IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC00-113 & SC00-154

LLOYD CHASE ALLEN, et al.,

Petitioners,

v.

ROBERT A. BUTTERWORTH, et al.,

Respondents.

MARK JAMES ASAY, et al.,

Petitioners,

v.

ROBERT A. BUTTERWORTH, and the State of Florida,

Respondents.

CORRECTED REPLY TO AMICUS CURIAE BRIEF OF JOHN E. THRASHER IN SUPPORT OF CONSTITUTIONALITY OF SECTIONS 6 AND 7 OF CHAPTER 2000-3, LAWS OF FLORIDA

NEAL A. DUPREE
Capital Collateral Regional Counsel
Southern Region
Florida Bar. No. 311545
TODD G. SCHER
Litigation Director
Florida Bar. No. 0899641
OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL
101 NE Third Avenue, Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284
Counsel for Petitioners in No. SC00-113

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080
ANDREW THOMAS
Chief Assistant CCC - NR
Florida Bar No. 0317942
OFFICE OF THE CAPITAL COLLATERAL COUNSEL
1533-B South Monroe Street
Tallahassee, FL 32301
(850) 488-7200
TIMOTHY P. SCHARDL
Special Assistance CCC-NR
Florida Bar No. 0073016
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004
(850) 224-3331 (facsimile)
Counsel for Petitioners in No. SC00-154

I.

INTRODUCTION

On March 6, 2000, Speaker of the House John E. Thrasher sought leave to file an *amicus*

curiae brief in support of the constitutionality of sections 6and 7 of the Death Penalty Reform Act of 2000 ("DPRA"). The motion and brief were filed under case numbers having nothing to do with DPRA, so the Court granted the motion under the above-styled cases, and allowed the parties to file a response by March 9, 2000. The Court has granted an extension until 12:00 PM, March 10, 2000, for the filing of the instant response.[1]

Due to the shortness of time, Petitioners cannot address in depth the arguments advanced by the Speaker, Petitioners will address only the Speaker's contention that the limitation and bar provisions of DPRA sections 6 and 7 are constitutional. The Speaker never specifies what precise language he considers a "statute of limitations," but factoring in his use of the case numbers assigned to the rulemaking proceedings and his request that the Court adopt rules that achieve the inequitable and unjust outcomes contemplated by DPRA, Petitioners understand his concern to be with the statute's timing and bar provisions.

With respect to those provisions and the manner in which the Amicus Brief was filed, Petitioners ask this Court to note that under DPRA no court in the State of Florida could consider a pleading filed outside the strict deadlines found in the sections which the Speaker writes to support. Unlike Florida Rule of Appellate Procedure 9.370, upon which the Speaker relies, DPRA's timing and bar provisions do not allow courts to exercise discretion and entertain untimely pleadings.

II.

ARGUMENTS IN REPLY

A. Facts and Omissions

1. Petitioners challenged DPRA's limitation and bar provisions

Before addressing some of the specific legal arguments advanced by the Speaker, Petitioners will correct some erroneous representations. First, the Speaker asserts that "[t]he petitions in the CCRC challenge cases do not directly challenge the statutes of limitations" (Brief at 2). This is

[1] The Speaker sent his brief by United States mail. The brief was received by CCRC-South on March 8, 2000.

incorrect. Petitioners expressly challenged Section 6 of the DPRA as "an unconstitutional instrusion into the Court's exclusive power to regulate rules and procedure." *See Allen* Petition at 16; *Asay* Petition at 16-24. Petitioners also urged that the time frames set forth in the DPRA, "by harshly limiting the nature of the postconviction process, has inalterably and intolerably compromised the Petitioners' ability to seek meaningful redress in the courts of this State through the `traditional postconviction relief proceedings.'" *Allen* Petition at 21-22. Petitioners further addressed, *inter alia*, how the DPRA's preclusion on amendments and its prohibition on any extensions of time regardless of the circumstances violate the right of habeas corpus, access to courts, and due process. *See id.* at 8-12; 20-25.

The Speaker argues that CCRC did not include as petitioners those defendants whose direct appeals were not completed before the effective date of DPRA, and that "CCRC counsel should be actively engaged in representation of all clients affected by the new limitations." Amicus Brief at 3 n.2. This argument overlooks that there is no procedural mechanism for CCRC to be appointed to the cases pending on direct appeal, and that this was on of the grounds on which this Court stayed the DPRA. *See* Order, No. SC00-242, at 2 ("procedural questions have arisen concerning the appointment of counsel for death-sentenced defendants whose appeals were pending prior to the effective date of the Act, as well as the procedures that apply to such defendants").[2] This argument also appears to be inconsistent with the argument advanced by the State of Florida that the named petitioners and the CCRC offices lack standing and statutory authority to challenge the DPRA; if the Regional Counsels' current clients lack standing, CCRC can only imagine the response of the State if CCRC attempted to raise issues to defendants who CCRC-South did not even represent.

2. The Speaker does not contest Petitioners equal protection challenge

[2] This argument is fully discussed in the pleadings filed in various direct appeal cases challenging the DPRA. *See* Motions challenging DPRA filed in *Rolando Garcia v. State*, No. 95,136; *Leo Perry v. State*, No. SC96499.

