IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO RULE OF
FLORIDA CRIMINAL PROCEDURE
3.851 (COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED)
_____/

No. SC96646

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

The Florida Public Defender Association (The Association) respectfully submits the following comments to the amendments to Florida Rule of Criminal Procedure 3.851. Part I of these comments are addressed to the proposal known as the Morris Committee Rule;[1] Part II addresses the alternative proposal known as the Padovano Rule.

INTRODUCTION

[1] The Morris Committee is the group of judges appointed by this Court to "assist the Court in developing an appropriate case management plan for capital postconviction relief and for evaluating and recommending to the Court any amendments to Florida Rules of Criminal Procedure which would improve the proper processing of these proceedings to adjudication." IN RE: SUPREME COURT COMMITTEE ON POSTCONVICTION RELIEF IN CAPITAL CASES, Administrative Order (Amended), March 31, 1999 (Internet access at http://www.flcourts.org/sct/sctdocs/probin/sc96646.pdf).

On December 9, 1999, a round table discussion was held by this court on the Morris Committee's Proposed Rule. At that meeting the Padovano Rule, an alternative that had not been subject to written comment, was introduced. That same day the Governor announced the call for a special session of the Legislature, convening January 5, 2000, to consider changing the method of execution and revising the capital postconviction process.[2]

Despite the uncertainty flowing from the simultaneous activity in the Legislature and the court, the round table discussion went forward with the court receiving written and oral submissions. At the conclusion, the Court suggested that supplemental comments be submitted on the new Padovano Rule.

Subsequently the Legislature passed and the Governor signed two bills, one providing for lethal injection as an alternative to electrocution (the lethal injection bill),[3] and the other substantially revising the procedures for capital postconviction litigation, including repeal of Fla.R.Cr.P. 3.851, 3.852, and to the extent of inconsistency, 3.850 (The Death Penalty Reform Act "DPRA").[4]

Following motions filed by at least one office of Capital Collateral Regional Counsel and one Public Defender Office representing clients on direct appeal of death sentences, this court

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[2] Similar to the assumptions in the letter of the Morris Committee, the Governor impugned the process with the pejorative assertion that "protracted postconviction legislation has resulted in substantial unnecessary delay in the execution of death sentences and has frustrated the ends of justice." Proclamation, State of Florida, Executive Department, December 9, 1999.

[3] SB10-A (first engrossed) Special Session "A" 2000.

[4] CS/HB 1-A (second engrossed as amended) (Special Session "A" 2000).

issued an order restoring nunc pro tunc to the date of repeal (January 14, 2000), the former Rules 3.850, 3.851, and 3.852.[5]

A report from The Florida Bar Criminal Procedure Rules Committee dated February 21, 2000, recommended several changes to the Morris Rule. The Rules Committee, however, left other portions of the Rule intact, including provisions governing amendments and successor petitions. The Association fervently believes those successor and amendment provisions are not well founded and if adopted will result in grave injustice, contrary to this Courts' tradition of dealing fairly with persons facing execution.

These comments by the Association are intended to (1) reiterate and add to the written submission to Chief Justice Harding at the December 9th round table discussion on the Morris Rule and, (2) present the Association's views, as requested at the conclusion of that discussion, on the Padovano Rule.

PART I

This section addresses the Morris Rule. The Morris Rule proposes wholesale changes that repeal safeguards evolved through adversary proceedings and court decisions over many years. By adopting the proposed rules the court would be abandoning, under the guise of procedure, important safeguards that have served the interests of justice in a fair and balanced way. Without adequate exposition for so drastically revising the entire system, the Morris Rule

[5] IN RE:RULES GOVERNING CAPITAL POSTCONVICTION ACTIONS, Case No. SC00-242, February 7, 2000.

and accompanying letter (the Letter) propose a revolutionary scheme to tip the scales against those whose rights have been necessarily guarded by the courts of this state.

At the outset, the Association disagrees with assumptions permeating the Rule and the committee's accompanying letter. The committee implies that problems in death penalty litigation are the result of "dilatory practices of defense counsel" (Letter at 5). Such statements show that frustration with the process has spurred a search for scapegoats. Rather, we submit, all efforts to speed up or streamline the death penalty process encounter the intractable complexity of the issues and the seriousness of the consequences. The quest for finality in the process must always be balanced against the awesome finality of the penalty. Rules, no matter how well crafted, are simply tools for achieving a just result. When rules alone are looked to as the final solution they will inevitably fail, as the task exceeds their potential.[6]

Seemingly the committee believed, as had other similar studies of the past, that all problems would be solved by adoption of a proper set of rules.[7] But this Court knows too well from its own experience that rules do not replace resources. The new procedures and rigid

[6] Justice Thomas, certainly not an opponent of the death penalty, described the United States Supreme Court's procedures as "Byzantine...jurisprudence...." Knight v. Florida, 120 S. Ct. 459 (1999) (Thomas, J., concurring in denial of certiorari). Changing cosmetic features embodied in rules avoids grappling with the more substantive underlying issues. See, Callins v. Collins, 510 U.S. 1141, 127 L. Ed.2d 435, 437 (1994) (Blackmun, J., dissenting) ("despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge [of imposing the death penalty fairly and with reasonable consistency], the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake.").

