IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE - RULE 3.852 (CAPITAL POSTCONVICTION PUBLIC RECORDS PRODUCTION) AND RULE 3.993 (RELATED FORMS)

CASE NO. 93,845

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COMMENTS OF THE CAPITAL COLLATERAL COUNSEL FOR THE NORTHERN REGION

Comes now Gregory C. Smith, Capital Collateral Counsel for the Northern Region (CCC-NR), and hereby files comments in response to the Court's opinion of September 18, 1998, promulgating Rule of Criminal Procedure 3.852. For good cause undersigned requests that the Court accept the comments as timely filed and in support would show:

The Rule requires that all affected cases simultaneously resume public records collection procedures. Since the effective date extensive additional efforts have been undertaken to meet the newly-established time tables. Because these efforts must be made in several cases simultaneously, the burden is substantial and is having a detrimental effect on the abilities of attorneys and investigators to satisfy other obligations.

In fact while undergoing extensive efforts to learn and comply with the new Rule, the due date set by this Court for the filing of comments to the emergency promulgation of the changes to Rule 3.852 made effective October 1, 1998 was overlooked. The oversight was noted immediately when undersigned received service of the State's comments. An effort to promptly compile comments for the Court's consideration has been made. Undersigned

apologizes for any inconvenience to the Court and the parties and requests that these comments be accepted as timely filed.

Access to public records is a substantive constitutional right rather than a procedural right.[1] As this Court is well aware, access to public record is fundamental to a meaningful capital postconviction proceeding.[2] This Court has expressly stated that under its rule-making authority it can only effectuate and implement constitutional and statutory rights.[3] Alteration of the rights granted by chapter 119 and article I, section 24, by statute or rule promulgation violates the doctrine against separation of powers.[4] The Rule should be amended to eliminate such alterations. For example, subsection (f) should be amended to conform to the language in section 119.07(2)(a) of

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[1]Wait v. Florida Power & Light, 372 So. 2d 420 (Fla. 1979); Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984) ("Access to public records is a matter of substantive rather than practice and procedure")(emphasis added).

[2]Mordenti v. State, 711 So. 2d 30 (Fla. 1998); Ventura v. State, 673 So. 2d 479 (Fla. 1996); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Muehleman v. Dugger, 623 So.2d 480 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). See also Mendyk v. State, 592 So. 2d 1076 (Fla. 1992).

[3]State, Dept. of H. & R. Serv., Etc. v. Golden, 350 So. 2d 344, 346 (Fla. 1977)("We have no authority to adopt rules which are primarily substantive in nature.")

[4]Art. II, § 3, Fla. Const.; Locke v. Hawkes, 595 So. 2d 32 (Fla. 1992); The Florida Bar, 398 So. 2d 446 (Fla. 1981); Times Publishing Co. v. Ake, 660 So. 2d 255 (Fla. 1995); Johnson v. State, 336 So. 2d 93 (Fla. 1976); Parole Commission v. Lockett, 620 So. 2d 153 (Fla. 1993). See also Wait v. Florida Power Light Co., 372 So. 2d 420 (Fla. 1979)(public policy arguments should be addressed by the Legislature).

the Florida Statutes (1998) requiring agencies to specify the statutory basis for any claimed exemption when records are redacted or withheld.[5] Without such a requirement, the Rule modifies substantive law by relieving agencies 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. Other provisions of Rule 3.852 and sections of chapter 119.19 of the Florida Statutes also alter substantive rights or in other ways violate due process and equal protection. See e.g. Fla. R. Crim. P. 3.852 (g)(3); (h)(3); (i); (l) and any provisions which place time limits on requests for public records.[6] As such, various

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[5]This statute requires that the person claiming the exemption shall:

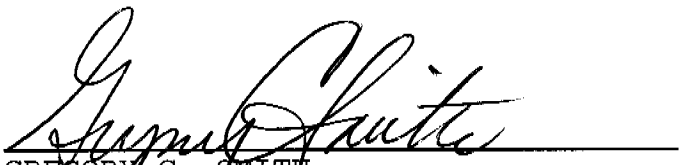
> state the basis of the exemption which he or she contends is applicable to the record, including the statutory citation to an exemption created or afforded by statute, and, if requested by the person seeking the right under this subsection to inspect, examine, or copy the record, he or she shall state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

§ 119.07(2)(a), Fla. Stat. (1998).

[6]For example, Rule 3.852 provides for time limits on requests and bars any requests not made within the time limits until a death warrant is signed and an execution date scheduled. This provision directly conflicts with several duties placed on counsel including counsel's duty of diligence and duty to timely investigate and raise claims pursuant to the provisions of Fla. R. Crim. P. 3.850(b).

provisions appear to dilute rather then protect the rights of capital postconviction defendants to public records.

I HEREBY CERTIFY that a true copy of the foregoing Comments has been furnished by United States Mail, first class postage prepaid and facsimile, to all counsel of record on December 11, 1998.



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