DPRA violates Petitioners right to the equal protection of the laws in a number of ways, none of which are contested by the Speaker. Petitioners assert that DPRA violates the State and federal Constitutions by invidiously discriminating against indigent death sentenced persons. *See Allen* Petition at 5-13; *Asay* Petition at 15-24. DPRA does this through two basic provisions that in practice would deny Petitioners many of the legal protections available to clients of privately retained and pro bono counsel. First, the Act imposes restrictions on what all state-funded counsel may file and attempts to chill their advocacy by establishing the Speaker, the President of the Senate, and the Governor as an *ultra vires* complaint board with the power to interfere with counsels' jobs and contracts. Second, through interaction with the Registry Act, section 27.710 and 27.711, Florida Statutes (1999), DPRA works a greater degree of discrimination against Petitioners who are subject to it by imposing greater restrictions on counsels' actions. Registry counsel are prohibited from receiving any funds to litigate certain claims in initial habeas corpus actions and all claims in second and successive actions. *See Asay* Petition at 29-34.

The specific provisions of DPRA supported by the Speaker, the limitation and bar rules contained in sections 6 and 7, violate Petitioners' right to equal protection of the laws in the following ways:

- by requiring people sentenced to death to file all possible claims for relief before their convictions and sentences are final, DPRA would deny Petitioners access to law enforcement investigative files until after it is too late to use them, while making these files available to all non-capitally sentenced people, *see Allen* Petition at 10-13, *Asay* Petition at 16-18;[3]

- by requiring people sentenced to death to raise claims of ineffective assistance of counsel before their convictions and sentences become final, and in some cases while they are still represented by trial counsel on appeal, DPRA forces only death sentenced people to risk waiving their Sixth Amendment right to effective, conflict-free

[3] This aspect of DPRA alone puts the lie to the Speaker's disingenuous claim, "In the DPRA the Legislature *expands* the state's efforts to provide early . . . access to important public records in order to facilitate the prosecution of postconviction claims, [and] sets out a time limitation carefully constructed to fit the claims . . . ." Amicus Brief at 10 n.13 (emphasis added). In reality, DPRA's pleading and bar rules were "carefully constructed" to *eliminate* access to "important public records in order to [prevent] the prosecution of postconviction claims."

counsel on retrial or resentencing,[4] in order to plead claims that they received ineffective assistance of counsel at trial, *see Asay* Petition at 29, 34;

- by prohibiting courts from expanding time for filing claims under any circumstances, DPRA would deny only people sentenced to death the due process right to a hearing on whether their counsel failed to file the motion;[5] and

- by requiring immediate dismissal with prejudice of all claims if any single claim is not "fully pled" or is supported by a memorandum of law that is not "concise," DPRA's pleading and bar rules would impose unachieveable burdens only on people sentenced to death without notice or an opportunity to cure the error, *see Allen* Petition at 8-10, *Asay* Petition at 18-24;

- by prohibiting state courts from considering free-standing claims of innocence, entitlement to a sentence less than death, newly discovered constitutional violations, and the benefit of new law held retroactively applicable, DPRA would deny people sentenced to death the right to habeas corpus relief based on those clearly established rules, *see Allen* Petition at 22-24, *Asay* Petition at 25-29.

The Speaker concedes that DPRA is subject to challenge on a number of fronts to which he can mount a defense. Amicus Brief at 4. His failure to acknowledge Petitioners' many equal protection arguments should be seen as a concession that he has no defense against them.

B. DPRA's Limitation and Bar Provisions Unconstitutionally Encroach Upon this Court's Exclusive Authority to Adopt Rules of Practice and Procedure and to Interpret the Florida Constitution

There is a basic dispute between Petitioners and the Speaker over what the Florida Constitution says, what is means, and who says so. Petitioners maintain that the Constitution

---

[4] Historically, in Florida there is a fifty percent chance that a capital case will be reversed and remanded on direct appeal.

[5] *See Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999) ("due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a Rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner"); *Medrano v. State*, 24 FLa. L. Weekly S477 (Fla. 1999) (same). In fact, under DPRA, if a person sentenced death even raised an argument under *Steele* and *Medrano*, the trial court would be required to threaten the person with the withdrawal of all state resources to pursue collateral relief, including exhausted claims in federal habeas corpus proceedings, unless the argument is "immediately" withdrawn. DPRA § 5. This aspect of DPRA, and its new restrictions on what state-funded counsel may file, refutes the Speaker's, "In the DPRA the Legislature expands the state's efforts to provide early legal representation . . . ." Amicus Brief at 10 n.13.

explicitly places authority to promulgate and adopt rules of practice and procedure in this Court, and as a matter of longstanding principle places authority over the interpretation of the Constitution with this Court in order to protect fundamental rights. Many of the arguments made by the Speaker and his counsel are premised on what they refer to as "our constitutional model." Amicus Brief at 6. In their model "rulemaking is inherently legislative," *ibid.*, and all substantive rights–including constitutional rights such as the right to habeas corpus relief and all the federal and state constitutional rights that are protected through habeas procedures–are held as a matter of legislative grace.[6] The problem, according to this model, is that by enforcing the Constitution, "appellate courts have been undermining the will of the majority . . . . [B]y substituting their own personal politics and whims for the work of elected officials,"[7] a "very lax, very liberal judiciary . . . [has] done everything they can to undermine [the death penalty]." Steve Bosquet and Leslie Clark, *Plan in Works to Expand State Supreme Court*, Miami Herald, March 4, 2000.[8]

The Speaker's constitutional model stands in sharp contrast to the model proposed by the Founders of the Republic and the people of the State of Florida. In the view of the Founders, "the courts were *designed* to be an intermediate body *between the people and the legislature* in order, among other things, to keep the latter within the limits assigned to their authority." The Federalist No. 78 (Alexander Hamilton). The Speaker's model consigns Article V, section 2(a) of the Florida Constitution, in which the *people* of the State of Florida explicitly placed the authority to adopt rules

---

[6] *See* Brief of Amicus at 7 n.8 ("The matter before this Court, however, is the ability of the Legislature to condition the substantive rights that parties assert when they invoke a court's jurisdiction. *All claims* and affirmative defenses *constitute or regulate substantive rights under the cognizance of the legislative power*, whether or not they constitute procedural regulation as well.").

