

appendix C of this Court's Opinion in Nos. 92,026 & 82,322, thirty-one of the Middle Region's cases had their tolling lifted as of September 1, 1998. In ten of those cases counsel had not previously filed public records requests, as indicated on the inventory filed February 27, 1998. Initial requests, as well as supplemental requests, were sent out on those cases whose tolling was lifted on September 1, 1998.

However, under the new rule, whether or not collateral counsel receives the requested documents for the initial request within 90 days of October 1, 1998, no supplemental requests can be made after the expiration of those 90 days, certain conditions excepted.

Under the former rule 3.852(d)(2)(D) this situation was considered and rectified as follows:

If a request or requests for production already have been served upon an agency, any supplemental request for production shall be filed within 90 days after the initial production of the records or within 90 days of the effective date of this rule, whichever is later. (emphasis added).

The new rule will effectively prohibit collateral counsel from filing any supplemental requests, especially in those cases where the initial production of records will not be provided until after the 90 days expires.

3. Further, Rule 3.852 is silent as to whether documents requested prior to October 1, 1998, but not produced, should be submitted to collateral counsel or to the repository. The rule is also quiet as to who is responsible for payment for the production of those documents requested, but not produced as of October 1, 1998.

4. There is also a disparity between the statute (Chapter 98-198) and Rule 3.852 regarding the State Attorneys' obligation to bear the costs of copying, sealing, and delivering

records to the repository. The statute, at section 119.19(3)(b), requires the State Attorneys to be responsible for said costs, whereas Rule 3.852 is silent about this requirement.

5. A number of agencies have taken various positions regarding their responsibility in producing requested documents: (a) some are submitting them to the repository; (b) some are merely offering inspection; and (c) some are requiring prepayment before production. Litigation has commenced in the Circuit Courts regarding these issues. In a number of cases the trial court had first ordered that agency documents should be submitted to the repository. Upon a sister court finding otherwise and upon a motion for rehearing, the first court reversed its ruling and found that the old rule still applies. It is abundantly clear that there is a considerable amount of confusion about the rule, not only among the various agencies but the Circuit Courts as well.

6. These varying positions will obviously cause a substantial amount of unexpected litigation due to the lack of uniformity in the production of public records. With regard to the repository process, this Court stated in Nos. 92,026 & 82,322:

"This process is intended to assist in eliminating the often lengthy disputes over public records production in capital cases that frequently involve those agencies."

If the true purpose of the repository is to eliminate the lengthy dispute over public records, then a more comprehensible and workable rule is necessary. The stated intent of the rule would best be served by requiring all agencies, who have public records in their possession that have not been previously produced, index them and submit them to the repository.

RECOMMENDATIONS

7. There can be no justifiable reason for Rule 3.852(h) to have more than one provision for the sole purpose of informing agencies where to put their documents, regardless

of whether the Mandate was issued prior to or after October 1, 1998. There are no substantive rights which are affected by different dates or different rules. In order to keep all document production simple, this Court should not differentiate between dates of request or dates of Mandate, but require all documents not previously produced be placed in the repository.

8. However, if this Court should find that 3.852(h) requires different functions for different dates, it is recommended that 3.852(h)(2) be modified by inserting the language "or from date of production, whichever comes later", right after "within 90 days of October 1, 1998".

GENERAL COMMENTS

As to other matters contained in the new rule it is respectfully requested that this court:

- (a) Add a definition of the term "Copy" in 3.852(b), to include "legible copies".
- (b). Clarify in Rule 3.852 (e) (2) that the State Attorney should bear the costs of copying, which will make the rule consistent with the statute.
- (c). Require any agency that objects to the additional public records request in Rule 3.852(g)(1)(c) on the basis of being "unduly burdensome", be required to state with specificity the facts which constitute "unduly burdensome".

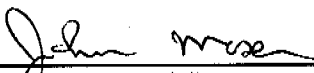
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Emergency Motion to Clarify has been furnished by United States Mail, first class postage prepaid, to all counsel of record on December 18, 1998.



JOHN W. MOSER
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Copies furnished to:

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State of Florida
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FILED

SID J. WHITE

DEC 21 1998

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

December 18, 1998

Sid White
Clerk of the Court
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

Re: In RE: Amendments to Florida Rules of Criminal Procedure --
Rule 3.852 (Capital Postconviction Public Records Production)
and Rule 3.93 (Related Forms), Case No. 93,845

Dear Mr. White:

Enclosed for immediate filing in the above-captioned case are:

1. Original of Comments of John Moser, Capital Collateral Regional Counsel - Middle;
2. A copy of the first and last pages of the above referenced document for return to CCRC-Middle after stamping with the date of filing;
3. A pre-addressed, stamped envelope.

Please use the enclosed CCRC-Middle pre-addressed envelope to return a copy of the first (date-stamped) and signature pages of the document to our office.

A copy has been provided to all opposing counsel of record.

Thank you for your assistance in this matter.

Sincerely,


John W. Moser
Capital Collateral Regional Counsel - Middle

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Enclosure

cc: Robert A. Butterworth, Attorney General
Richard B. Martell, Chief, Capital Appeals
Carolyn Snurkowski, Assistant Deputy Attorney General