[7] In recent years the court and the Legislature have come up with a succession of rule and statute changes, and even a constitutional amendment, in efforts to "speed up the process", as if that were the superior goal. The proper goal is to ensure that justice is done, and justice is not defined, as the Legislature apparently has, as hastening execution. Sometimes, as this Court has so often held, a just result is a life sentence or an order of release.

procedural bars place excessive faith in untried remedies to be carried out by unidentified counsel of unknown skill. Adopting the Morris Rule, even with the Rules Committee amendments, is like carrying passengers on an experimental airplane making its first test flight. The risk is simply too great.

This Court's Order in IN RE: RULES GOVERNING CAPITAL POSTCONVICTION ACTIONS, Case No. SC00-242 (Feb. 7, 2000), restores temporarily the procedural rules repealed by the DPRA, saying "there is confusion among lawyers and judges relative to which rules of criminal procedure to apply." The Association agrees there is confusion, but points out that this state of affairs was needlessly created by the Legislature's failure to provide a reasonable schedule for implementing the DPRA. The radical changes made by that act became effective immediately, rather than being phased in gradually. DPRA, section 22. As a result, this Court and all others affected by the DPRA are forced to consider in haste new rules to patch the obvious holes in it. Such a serious endeavor should not be rushed. The Legislature's lack of forethought should not pressure this Court into hasty action that would in the long run prove unwise and unfair.

A. Specific Comments. The following are directed to specific provisions of the Morris Rule. Many of these were addressed in the Association's written submission at the round table discussion, but are repeated here to give a complete rendering of the Association's position in these proceedings.

1. Sufficiency of the Motion. Presently Rule 3.850(d) gives the defendant the right to an evidentiary hearing unless the "motions, files, and records in the case conclusively show that the prisoner is entitled to no relief." This standard is absent from Proposed Rule 3.851(e)(8),

which says that "if the motion, files and records in the case show that the defendant is entitled to no relief, the court shall ... deny the motion...." The key word "**conclusively**" has been dropped from the rule, which may alter the prevailing standard for ruling on the motion. Compare, however, Proposed Rule 3.851 (h)(2), which says that the summary appeal procedures of Fla.R.App.P. 9.140(i) apply if the trial judge has denied an evidentiary hearing on the ground that "the attached files and records **conclusively refute** the defendant's claim." The Proposed Rule should retain the clarity of Rule 3.850 that requires an evidentiary hearing absent a **conclusive** refutation of the claim.

2. Finality. Proposed Rule 3.851(c)(1)(A) says that the direct appeal will be final when the Florida Supreme Court issues its mandate, moving the date forward from the present benchmark, the denial of certiorari by the United States Supreme Court (or the expiration of time to file certiorari). Rule 3.851(b)(1). The Committee reasoned this change would speed the process without harming it, but overlooked or misunderstood several important factors.[8]

First, the committee assumed that it would be "a rare exception for [the U.S. Supreme] court to grant review so early in the process" (Letter at 3). But full-fledged certiorari (as opposed to grants dependent on the ruling in a lead case) was granted at least nine times following direct review of this Court's decision in capital cases.[9] By contrast, review was granted at least seven

[8] Filing a petition for discretionary review of the direct appeal decision affirming death is virtually required under this Court's interpretation of equal protection. Green v. State, 620 So. 2d 188 (Fla. 1993).

[9] Proffit v. Florida, 428 U.S. 242 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Dobbert v. Florida, 432 U.S. 282 (1977); Enmund v. Florida, 458 U.S. 782 (1982); Barclay v. Florida, 463 U.S. 939 (1983); Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989); Sochor v. Florida, 504 U.S. 527 (1992); and Espinosa v. Florida, 505 U.S. 1079 (1992).

times in postconviction.[10] Contrary to the Committee's belief, certiorari is granted more frequently in direct appeal than in postconviction.

Second, changing finality would also affect the postconviction process if certiorari were granted. That is, a grant of certiorari by the U.S. Supreme Court would necessarily affect the ruling on direct appeal; the Proposed Rule makes no provision for that possibility. The postconviction timetable depends on a final ruling on the appeal, yet that finality could not be achieved while the decision is subject to certiorari review. If granted, a certiorari petition would stay the judgment and sentence, but would not stay or otherwise postpone the requirement of going forward with the postconviction proceedings, even though those proceedings might be mooted or altered by the ultimate decision of the United States Supreme Court.

[10] Wainwright v. Goode, 464 U.S. 78 (1983); Ford v. Wainwright, 477 U.S. 399 (1986); Hitchcock v. Dugger, 481 U.S. 393 (1987); Dugger v. Adams, 489 U.S. 401 (1989); Parker v. Dugger, 498 U.S. 308 (1991); Lambrix v. Singletary, 520 U.S. (1997); and Bryan v. Moore, (U.S. cert. granted, Oct. 26, 1999, No. 99-6723; dismissed as improvidently granted, 120 S. Ct. 1003, Jan. 24, 2000).