[7] Jo Becker, *Bills Would Give Governor Tighter Grip on Judiciary*, St. Petersburg Times, March 7, 2000. Available at www.sptimes.com/News/030700/news_pf/State/Bill_would_give_gove.shtml.

[8] Also available at www.herald.com/content/sat/news/florida/digdics/017102.htm. The court-packing plan has been scuttled. Martin Dyckman, *Fending Off the Threats to Our Court*, St. Petersburg Times, March 9, 2000. Available at www.sptimes.com/News/030900/opinion/Fending_off_the_threat.shtml.

of practice and procedure in this Court's exclusive control, to a footnote as an aberration against the natural order. Of course, the people of the State of Florida once allowed the Legislature to enact rules of Court, but the people *rejected* majoritarian control over how and when rights could be exercised in favor of the courts, "the bulwarks of a limited Constitution against legislative encroachments" on fundamental rights. Federalist No. 78. By being independent and able to apply Article I, section 13 and the other constitutional provisions implicated by this action, this Court can do what the Founders and the people of this State intended, ensure that the "representatives of the people are [not] superior to the people themselves." *Id.*

It is no answer for the Speaker to rely upon the balance of power struck between the United States Supreme Court and the Congress over rulemaking, or on the Suspension Clause of the United States Constitution.[9] This Court must "give primacy to our state Constitution and . . . give independent legal import to every phrase and clause contained therein." *Traylor v. State*, 596 So.2d 957, 962 (Fla. 1992). DPRA's limitation and bar rules violate many of the fundamental rights guaranteed under Florida's Declaration of Rights, including the right to equal protection of the law, due process of law, access to courts, and access to habeas corpus relief. When called upon to apply the state Constitution

> courts should focus primarily on factors that inhere in their own unique state experience, such as the express language of the constitutional provision, its formative history, both preexisting and developing state law, evolving customs, traditions and attitudes within the state, the state's own general history, and finally any external influences that may have shaped state law.

Traylor, supra.

Relying on *Whiddon v. Dugger*, 894 F. 2d 1266 (11th Cir. 1990), the Speaker first argues that that "[t]he DPRA is a constitutional exercise of unquestionable legislative authority" (Brief at 4).[10]

---

[9] Petitioners submit that the manner in which federal rules are promulgated and adopted is far more collaborative than the Speaker suggests. Unlike the Florida Legislature, Congress works with the Supreme Court which generally approves rules *before* they are enacted by Congress.

[10] CCRC-South would note, however, The Speaker's concession that the limitations period contained in the DPRA "could be attacked on a number of grounds" (Brief at 4).

A cursory reading of *Whiddon* reveals that it in no way supports the constitutional argument it is purportedly being cited to support. At issue in *Whiddon* was whether a Florida petitioner's failure to timely seek collateral relief pursuant to Fla. R. Crim. P. 3.850 was subject to the "cause and prejudice" analysis under *Wainwright v. Sykes*, 433 U.S. 72 (1977), or, as advanced by the defendant, the "deliberate bypass" standard of *Fay v. Noia*, 372 U.S. 391 (1963). In determing that *Wainwright* applied under the facts, the Eleventh Circuit went on to address how the petitioner in that case had not established "cause" because the claim was available during the two-year period of Rule 3.850. *Whiddon*, 894 F. 2d at 1267-68. *Whiddon* is not a case discussing Florida's separation of powers doctrine under the Florida Constitution, but rather an unremarkable decision applying the well-settled "cause and prejudice" analyis for procedural default under *Wainwright*.

The Speaker's brief addresses only the putative authority for the legislature to enact a "statute of limitations" governing postconviction proceedings. Despite conceding that "statutes of limitations have been described as 'procedural in nature,'" (Brief at 6) (citation omitted), the Speaker nonetheless argues "[s]tatutes of limitations do not violate the constitutional rulemaking power of this Court" (Brief at 5). The Speaker relies solely on *Williams v. Law*, 368 So. 2d 1285 (Fla. 1979), in support of his argument. The issue addressed by the Court in *Williams* was whether the legislature's enactment of a time limitation for seeking judicial review of a county board of tax adjustment violated article V, section 2(a) of the Florida Constitution. In holding that it did not, the Court, indicating that the legislature had authority to create the limitation at issue, noted that the legislation "is not a time limit for filing an appeal from a decision of the Board of Tax Adjustment but, rather, constitutes a statute of limitations governing the time for filing an original action to challenge such decision." *Williams*, 368 So. 2d at 1287. Thus, on its face, *Williams* is inapposite. DPRA's limitation provisions for commencing a state habeas corpus action, along with legislatively mandating what such an action must allege, how and when it must be adjudicated by the courts, and

how and when appellate review is to be undertaken by this Court,[11] is noting at all like the issue in *Williams*.

