal habeas corpus proceedings.

and/or copy public records merely because of a lack of specifics in the request. See, e.g., State ex rel. Davidson v. Couch, 116 Fla. 120, 127, 156 So. 297, 300 (1934); Lorei v. Smith, 464 So. 2d 1330, 1332 (Fla. 2d DCA), rev. denied, 475 So. 2d 695 (Fla. 1985) (the "breadth of such right is virtually unfettered, save for the statutory exemptions"). Rather, the records custodian must promptly notify the requestor that more information is needed; it is the responsibility of the records custodian to follow up on any requests for public records. Moreover, in the absence of a statutory exemption, a records custodian must produce the records requested regardless of the number of documents involved or possible inconvenience.[3]

Next, Section (f) of Proposed Rule 3.852 provides that once the agency has failed to comply with a public records request by a capital postconviction defendant, the defendant has an affirmative obligation to pursue a motion to compel or waive his or her rights to the public records. However, under the Public Records Act, the burden of establishing entitlement to an exemption remains with the agency. See, e.g., Tribune Co. v. Cannella, 458 So. 2d 1075, 1078-79 (Fla. 1984), appeal dismissed sub nom. DePerte v. Tribune Co., 471 U.S. 1096 (1985); Barfield v. City of Ft. Lauderdale Police Dep't, 639 So. 2d 1012, 1015

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[3] However, the records custodian may charge, in addition to the actual cost of duplication, a reasonable service charge for the cost of extensive use of information technology resources or personnel, if such extensive use is required because of the nature or volume of the public records to be inspected, examined or copied. See Fla. Stat. § 119.07(1)(b) (1995).

(Fla. 4th DCA), rev. denied, 649 So. 2d 869 (Fla. 1994); Tribune Co. v. Public Records, 493 So. 2d 480, 484 (Fla. 2d DCA 1986), rev. denied, 503 So. 2d 327 (Fla. 1987). Moreover, inaction has never been held sufficient to waive constitutional or statutory rights of access to public records.

Section (e) of Proposed Rule 3.852 would allow delays in the production of public records by allowing the public agency thirty (30) days to respond with the time and place for production of the documents not objected to and sixty (60) days to produce those documents. This Court's own prior decisions hold that the only delay in producing the records permitted under Chapter 119 is the reasonable time allowed the records custodian to retrieve the records and delete those portions that are assertedly exempt. See, e.g., Michel v. Douglas, 464 So. 2d 545, 545 n2 (Fla. 1985); Cannella, 458 So. 2d at 1079. Indeed, the very purpose of the Public Records Act is "to afford disclosure of information without delay to any member of the public making a request." Daniels v. Bryson, 548 So. 2d 679, 680 (Fla. 3d DCA 1989) (emphasis added).

Finally, Section (h) of Proposed Rule 3.852 would require only an "expedited" hearing after a denial of access even though the Public Records Act requires an "immediate" hearing. See Fla. Stat. § 119.11(1) (1995).

III. Proposed Rule 3.852 Would Substantively Redefine the Public Records Access Rights of an Entire Class of Individuals

These dramatic substantive changes to the rights of capital postconviction defendants would conflict with the express language and underlying intent of the Public Records Act and would impair access rights guaranteed by both the Florida Constitution and the Public Records Act based solely on one's status as a convicted capital felon.

The Florida Constitution guarantees that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officers, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." FLA. CONST. art. I, § 24. Section 119.07(1)(a) also establishes a right of access to public records in clear and unequivocal terms:

> Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee. The custodian shall furnish a copy or a certified copy of the record upon payment of the fee prescribed by law or, if a fee is not prescribed by law, for duplicated copies of not more than 14 inches by 8 inches, upon payment of not more than 15 cents per one-sided copy, and for all other copies, upon payment of the actual cost of duplication of the record.

Fla. Stat. § 119.07(1)(a).