Third, the committee assumed that the process would not be hindered by simultaneous proceedings as "the matters raised are often the same as those raised in the state action" (Letter at 3).[11] As a matter of law that is simply wrong because at this stage certiorari and postconviction are mutually exclusive. Certiorari is for direct appeal issues; postconviction relief is for claims "which were unavailable at the time of trial or direct appeal...." and excludes claims "based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal...." Rule 3.850; Proposed Rule 3.851(a).

Finality also affects the timing of petitions for extraordinary remedies such as habeas corpus. Proposed Rule 3.851(c)(2) requires these petitions to be filed in the Florida Supreme Court within 120 days of the appointment of collateral counsel. This modifies the existing and sensible requirement of filing the habeas petition along with the brief on appeal from the denial of postconviction relief. Rule 3.851(b)(2). No rationale supports the change, which would again require simultaneous access to the record by two sets of counsel, but worse, would have collateral counsel questioning the effectiveness of the appellate lawyer who is still representing the client on certiorari (a more detailed analysis of the problems created by overlapping counsel is presented in Part II, infra).

[11] Although not entirely clear, the committee appears to have equated the "matters raised [in certiorari with] those raised in the state [postconviction] action...." Letter at 3.

In light of the committee's questionable understanding of this stage of the process, its recommendations for changing the event marking finality and the filing of the habeas petition should be reexamined and rejected.[12]

[12] Practical problems are inherent in the change. For one, the direct appeal attorney seeking certiorari will still have and need the record in order to proceed in the U.S. Supreme Court. At the same time, the record is essential to postconviction counsel. Both cannot have the single record, often quite voluminous. Making a duplicate is a remedy, but who bears the burdens of time and expense doing so?

3. Time Limitations and Extensions. Proposed Rule 3.851(c)(1)(A) requires postconviction motions to be "fully pled" and 3.851(d)(1)-(6) describes the motion's contents. Proposed Rule 3.851(d)(6) attempts to put teeth into the "fully pled" requirement by allowing the court on its own or at the state's request to strike the motion for failure to comply with any of the time limitations or pleading requirements (including not "fully pled", exceeding the 50 page limitation, or various other pleading flaws). Failure to remedy the deficiency in 30 days requires dismissal of the motion "with prejudice." Such harshness has few, if any, counterparts in Florida litigation, civil or criminal. It purports to divest both trial judges and this Court of the discretion needed to accommodate unforseen or unavoidable events that cannot be itemized in advance.

The ultimate objective being due process, the rigidity of the Proposed Rule promotes the opposite end. "It has long been established that flexibility is a concept fundamental to a determination of the adequacy of a statute's due process protections.... any concept of rigid procedure is incompatible with the elastic nature of due process." (Emphasis added). Caple v. Tuttles's Design-Build, 25 Fla. L. Weekly S76,S77 (Fla. Feb. 3, 2000). This mandatory provision of the Proposed Rule should be stricken as unworkable and unfair; it could forfeit a legitimate claim by a person sentenced to death in violation of the basic due process principle that "requires balancing the interests of the parties involved." Caple, supra, at S77, citing Connecticut v. Doer, 501 U.S. 1, 2 (1991).[13]

Under Proposed Rule 3.851(c)(1)(C), grounds for extension must rise to the level of preventing a "manifest injustice" rather than the present requirement of "good cause." A further

[13] Unfairness is further shown by the absence of any page limit or sanction connected with the state's answer. Proposed Rule 3.851(e)(6).

restriction prevents courts from granting an extension on grounds of pending public records requests, other litigation, or "failure of collateral counsel to timely prosecute a case...." The Proposed Rules do not explain what exactly is meant by "failure of ... counsel to timely prosecute a case..." nor do they specify what relief (if any) is available to the person when counsel is unable to obtain an extension or to timely file due to a systemic failure such as lack of qualified counsel, or when counsel is appointed late due to withdrawal or disqualification of prior counsel, or in the event of the illness or death of counsel.[14]

The rule irrationally penalizes those seeking public records while rewarding those who successfully suppress them. Proposed Rule 3.851 (c)(1)(C) says that the "pendency of public records requests or litigation...." shall not be grounds for extending or tolling the time for filing any pleading. Contrary to this provision, the negligence, refusal, or recalcitrance of the state in providing public records to support a claim must be deemed a legitimate ground for an extension. See Ventura v. State, 673 So. 2d 479, 481 (Fla. 1996) ("The State cannot fail to furnish relevant

[14] To avoid unfairness due to lack of available postconviction counsel this Court had to extend dates for compliance in the past. E.g., AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE--CAPITAL POSTCONVICTION PUBLIC RECORDS PRODUCTION (TIME TOLLING), 708 So. 2d 913 (Fla. 1998). By contrast, the inflexibility of the Proposed Rules penalize the person sentenced to death for potential shortcomings in the system. If enforced in this manner, the Rules deny due process.

information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to [provide public records]".)