The Speaker next asserts that application of article II, section 3 of the Florida Constitution "to questions of legislative jurisdiction . . . would be mistaken" because "rulemaking is inherently legislative" (Brief at 6).[12] The Speaker cites no legal authority for this proposition, relying instead on a legally unsupported proposition that the legislative action undertaken herein "constitutes positive policy-making in the inherent cognizance of the legislative power" (Brief at 6-7). The Speaker acknowledges that "[b]ut for" Article V, section 2 (a) of the Florida Constitution, "judicial procedure would be exclusively legislative" (Amicus Brief at 7). The Speaker does not explain why the "but for" constitutional prohibition on legislative rulemaking, and the affirmative choice of the people of this State to place that authority solely with this Court does not apply to the rules at issue here. The Florida Constitution clearly states that rulemaking authority vests with this Court, not the Legislature. *See, e.g., Markert v. Johnson*, 367 So. 2d 1003, 1006 (Fla. 1979). "[N]o branch of state government can arrogate to itself powers properly inhering in a separate branch." *State v. Ashley*, 701 So. 2d 338, 342 (Fla. 1997).

C. Under DPRA's Limitation and Bar Provisions Habeas Corpus Relief is not Grantable of Right, Freely and without Cost for People Sentenced to Death

Section 13 of the Florida Declaration of Rights provides that the writ of habeas corpus may not be suspended except in times of rebellion, *and* that it must be "grantable of right, freely and without cost." Art. I, § 13, Fla. Const. The latter quoted provision is not found in the federal Constitution's provision preserving the Writ of Habeas Corpus. *See* U.S. Const. Art. I, § 9, cl. 2.

---

[11]CCRC would note that the DPRA prohibits any interlocutory appeals. However, this Court recently held that it did have constitutionally-derived jurisdiction to entertain certain interlocutory appeals. *Trepal v. State*, Case No. SC94505 (Fla. March 9, 2000).

[12]This argument conflicts with the arguments advanced by the State of Florida. The State has not argued that the legislature had rulemaking authority, but rather has asserted that "the fact that some provisions of the Act may be characterized as procedural is not fatal to their own constitutionality or to the Act as a whole." Response to Petition, *Allen v. Butterworth*, at 11.

This Court must "give independent legal import to [this additional] phrase." *Traylor*, *supra*, 596 So.2d at 962. Thus, the Speaker's premise -- that the only difference between the state and federal constitutional protections of the writ is in the where they are placed--is faulty. The rest of the Speaker's arguments necessarily fall as a result.

Relying on federal law construing the writ of habeas corpus provision of the United States Constitution, the Speaker asserts that "there should be no doubt about the legislative power to regulate habeas corpus through statutes of limitations" (Brief at 9). Reference to cases such as *Lonchar v. Thomas*, 517 U.S. 314 (1996), provide no meaningful authority for the proposition that the *Florida* Legislature may set temporal or other limits on whether and how people sentenced to death may seek habeas corpus relief under the *Florida* Constitution.

This Court is the ultimate arbiter of Florida constitutional law, *Commission on Ethics v. Sullivan*, 489 So.2d 10, 13 (Fla. 1986),[13] including the parameters of the rights guaranteed under Article I, section 13. *Haag v. State*, 591 So.2d 614 (Fla. 1992). This Court has determined that a *reasonable* time for seeking habeas corpus relief in capital cases is one year from the date of finality, ***if and only if***, all people sentenced to death are equally provided fully-funded, conflict-free counsel who are immediately ready to work on the cases when the limitations period begins to run. *In re Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence has been Imposed)*, 626 So.2d 198 (Fla. 1993). "[T]he legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional right," *Munoz v. State*, 629 So.2d 90, 98 (Fla. 1993), and statutes cannot constrict rights guaranteed under the Florida Constitution. *Austin v. State ex rel. Christian*, 310 So.2d 289 (Fla. 1975). Likewise, it is ultimately this Court alone that may decide whether legislative action violates Florida's separation of powers doctrine.

The Speaker also cites *Lonchar* for the proposition that the Supreme Court "has recently

---

[13] "The judicial power is defined by the declaration of policy as follows: The judicial branch has the purpose of...adjudicating any conflicts arising from the interpretation or application of the laws." *Id.* (internal citations omitted)

addressed the applicability of statutes of limitations to claims cognizable in habeas corpus proceedings" (Brief at 8). This is not accurate. *Lonchar* did not involve a statute of limitations question; the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") did not become effective until April 24, 1996, weeks **after** the decision in *Lonchar*. Rather, *Lonchar* addressed whether the Eleventh Circuit could dismiss Lonchar's first habeas petition for reasons other than those enumerated in the federal Rules Governing Habeas Corpus Cases. Any reference to the word "statutes" used by the *Lonchar* Court did not refer to statutes of limitations, as it was not until *Felker v. Turpin*, 518 U.S. 651 (1996), where the Supreme Court first addressed the statute of limitations argument under the AEDPA.[14]

That the United States Supreme Court "yields to the legislatively established balance" between liberty and finality (Brief at 10), is not germane to the serious constitutional issues presented by the passage of DPRA. While "the federal Constitution secures a common degree of protection for the citizens of all fifty States, . . . state courts and constitutions have traditionally served as the prime protectors of their citizens' basic freedoms." *Traylor*, *supra*, 596 So. 2d at 961. "When called upon to decide matters of fundamental rights, Florida state courts are bound under federalist principles to give primacy to our state Constitution and give independent legal import to every phrase and clause contained therein." *Id.* at 962. Although the Speaker asserts that "this Court should not stretch the state's constitutional protection of habeas corpus into a realm of judicial dominance beyond that which the United States Supreme Court asserts for itself," (Brief at 11), he is essentially asking this Court to abdicate one of its most fundamental roles -- to interpret the Florida Constitution and enforce the rights accorded therein. *Id.* at 963 ("No other broad formulation of legal principles,