The stated reason for erecting additional barriers to the acquisition of public records by capital postconviction defendants is to enhance the orderliness of the process. While

such a purpose may be desirable, Section 119.01(1) expresses Florida policy that "all state, county, and municipal records shall be open for personal inspection by any person." Fla. Stat. § 119.01(1) (1995) (emphasis added). Of course, this right has been elevated to constitutional status in Article I, Section 24 of the Florida Constitution. Moreover, this Court has held that public records are available to all citizens, regardless of their individual motivation. Couch, 116 Fla. at 125, 156 So. at 299; see also Lorei, 464 So. 2d at 1332 ("[t]he purpose for such inquiry is immaterial"); Warden v. Bennett, 340 So. 2d 977, 978 (Fla. 2d DCA 1976) ("the Public Records Act does not direct itself to the motivation of the person who seeks the records"); Op. Att'y Gen. 73-167 (1973); Op. Att'y Gen. 72-413 (1972). Thus, a capital postconviction defendant is entitled to the public records he or she seeks regardless of his or her purposes.[4] Indeed,

> The Public Records Act and cases interpreting the Act make it clear that all documents falling within the scope of the Act are subject to public disclosure unless specifically exempted by an act of our legislature. . . . Absent a statutory exemption, a court is not free to consider public policy questions regarding the relative significance of the public's interest in disclosure and the damage to an individual or institution resulting from such disclosure. Because this type of public policy question was raised by the hospital's affirmative defenses of financial and public harm resulting from disclosure, we hold that these defenses are irrelevant and should have been stricken. The hospital's defense alleging malicious motives for

[4] See Fla. Stat. § 119.01(1) (providing public records access to "any person"); Fla. Stat. § 119.07(1)(a) (same); Op. Att'y Gen. 75-175 (1975) (state employee is "person" within meaning of Public Records Act).

> seeking the documents is likewise irrelevant. The Public Records Act does not direct itself to the motivation of the person who seeks the records.

News-Press Publishing Co. v. Gadd, 388 So. 2d 276, 278 (Fla. 2d DCA 1980) (citations omitted; emphasis added).

Similarly, adopting a rule which limits the constitutional and statutory access rights based on a perceived need to increase orderliness of public records requests by capital postconviction defendants relies on precisely the type of "public policy question" that this Court has rejected. See Florida Freedom Newspapers, Inc. v. McCrary, 520 So. 2d 32, 34 (Fla. 1988) ("the judiciary should not create public policy exemptions beyond those specified by the legislature"); Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979) (public policy arguments should be addressed to the legislature); see also Gadd, 388 So. 2d at 278 (claims of "financial and public harm" and "malicious motives" are simply irrelevant).[5]

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[5] Moreover, it is unclear why there is a perceived special need for "orderliness" in the context of public records requests by capital postconviction defendants, particularly since Florida courts have consistently determined that they are "entitled to no greater relief than other persons requesting relief pursuant to chapter 119." Campbell v. State, 593 So. 2d 1148, 1149 (Fla. 1st DCA 1992). Thus, this Court has held that indigent capital postconviction defendants are not constitutionally entitled to free copies of public records, nor are they entitled to have the original public records delivered to their place of incarceration for personal examination. Roesch v. State, 633 So. 2d 1, 2-3 (Fla. 1993). "In essence, he is in the same position as anyone else seeking public records who cannot pay the copying costs and who cannot afford the trip to personally examine the record." Id. at 3.

Indeed, in Wait, this Court rejected the theory that a litigant may not use the Public Records Act to obtain information from an adversary.

> We find no authority to support the argument that Florida Power & Light by engaging in litigation before a federal forum, has somehow given up its independent statutory rights to review public records under chapter 119. The fact that Florida Power & Light simultaneously engaged in litigation before a federal agency does not in any way prevent its use of chapter 119 to gain access to public documents.

Id. at 424. By analogy, the fact that Proposed Rule 3.852 only affects capital postconviction defendants should not prevent their effective use of Chapter 119 to gain access to public records. Since Wait, this Court has confirmed that litigants may use the Public Records Act to obtain information from their adversaries. In fact, just months ago, this Court noted the clear availability of Chapter 119 information to criminal defendants and their attorneys. See Ventura v. State, 21 Fla. L. Weekly S15, 1996 WL 8259 at *2 (Fla. Jan. 11, 1996) ("This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure").

CONCLUSION

The Florida Constitution expressly reserves to the legislative branch the responsibility for regulating public records requests directed to non-judicial agencies. Proposed Rule 3.852 would violate the principle of separation of powers long cherished by this Court by encroaching on this legislative prerogative and effecting substantive changes in the access

rights of a select group of individuals. The First Amendment Foundation thus respectfully requests that this Court not deviate from its tradition of preserving the coequal branches of government by adopting Proposed Rule 3.852.

Respectfully Submitted,

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