The Proposed Rules say denial of an extension motion is not grounds for appeal.[15] While this may seem efficient, it has severe drawbacks. For example, if the trial court errs by denying an extension it would be more efficient to correct the wrong immediately than after trial court hearings which would be voided by the reversal months or years later. That would add, rather than reduce, delay. And as a matter of policy this Court should not be deprived of jurisdiction or discretion to hear interlocutory appeals as expressly forbidden by Proposed Rule 3.851(h).

The availability of interlocutory review also makes it easier for this Court to maintain consistent statewide standards for granting or denying extensions as it does now under Rule 3.851(b)(4).

[15] Prohibiting an appeal from the denial of a motion for extension of time may prevent that ruling from being raised on plenary appeal. Proposed Rule 3.851(h) expressly prohibits interlocutory appeals, so arguably the ban on appealing the denial of an extension would be superfluous unless it is intended to render such ruling immune from <u>any appellate review</u>.

The committee's letter criticized "shell pleadings" perhaps without adequately understanding the development of the practice and its necessity. Until April 1996, time limits for filing federal habeas corpus did not exist. In state postconviction, extensions that exceeded the one year filing limit were granted by the Florida Supreme Court because of the chronic under-funding and excessive caseloads of collateral counsel. See generally, Fla.R.Cr.P. 3.850, 3.851 and Commentary. When Congress adopted the Antiterrorism and Effective Death Penalty Act (AEDPA) in 1996,[16] however, it included a one year limitation, tolled only by the pendency of a state postconviction motion.[17] That is, the federal limitation began not at the conclusion of state postconviction, but at the end of the direct appeal as determined by state law. Recourse to federal habeas corpus would be barred if state postconviction petitions were filed more than one year after the direct appeal, even if the petition in state court was timely under state law. In Florida it meant that some kind of pleading had to be filed within a year, even though this Court had to grant extensions beyond a year during the caseload crisis.[18] To resolve this conundrum (created by federal law which cannot be ignored in devising equitable state procedures)[19], the practice of "shell pleadings" arose. This was the only alternative to either (1) filing a fully pled

[16] Chapters 153, 154 28 U.S. Code (28 U.S.C. sections 2241-2255; & 2261, et. seq.)

[17] Id. at 28 U.S.C. 2244(d)(1).

[18] Supra, note 14.

[19] Ironically, the federal legislation impinged on the state's prerogative to set its own schedule for postconviction relief by making the habeas corpus clock begin to run from the finality of the direct appeal, rather than from the conclusion of state postconviction. Due to the influence of federal law on the timing of state postconviction proceedings it was not accurate for the Committee to have stated it "feels the timeliness of state proceedings is a matter separate and apart from those federal decisions." (Letter at 4.)

postconviction pleading more than one year after finality that would be timely based on state court extensions but would forfeit federal remedies or (2) requiring immediate, substantial increases in funding for collateral counsel to have the resources to comply with one-year deadlines and to remain eligible for federal relief.

The Committee should have taken into account the genesis and necessity of so called shell pleadings before condemning and banning them.[20]

Now, however, without any assurance that the present system will in fact have sufficient funds and lawyers to avoid the situation which made shells a necessary evil, the Proposed Rules would bar them and impose the ultimate sanction of dismissal of the cause for failure to file a fully pled motion.

For example, the Committee's letter says that simultaneous with the issuance of this court's mandate affirming the direct appeal the court should appoint the Capital Collateral Regional Counsel. Then, should that office withdraw within 30 days, the Court would utilize the

[20] In fact, the Committee may have been under a serious misconception about the federal habeas time limits. All the members are state court judges not schooled in the (Byzantine) minutiae of federal practice, especially in this context. And materials recently distributed at a seminar on death penalty law by one of the committee members failed to note even the passage of the AEDPA in 1996. Most important for present purposes is the following erroneous statement that "[t]here is no time limit for filing a petition for writ of habeas corpus in federal court." Padovano, Postconviction Proceedings in Capital Cases at 37, (Florida Assn. Of Criminal Defense Lawyers, Death Is Different VI, Feb. 25-26, 2000).

list of the Commission on Capital Cases to immediately secure substitute counsel. "**This could cause some delay, but as the list of attorneys and procedures for appointment improve with the passage of time, we hope delay can be minimized**." (Emphasis added).