---

[14] The Speaker argues that "Congress retains the power to establish a time bar to habeas corpus claims, without violating the federal prohibition of suspending the Great Writ" (Brief at 9). This statement, however, is only partly true. In *Felker*, the Supreme Court determined that the AEDPA was not an unconstitutional suspension of the writ of habeas corpus because the AEPDA did not alter the Supreme Court's jurisdiction to entertain original habeas petitions. *Felker*, 518 U.S. at 658. Under the DPRA, however, a collateral attack by state-paid counsel can only consist of **one** postconviction motion, **one** appeal therefrom, and **one** petition for habeas corpus alleging ineffective assistance of appellate counsel. No state forum would be available for a claim that did not fit the narrow exception set forth in § 924.056 (5).

whether state or federal, provides more protection from government overreaching or a richer environment for self-reliance and individualism than does this 'stalwart set of basic principles'").

E. DPRA's Limitation and Bar Provisions Look Like a Statute of Repose, Act Like a Statute of Repose, but . . . .

The Speaker's attempt to defend DPRA by claiming that "the judicially created time bars in Fla. R. Crim. Proc. 3.850 and 3.851 implicitly establish that time bars on postconviction claims do not violate Art. I, section 21, Fla. Const." (Amicus Brief at 11), ignores that DPRA both shortens the time bar and prohibits amendment with the discovery of new evidence. The existence of a prior time bar adopted by this Court is not dispositive here and cannot help DPRA withstand constitutional challenge when its effect is to deny capital defendants their right of access to the courts. "Where rules and construing opinions have been promulgated by this Court relating to the practice and procedure of all courts and a statutory provision provides a contrary practice or procedure, . . . the statute must fall." *School Board of Broward County v. Surette*, 281 So. 2d 481 (Fla. 1973), *receded from on other grounds*, *School Board of Broward County v. Price*, 362 So. 2d 1337 (Fla. 1978).

The Speaker also claims that DPRA is constitutional because other limitations periods have withstood constitutional challenge before this Court. Amicus Brief at 11. In fact, DPRA not only shortens the period in which to file a capital post-conviction claim, it actually denies "the opportunity for their prosecution" which the Speaker admits is essential to satisfy the constitutional guarantee of access to courts. By requiring that applications for habeas corpus relief be filed before evidence is available to capital defendants and prohibiting amendment when such evidence becomes available, DPRA denies capital post-conviction defendants a judicial forum in which to raise the claims that entitle them to relief in clear violation of the right of access to court. *Overland Construction Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979) (holding that a statute of repose that operated as a complete bar to bringing a cause of action violated the plaintiff's constitutional right to access to courts).

The Speaker refers to DPRA's time period for filing a claim as a statute of limitation; however, by its terms, it would function like a statute of repose by completely barring litigation before a cause of action accrues. *Whigham v. Shands Teaching Hosp. and Clinics, Inc.*, 613 So. 2d

110, 112 (Fla. 1st DCA 1993)("A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues. A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action."). An absolute bar to raising a habeas corpus claims that a capital conviction or death sentence is unconstitutional, whether the Speaker prefers to call it a statute of repose or a statute of limitation, is unconstitutional if it precludes the litigation of the claims before the facts supporting those claims are known to defendants.[15] In order to withstand constitutional challenge, a time bar to litigation of capital habeas corpus claims must operate from the time of discovery of the facts supporting a claim.[16] *Diamond v. E.R. Squibb and Sons, Inc.*, 397 So. 2d 671 (Fla. 1981)(holding

---

[15] This Court has upheld statutes of repose that operate as a complete bar to raising causes of action in both product liability and medical malpractice cases. *Carr v. Broward County*, 541 So. 2d 92 (Fla. 1989); *Pullum v. Cincinnati, Inc.*, 476 So. 2d 657 (Fla. 1985). However, those statutes cannot be compared to DPRA which seeks to completely deny capital defendants the opportunity to raise claims that may prove they are actually innocent of the crimes for which they were convicted, that they are innocent of the death penalty, or that their trial was fundamentally unfair due to constitutional error.