Avoidance of absolute dismissal should not have to hinge on "hope" rather than on fact. One has to ask what if the imaginary counsel does not materialize in time to file a fully pled petition? Does the defendant lose not only the right to state postconviction relief but federal relief as well? The rule simply cannot leave a person bereft of remedy due to the state's failure timely to appoint counsel, yet by its literal wording it does just that.[21]

4. Contents of the motion. The format is drastically changed, most significantly by limiting the page numbers to 50 and by requiring disclosure of actual witness information, including affidavits and addresses. The latter provision incorporates some discovery as a

[21] The present rule wisely reserved to this Court the authority to revert the one year filing time to two years in the event the Legislature did not fully fund the [then single] office of the capital collateral representative. Court Commentary to Rule 3.851 (1993 Adoption). Indeed this Court's Amended Administrative Order of March 31, 1999, supra, note 1, requested the Committee's "[c]onsideration of whether the time period of rule 3.851 should be returned to two years with milestone markers for discovery of public records, investigation, and other [preliminary] matters...." Id. at 3. The Committee's response differed widely from the more cautious approach taken by this Court when enacting the one year time limit.

requirement, which the Supreme Court previously declined to do.[22] When coupled with the rigid time limits for a "fully pled" motion, this imposes an arbitrary, unmitigated burden with no assurance that it realistically can be accomplished within the deadline. If collateral counsel has to comply or face dismissal, the rule should allow more rather than less leeway for granting extensions to file, at least until the system is tried.

5. Oath. The proposed rule continues the present requirement that the motion be under oath. Proposed Rule 3.851(d). The defendant has been obliged to swear to personal knowledge of the facts, but not necessarily to "first hand knowledge." Gorham v. State, 494 So. 2d 211 (Fla. 1986); Anderson v. State, 627 So. 2d 1170 (Fla. 1993). Presumably, when the client is incompetent to swear or affirm, the verification of counsel will suffice, as now allowed under Carter v. State, 706 So. 2d 873 (Fla. 1997). The proposed rules are deficient for lack of clarity in this area. They should clarify this ambiguity.

6. Amendments And Successors. The Proposed Rule makes dramatic changes regarding amendments and the related requirements for successor petitions with insufficient justification.

(a) *Fact-Based Amendments.* Under restored Rules 3.850 and 3.851 amendments were permitted if based on belated disclosure of public records. See Ventura v. State, 673 So. 2d 479, 481 (Fla. 1996) ("This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure. See Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). This Court has further

[22] See State v Lewis, 656 So. 2d 1248 (Fla. 1995).

determined that a defendant should be allowed to amend a previously filed rule 3.850 motion after requested public records are finally furnished.").

The Proposed Rules depart from past practice by insisting that no extension be granted for lack of public records, nor any amendment be made after the state files its answer. This bars even amendments arising from unresolved public records requests, again giving no heed to the possibility that late disclosure might have been caused by negligence or willfulness on the state's part.

The no-amendment rule also means that if new claims of innocence are based on records disclosed after the state's answer, amendments (including actual innocence) must pass the more stringent test applicable to successor motions in Proposed Rule 3.851(g). The Committee over-optimistically wrote that "a thoroughly researched and prepared motion and answer eliminates the need to amend." (Letter at 5). In an ideal world, that sentiment might hold up, but not in the real world of postconviction. Extraordinary circumstances requiring exceptions are inevitable. The Committee's expectations, based on no facts but on bare assertions, are too ironclad and unrealistic.

The Committee also explained that "the provisions for amendment and successive motions taken together are a measure to prevent and sanction dilatory practice." (Letter at 5).[23] The Rule already protects against "sandbagging" (withholding claims for subsequent proceedings) by requiring that claims arising from newly discovered evidence must have been

[23] The Committee apparently did not realize that the due diligence requirement was already a safeguard against "dilatory tactics" and that this additional sanction wrongfully punishes the person when an amendment or successor is necessitated by the state's failure to comply with its obligation to furnish public records.

previously undiscoverable through the exercise of due diligence. Successors which fail to pass that test are already barred, making the further restrictions unreasonable. The Committee went too far in favoring finality over fairness.

But more important, amendments are prohibited even if they would qualify under the present test for newly discovered evidence, which is the probability of producing an acquittal.[24]

[24] This Court again applied the newly discovered evidence test recently in State v. Reichmann, Case No. SC93236 (Fla. Feb. 24, 2000), slip opinion at 32 (in postconviction, albeit not in a successor).

The probability standard of Rule 3.850 and Rule 3.851 evolved from Richardson v. State, 546 So. 2d 1037 (Fla. 1989) when this Court said that newly discovered evidence claims, formerly cognizable under coram nobis, were subsumed under Rule 3.850, unless the person was not in custody.[25]

The test for obtaining relief based on newly

> discovered evidence
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> was later clarified by
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> Jones v. State, 591 So.
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> 2d 911, 915 (Fla.
>
> 1991) when this Court
>
> modified the coram
>
> nobis test of Hallman
>
> v. State, 371 So. 2d
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> 482, 485 (Fla. 1979)
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> from one of
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> conclusiveness to
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> probability of a
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> changed result

[25] Last year the Court amended Rule 3.850 by deleting the "in custody" requirement so that "both custodial and noncustodial movants may rely and be governed by the rule, thereby eliminating the need for the writ [of coram nobis]." Wood v. State, 24 Fla. L. Weekly S240 (Fla. May 27, 1999).

because

> we have now concluded that the Hallman standard is simply too strict. The standard is almost impossible to meet and runs the risk of thwarting justice in a given case. Thus, we hold that henceforth, in order to provide relief, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial. The same standard would be applicable if the issue were whether a life or a death sentence should have been imposed. (Emphasis added).