16 This Court has repeatedly allowed a rule 3.850 motion to be amended **following the disclosure of public records**. *See, e.g.*, *Reed v. State*, 640 So. 2d 1094, 1098 (Fla. 1994) ("Reed should be allowed a reasonable time to obtain any records to which he is entitled and allowed a reasonable time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents"); *Hoffman v. State*, 613 So. 2d 405, 406 (Fla. 1993) ("Hoffman may seek the relevant public records . . . and within a reasonable time shall be permitted to amend his petition under rule 3.850, raising any new ground brought to light by the disclosure of the public records"); *Walton v. Dugger*, 634 So. 2d 1059, 1062 (Fla. 1993) ("Should the trial court determine that Walton is entitled to disclosure of the records at issue, we direct that Walton be granted an additional thirty days from the rendition of that ruling in which to amend his rule 3.850 motion to permit additional claims or facts discovered as a result of the disclosure to be raised before the trial court"); *Anderson v. State*, 627 So. 2d 1170, 1172 (Fla. 1993) ("The various state agencies must either comply with Anderson's requests or object pursuant to the procedures set forth by this Court and under chapter 119. We direct that Anderson be granted thirty days to amend his motion, computed from the date the various state agencies deliver to Anderson the records to which he is entitled"); *Lopez v. Singletary*, 634 So. 2d 1054, 1058 (Fla. 1994) ("Therefore, we direct the state attorney's office to tender to the trial court the portions of its records that it sealed for an in camera inspection of those documents. . . . If those documents reveal any new claims, i.e., claims other than those raised in the instant motion and petition, Lopez will have thirty days from the date of access to file an amended postconviction motion raising those new claims"); *Provenzano v. Dugger*, 561 So. 2d 541, 547 (Fla. 1990) ("[W]here a defendant's prior request for the state attorney's file has been denied, we believe that it is appropriate for such a request to be made as part of a motion for postconviction relief. . . In the event that a disclosure is ordered, the defendant will then have an opportunity to amend his motion to allege any *Brady* claims which might be exposed"); *Mendyk v. State*, 592 So. 2d

that a statute that barred the filing of a cause of action before the cause had accrued would violate the right of access to the courts guaranteed by Article I of the Florida Constitution); *Batilla v. Allis Chalmers Manufacturing Co.*, 392 So. 2d 874 (Fla. 1981)(same); *Universal Engineering Corp. v. Perez*, 451 So. 2d 463 (Fla. 1984)(same); *Overland Constructon Co. v. Sirmons*, 369 So. 2d 572 (Fla. 1979)(holding that "the unique restriction imposed by our constitutional guarantee of a right of access to courts makes it irrelevant that this `statute of repose' may be valid under state or federal due process or equal protection guarantees"); *Creviston v. General Motors Corp.*, 225 So. 2d 331 (Fla. 1969)("The purpose served generally by statutes placing a time limit on the right to assert claims is to prevent a stale assertion of such claims after an aggrieved party is placed on notice of an invasion of his legal rights."); *Owens-Corning Fiberglass Corp. v. Corcoran*, 679 So. 2d 291 (Fla. 3d DCA 1996); *In re Estate of Smith*, 640 So. 2d 1152 (Fla. 1st DCA 1994).

The Speaker misrepresents the effect of DPRA in an attempt to persuade this Court that it does not deny capital defendants their right of access to court. The Speaker claims that the "limitations periods remain approximately what they have been for most postconviction claims" and that the time for filing a post-conviction motion "would rarely be less than one year after sentencing, so it would typically allow more time than presently provided for investigation and prosecution of capital postconviction cases." (Brief at 13). This is not correct. The Speaker distorts the DPRA to

---

1076,1082 (Fla. 1991) ("Having found merit to Mendyk's claim under chapter 119, Florida Statutes (1989), we extend the two-year time limitation of Florida Rule of Criminal Procedure 3.850 for sixty days from the date of disclosure solely for the purpose of providing Mendyk the opportunity to file a new motion for post-conviction relief predicated upon any new claims arising from the disclosure"); *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991) ("[T]he state attorney shall disclose to Engle's attorney those portions of his file covered by chapter 119, Florida Statutes (1987), as interpreted in *State v. Kokal*, 562 So. 2d 324 (Fla. 1990). The two-year time limitation of Florida Rule of Criminal Procedure 3.850 shall be extended for sixty days from the date of such disclosure solely for the purpose of providing Engle with the opportunity to file a new postconviction motion relief predicated upon any claims under *Brady v. Maryland*, 373 U.S. 83 (1963), arising from the disclosure of such files. In this manner, Engle will be placed in the same position as he would have been if such files had been disclosed when they were first requested"); *Muehleman v. Dugger*, 623 So. 2d 480 (Fla. 1993) ("Muehleman has sixty days from the date he receives the records to which he is entitled or from the date of this opinion, whichever is later, to amend his 3.850 petition to include any facts or claims contained in the sheriff's records").

argue that capital post-conviction defendants will actually benefit because litigation will occur when "the evidence and the inmate's and witnesses' memories are fresher" and "[r]ather than denying access to courts, the policy promotes speedy justice by adjudicating all meritorious claims sooner." (Brief at 13-14). Rather than "speedy justice," DPRA will result in no justice at all for those men and women whose claims cannot be known before their motions must be filed. DPRA violates Petitioners' right of access to the courts by completely barring their claims before they accrue in violation of Article I of the Florida Constitution.

F. DPRA's Arbitrary and Inflexible Limitation and Bar Provisions Violate Petitioners' Right to Due Process of Law

1. Less is Not More

Petitioners have described in detail how DPRA's arbitrary and inflexible pre-finality limitations provisions violate due process. *See Asay* Petition at 15-24. DPRA's so-called "dual track" creates a shortcut to the death house by bypassing the courthouse. By requiring Petitioners to plead all possible claims while evidence of constitutional violations is hidden under a blanket exception to Florida's public records law, and by pitting Petitioners' Sixth Amendment and Due Process Clause rights to counsel against their right to enforce those rights through state habeas corpus proceedings, DPRA "destroy[s] actions before they are susceptible of enforcement." Amicus Brief at 14. This, as the Speaker apparently would concede, violates due process. *Ibid.* The Speaker's unrealistically sanguine claim that "DPRA promotes, for the first time, the investigation and analysis of postconviction claims while the evidence is fresh," proves Petitioners' allegations regarding the cynicism of the statute's proponents. *See Asay* Petition at 18.