The probability standard was applied to the sentence as well as the conviction in Scott v. Dugger, 604 So. 2d 465, 468-469 (Fla. 1992) (a codefendant's subsequent life sentence constitutes newly discovered evidence which would permit collateral relief).

Notwithstanding this Court's deliberate abandonment of the Hallman conclusiveness test, the proposed rule, sub silentio, makes a radical change from the Jones[26] standard, imposing for a successor claim a test nearly as daunting as that in Hallman.

While the Jones standard allows relief based on newly discovered evidence that would "probably produce an acquittal on retrial," the change made by Proposed Rule 3.851(g) adopts the following language obliterating Jones:

> No successive motion shall be entertained 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 no reasonable fact finder would

[26] Because the newly discovered evidence standard evolved from the writ of coram nobis, which is now subsumed under Rules 3.850 and 3.851, the writ itself was abolished because of those rules. Should the modification of Rule 3.851 eliminate the ground of newly discovered evidence, arguably the writ would be revived.

have found the defendant guilty of the underlying offense or recommended or imposed the death penalty. (Bold added).

The "clear and convincing evidence" test was described by the Committee as "strict and necessary....provid[ing] for both closure and fairness....to prevent and sanction dilatory practice." (Letter at 5). As stated above and in note 25, it is unnecessarily strict, given the threshold requirement of due diligence. It is similar to a successor standard in federal habeas corpus which, however, was limited to claims of innocence of the death penalty (i.e., ineligibility). Innocence was not itself the claim, but allowed claims of constitutional error affecting the sentence to be raised in successor motions. See Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

By contrast, when the constitutional claim relates to innocence of the offense, the United States Supreme Court imposed a lesser standard, which is that the newly discovered facts made it "more likely than not" that no reasonable juror would have convicted him in light of the new evidence. See Schlup v. Delo, 513 U.S. 298, 327 (1995), citing Murray v. Carrier, 477 U.S. 478, 496 (1986) for the proposition that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of cause and prejudice for the procedural default."[27]

[27] This distinction was recently explained in Calderon v. Thompson, 523 U.S. 538, 559-560 (1998):

Thus, to the extent a capital petitioner claims he did not kill the victim, the *Schlup* "more likely than not" standard applies. To the extent a capital petitioner contests the special circumstances rendering him eligible for the death penalty, the *Sawyer* "clear and convincing" standard applies...."

Two observations are in order: One, the newly discovered evidence claim under both Jones and the Proposed Rule does not depend on an underlying constitutional error. It is a "freestanding" claim of actual innocence. That contrasts with successor claims in federal habeas, in which actual innocence is not itself a claim, but can be used as a "gateway" for otherwise barred constitutional claims. See Herrera v. Collins, 506 U.S. 390 (1993); Schlup.

The second observation is that the "clear and convincing" test for gateway evidence in habeas corpus was rejected by the United States Supreme Court in assessing innocence (as opposed to innocence of death).[28] Instead, in Schlup, the Court said "[t]hough the *Sawyer* standard was fashioned to reflect the relative importance of a claim of an erroneous sentence, application of that standard to petitioners such as Schlup would give insufficient weight to the correspondingly greater injustice that is implicated by a claim of actual innocence." 513 U.S. at 325 (emphasis added).

[28] The higher standard (clear and convincing evidence) applied to innocence of death is a reflection of the greater difficulty in assessing the factors of the life or death decision. In Sawyer the "Court struggled to define 'actually innocent' in the context of a petitioner's claim that his death sentence was inappropriate [and] concluded that such actual innocence 'must focus on those elements which render a defendant eligible for the death penalty'". (Emphasis added). Schlup, 513 U.S. at 323, quoting Sawyer, 505 U.S. at 347.

Thus, even in federal habeas, with its respect for the comity interests of the states, see Schlup, 513 U.S. at 318-320,[29] the innocence standard was not as high as set by the Proposed Rule.

The federal courts adopted higher standards for successors challenging state court convictions because even in a death case innocence is (arguably) not a constitutional violation if the state afforded the defendant a fair trial.

> The question is a sensitive and, to say the least, troubling one. It implicates not just the life of a single individual, but also the State's powerful and legitimate interest in punishing the guilty, and the nature of state-federal relations. Indeed, as the Court persuasively demonstrates ... throughout our history the federal courts have assumed that they should not and could not intervene to prevent an execution so long as the prisoner had been convicted after a constitutionally adequate trial. The prisoner's sole remedy was a pardon or clemency. (Emphasis added).

Herrera v. Collins, 506 U.S. 390, 421 (1993)(O'Connor, J. concurring).