Still the Speaker protests the good intentions of DPRA's proponents. By requiring all possible claims to be pled while records are concealed and relevant information is subject to the attorney-client privilege protected by the Sixth Amendment, DPRA "promotes speedy justice by adjudicating all meritorious claims sooner." Amicus Brief at 14. Viewed in light of DPRA's totally inflexible pre-finality filing deadline and its prohibition on amendments to timely filed pleadings, the Speaker's claim that DPRA's would-be limitations "would typically allow more time than presently provided for investigation and prosecution of capital postconviction cases," Amicus Brief at 13, is unpersuasive.

In addition, as the Speaker concedes, DPRA contains no tolling provisions allowing for flexible application of the limitations provision. Amicus Brief at 15 n.17. "The very nature of due process negates any concept of inflexible procedures universally applicable to any imaginable situation." *Mitchell v. W.T. Grant*, 416 U.S. 600, 610 (1974). Perhaps recognizing that DPRA's limitation and bar provisions are doomed by this rule of constitutional law, the Speaker attempts to

rewrite DPRA.

2. Can't Get There from Here

DPRA plainly states that "**all claims *shall be barred* unless they are commenced within 180 days after the filing of the appellant's initial brief in the Florida Supreme Court** on direct appeal . . . . " DPRA § 6 (creating § 924.056(3)(b), Fla. Stat.) (emphasis added). "**All capital postconviction actions** pending on the effective date of this act ***shall be barred, and shall be dismissed with prejudice*, unless fully pled** in substantial compliance with section 924.058 . . .," by January 8, 2001 or any earlier, pre-established date. DPRA § 7 (creating § 924.057(3), Fla. Stat.) (emphasis added). "**A capital postconviction action filed in violation of the time limitations provided by statute *is barred,* and all claims therein *are waived*. A state court *shall not consider* any capital postconviction action filed in violation of sections 924.056 or sesction 924.057.**" DPRA § 9 (creating § 924.059(8), Fla. Stat.) (emphasis added).

The Speaker claims the repeated use of the words "shall be barred" and "shall not consider" "constitutes an affirmative defense, not an absolute destruction of a claim," Amicus Brief at 15, which is "subject to waiver by the state." *Id.* at 15 n.17. With all due respect, this is untenable. The Speaker is but one member of the Legislature. The Legislature as a whole explicitly stated its that intention that a "person sentenced to death or that person's capital postconviction counsel *must file* any postconviction legal action in compliance with the statutes of limitations established in section 924.056 and elsewhere in this chapter." DPRA § 5 (creating § 924.055(1), Fla. Stat.) (emphasis added). As if this wasn't clear enough, DPRA punctuates the point with a death threat: "Failure to *seek* relief within the statutory limits constitutes grounds for issuance of a death warrant . . . ." DPRA § 4 (amending § 922.095, Fla. Stat.)(emphasis added). If the Legislature as a whole intended to create non-absolute limitations rules subject to waiver, it would not have used the terms it used. Regardless of who is making the request, this Court simply may not rewrite a statute where its plain terms make the Legislature's intentions clear. *Brown v. State*, 358 So.2d 16 (Fla. 1978). The statute that was passed contains an unconstitutional absolute bar on consideration of statutorily untimely

claims, and that is the only statute the Speaker may defend.

Finally, only the Speaker views the limitation and bar provisions as subject to waiver. As the Speaker points out, the State views these provisions as a statute of repose. Consequently, any suggestion that State might "waive" or simply not assert the plainly self-executing limitation and bar provisions is without textual support in the statute, empirical support from the party being relied upon, and historical support based on the State's consistent position, taken even before DPRA, that all claims pled outside the time periods in the rules are barred unless they meet the test for newly discovered evidence.

3. No Exceptions, No Excuses

As noted in Section II.B, *supra*, DPRA's restrictions on what state-paid counsel may file, its reliance upon conflicted, hamstrung, and under-funded Registry counsel, and its threat against the livelihood of CCRC and contract counsel, drastically impair Petitioners' access to habeas corpus relief. For example, mentally ill Petitioners such as David Johnston, Tony Watts, Antonio Carter, and others would be barred from receiving state resources because they are incompetent to proceed in postconviction proceedings, DPRA § 6, and counsel could not enforce their Eighth Amendment right not to be executed while incompetent, *Ford v. Wainwright*, 477 U.S. 399 (1986), because such an action is not "authorized by statute," DPRA § 2, and because Registry counsel are denied funds for even investigating such claims. § 27.711(1)(c) & (4), Fla. Stat. (1999). "Due process considerations dictate that a court's actions in first appointing then discharging counsel must not work to the detriment of the indigent defendant, i.e., a defendant should not be left in a position worse than if no counsel had been appointed in the first place." *State v. Ull*, 642 So. 2d 721, 724 (Fla. 1994). Obviously these considerations were wholly absent from the Speaker's mind and those of his colleagues when they passed DPRA. The statute is unconstitutional.

4. The Execution of the Innocent Act Redux

The Speaker asserts that "[t]he DPRA makes provisions for late discovered evidence of actual innocence" (Brief at 14). This is just not true no matter how many times it is repeated by proponents

of the Act. Again, the Speaker's argument is defeated by the plain words of the statute. Under the DPRA, a second or successive motion in a capital case filed by state-paid counsel "**shall be barred**" unless "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, **but for constitutional error, no reasonable factfinder would have found the defendant guilty of the underlying offense.**" § 924.056 (5) (as amended) (emphasis added). This is **not** a freestanding claim of "actual innocence" that was previously permitted under *Jones v State,* 591 So. 2d 911 (Fla. 1991); the DPRA standard requires an additional showing of constitutional error. This is the exact same standard as the federal standard, and the federal courts have made it very clear that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." *Herrera v. Collins*, 506 U.S. 390, 400 (1993). *See also id.* at 404 ("a claim of `actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits").[17]

Moreover, the Speaker fails to mention that the DPRA precludes a large class of non-innocence type claims from ever being heard in the courts of Florida. For example, were a capital defendant to discover information which does not prove innocence but rather proves a deprivation of an impartial judge, *see, e.g.*, *Porter v. State,* 723 So. 2d 191 (Fla. 1998), or information which demonstrates that the defendant might not be eligible for the death penalty, *see, e.g.*, *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), or a new rule of law deemed to apply retroactively, *see Witt v. State*, 387 So. 2d 922 (Fla. 1980), these claims would be barred in a successive postconviction motion, and no state-paid counsel would be allowed to invoke the original jurisdiction of this Court

[17]This standard is arguably stricter than the one struck down by the Court in *Jones v. State,* 591 So. 2d 911 (Fla. 1991); at best, it is an equally harsh standard as the one found by the Court to be "almost impossible to meet" and ran "the risk of thwarting justice in a given case." *Id.* at 915.

because of the "one motion, one appeal, one habeas" restriction.[18] This result is not only unfathomable, but it is a blatant suspension of the writ of habeas corpus and a violation of due process.

5. The Quantity of Mercy in Florida is Nil

Finally, the Speaker asserts that "finality in imperfect judicial proceedings and actual justice for the innocent can be harmonized only through an external intervention like clemency" (Amicus Brief at 16). *Jones* holds to the contrary. Additionally, Petitioners are constrained to point out that this statement, in conjunction with the Speaker's argument that DPRA must be viewed in light of the legal representation which the State makes available to Petitioners, is misleading. CCRC and Registry attorneys are statutorily precluded from representing their clients in clemency proceedings. There is no entitlement to clemency counsel before an execution, when newly discovered evidence of innocence is available for consideration. Thus, the attorneys most familiar with the "imperfections" in a particular case are not allowed to bring a clemency petition before the Governor and Cabinet. No mechanism exists to ensure that clemency counsel is appointed for each and every inmate; some inmates are lucky and some are not. It is that arbitrary.

Politically, compared to other states, Florida's clemency process stacks the deck against an inmate. Florida's Governor does not have sole authority to grant clemency; the Governor must have a recommendation from the clemency board on which he, the Attorney General, and other elected officials sit. No person sentenced to death in this State has received clemency since 1983. In contrast, several people have been granted habeas corpus relief based on successive applications brought after a death warrant was signed. Those who have studied the clemency process nationally agree that clemency generally is not a meaningful avenue for correcting injustices in capital cases. *See, e.g.*, Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 38 N.Y.U. Rev. of L. & Soc. Change 255 (1990-91).

---

[18]Of course, no restrictions apply to privately-retained or *pro bono* counsel. *See* Section II, *supra*.

IV.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions and Replies filed in these cases, sections 6 and 7 of Chapter 2000-3, Laws of Florida, should be declared unconstitutional.

Respectfully submitted,

NEAL A. DUPREE
Capital Collateral Regional Counsel
Southern Region
Florida Bar. No. 311545
TODD G. SCHER
Litigation Director
Florida Bar. No. 0899641
OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL
101 NE Third Avenue, Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284
Counsel for Petitioners in No. SC00-113

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080
ANDREW THOMAS
Chief Assistant CCC - NR
Florida Bar No. 0317942
OFFICE OF THE CAPITAL
COLLATERAL COUNSEL
1533-B South Monroe Street
Tallahassee, FL 32301
(850) 488-7200
TIMOTHY P. SCHARDL
Special Assistance CCC-NR
Florida Bar No. 0073016
LAW OFFICES OF MARK E. OLIVE, P.A.
320 West Jefferson Street
Tallahassee, Florida 32301
(850) 224-0004
(850) 224-3331 (facsimile)
Counsel for Petitioners in No. SC00-154

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by United States Mail to Larry B. Henderson, Asst. Public Defender, 112 Orange Avenue, Suite C, Daytona Beach, FL 32114; Christina A. Spaulding, Asst. Public Defender, 1320 N.W. 14th Street, Miami, FL 33125; Michael Minerva, Public Defender, Leon County Courthouse, Tallahassee, FL 32301; Robert A. Butterworth, Attorney General, Richard B. Martell, Chief of Capital Appeals, Carolyn M. Snurkowski, Division Director, Tallahassee, FL 32399; Todd G. Scher, Litigation Director, Capital Collateral Counsel-Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301; Eugene Zenobi, 325 Almeria Avenue, Coral Gables, FL 33134; Terence Lenamon, 1000 Ponce de Leon Blvd., Suite 208, Coral Gables, FL 33134; John W. Moser, Capital Collateral Counsel-Middle Region, 3801 Corporex Park Drive, Suite 201, Tampa, FL 33619; J. Rafael Rodriguez, 6367 Bird Road, Miami, FL 33155; and Tom Feeney, House of Representatives, The Capitol, Tallahassee, FL 32399, on this 10th day of March, 2000.

TIMOTHY P. SCHARDL