The state courts are not so restricted by considerations of comity. Florida has a cherished history of providing to its citizens under the state constitution more than the bare minimum of due process and other rights specified in the federal constitution. See, e.g., Haliburton v. State, 596 So. 2d 957 (Fla. 1992); Traylor v. State, 596 So. 2d 957, 962 (Fla. 1992):

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[29] Comity is a major restraint in federal habeas proceedings challenging state court convictions: "In the light of the historic purpose of habeas corpus and the interests implicated by successive petitions for federal habeas relief from a state conviction, we conclude that the 'ends of justice' require federal courts to entertain such petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence." (Emphasis added.)

> Federal and state bills of rights thus serve distinct but complementary purposes. The federal Bill of Rights facilitates political and philosophical homogeneity among the basically heterogeneous states by securing, as a uniform minimum, the highest common denominator of freedom that can prudently be administered throughout all fifty states. The state bills of rights, on the other hand, express the ultimate breadth of the common yearnings for freedom of each insular state population within our nation.

Particularly when actual innocence is involved the state's interest in avoiding a miscarriage of justice should prevail over any interest in finality. This Court has allowed claims of innocence in successors, unconnected to constitutional claims, to avoid the "intolerable event"[30] of executing an innocent person, see, e.g., Spaziano v. State, 660 So. 2d 1363, 1365-1366 (Fla. 1995);

> The motions for rehearing filed in this cause are clearly not authorized. However, consistent with our constitutional responsibility to refrain from dismissing a cause solely because an improper remedy has been sought, we have considered the contents of these motions and the recently filed supplemental affidavit to determine whether they have any basis for relief under our jurisdiction. Under the unique circumstances of this cause, we conclude that these two out-of-time motions for rehearing, together with the supplemental affidavit of Anthony DiLisio, should be treated as a successive Rules of Criminal Procedure 3.850-3.851 motion based only on the newly discovered evidence of the recantation of the testimony of a significant witness, and the motion must be remanded to the Circuit Court of the Eighteenth Judicial Circuit for consideration of that issue. (Emphasis added).

[30] Without deciding the precise constitutional basis, Justice O'Connor said "the execution of a legally and factually innocent person would be a constitutionally intolerable event." Herrera v. Collins, 506 U.S. at 419 (O'Connor, J., concurring).

The Proposed Rule abandons the implicit Spaziano holding that the probability standard was a constitutional imperative. In its place the Proposed Rule restores something akin to the Hallman conclusiveness test despite this Court's decision that the test was "almost impossible to meet" and "runs the risk of thwarting justice." Jones, supra, 591 So. 2d at 914-915. Nothing in the Committee's Letter or its Proposed Rule comes close to explaining why the Jones standard should be discarded or why a perversion of an inapt federal test is better or fairer.[31] Indeed, the Committee went too far by proposing that a mere rule nullify a decision of this Court bottomed on due process.

In other words, had the successor standards in the Proposed Rule been in effect in 1995, Mr. Spaziano's petition would have been procedurally barred and, instead of being granted a new trial after the evidentiary hearing ordered by this Court,[32] he would have been executed without that hearing ever taking place. So also would Raleigh Porter have been executed under the Proposed Successor Rule, as his claim was neither innocence of the offense nor of the death penalty, but was the lack of an impartial sentencing judge. See Porter v. State, 723 So. 2d 191 (Fla. 1998).

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[31] If the Court adopts the rule proposed here and with it the federal gloss, the defendant likely will have to show that he was not eligible for the death penalty, meaning that no reasonable juror would have found any factors in aggravation; consideration of mitigating factors, including the disposition of equally culpable codefendants, would not count. Such a standard is inconsistent with Florida's proportionality requirement. Should the proposed rule follow federal precedent (as the state will surely argue), mitigation would not be considered in a successive postconviction motion, thus preventing relief in a successor motion when a death sentenced co-defendant obtained a life sentence after a new trial. Such harshness runs counter to the established jurisprudence of this state and eliminates a substantive law claim now available. See Scott v. Dugger, supra, 604 So. 2d 465 (Fla. 1992).

[32] See State v. Spaziano, 692 So. 2d 174 (Fla. 1997).

So, by the simply expedient of a rule change whose ostensible purpose is to speed the process without sacrificing significant rights, the Court is asked to retreat from well established principles of law that were thoughtfully reached after years of refinement through vigorous adversary proceedings. No legitimate reason supports such revolutionary changes.

The federal system's rules are not a model for this state, as they are designed for different purposes. There are reasons Florida has more persons on death row than most other states; the statute is too broad, there are too many aggravators, jury recommendations of death need only a simple majority, and trial judges can override life recommendations. Furthermore, there are no statutory exceptions based on the defendant's youth or mental retardation. Postconviction (after direct appeal) must be flexible enough to provide the needed safety net. The Proposed Rules for successors and amendments are not enough protection against execution of innocent or wrongly convicted or sentenced people. Florida is not the wild west of Texas.

To reiterate, the Rule unreasonably forces all successor claims to pass the new, more onerous test of demonstrating clear and convincing evidence of innocence, even if the defendant or counsel could not have known of the claim before and even if the state was at fault by not disclosing public records or exculpatory evidence under Brady v. Maryland, 373 U.S 83 (1963).[33]

(b) *Legal Claims*. The Proposed Rule seems to do away entirely with the exception to time limits based on fundamental changes in the law, now codified in Rule 3.850(b)(2) when "the fundamental constitutional right asserted was not established within the period provided for

[33] This could well give rise to a due process claim in federal court, because the state's procedural bar was unreasonable.

herein and has been held to apply retroactively." See Witt v. State, 387 So. 2d 922 (Fla. 1980).

This ground is based on "[t]he concern for fairness and uniformity in individual cases [which] outweighs any adverse impact that retroactive application... might have on decisional finality." State v. Callaway, 658 So. 2d 983 (Fla. 1995), *receded from on other grounds*, Dixon v. State, 730 So. 2d 265, (Fla. 1999). This principle, incorporated in the existing rules, is unexplainedly absent from the Proposed Rules.

The Proposed Rules also eliminate the ground of unlawful conviction or sentence based on serious constitutional errors discovered in successor status, such as denial of an impartial judge. See Porter v. State, 723 So. 2d 191 (Fla. 1998).

(c) *Effect of Disallowing Amendments*. The absolute ban on amendments after the state answers, means that any further grounds will be governed by the successor rule. Aside from the extreme new standard discussed above, the new grounds would have to be filed expeditiously to avoid being stricken as an abuse of the procedure governed by the rules. The requirement of a successor motion rather than an amendment could result in multiple motions pending in the trial court or even in the trial and appellate court simultaneously. The possibility of piecemeal litigation would be eliminated or minimized by allowing amendments in the interests of justice or judicial economy.

(d) Violation of Due Process and Equal Protection. Proposed Rule 3.851 limits successor petitions for death sentenced persons in ways that do not apply to those non-death sentenced persons, whose rights are governed by Rule 3.850 i.e., eliminating claims based on fundamental changes in the law, see Witt, supra, and denial of an impartial judge, see Porter, supra. By seriously curtailing the rights only of those in postconviction facing the death penalty, the

Proposed Rules create an unconstitutional category in violation of due process and equal protection. No rational reason supports a rule that allows persons convicted of non-capital crimes to obtain postconviction relief based on a fundamental change in the law while death sentenced persons are denied relief on those same grounds. "A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." Romer v. Evans, 517 U.S. 620, 633 (1996).

While those on death row are among society's least regarded, that does not justify singling them out for unequal treatment. "[L]aws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." Romer, 517 U.S. 634. Furthermore, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Department of Agriculture v. Moreno, 413 U.S. 528, 534 (1973).

7. Mental Status Claims. Proposed Rule 3.851(e)(10) says in part:

> If the defense intends to offer expert testimony of his/her mental status, the state shall be entitled to have the defendant examined by an expert of its choosing. All the defendant's mental status claims in the motion shall be stricken if the defendant fails to cooperate with the state's expert. (Emphasis added).

The emphasized portion is unduly punitive. The comparable rule in the penalty phase of a capital trial gives the court discretion to either "(1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluation by the defendant's mental health expert;

or (2) prohibit defense mental health experts from testifying concerning mental health test, evaluations, or examinations of the defendant." Fla.R.Cr.P. 3.210(e).[34]

The proposal possibly conflicts with this Court's decision in Carter v. State, 706 So. 2d 873 (Fla. 1998), which entitles a defendant to a determination of competency in postconviction proceedings when specific factual matters are in issue that require the defendant to competently consult with counsel. If a defendant needs to be competent the judge should not be allowed to avoid a competency determination just because the defendant does not submit to a mental health evaluation. This may not be the intent of the proposal but the phrase "mental status claim" used in the rule is not defined and may be interpreted to apply to competency in postconviction.

[34] The rule is based on Dillbeck v. State, 643 So. 2d 1027, 1033 (Fla. 1994) in which the court established this reasonable procedure: "When a defense expert [who has interviewed the defendant] will be used to demonstrate the presence of the syndrome, the state will then have the opportunity to have the defendant examined by its expert, who will be allowed to testify at trial to rebut a defense expert's testimony. This presents a defendant with the choice of either 1) having her expert testify directly about her case, in which instance the state may have her examined by its expert, or 2) both sides may present the testimony of experts who have not examined the defendant and who will not testify about the facts of her case." (Emphasis added).

PART II

This section addresses the proposed revision to Rule 3.851 drafted by the Honorable Phillip J. Padovano, circulated to the Morris Committee members on November 30, 1999, and revised on December 16, 1999. The revised proposal was distributed and discussed at the December 21, 1999 meeting of the Commission on Capital Cases in Tallahassee.

1. Parallel Track. The Padovano proposal differs from the Morris Committee's proposal in that it adopts a "parallel track" approach to capital postconviction proceedings. Like the Death Penalty Reform Act of 2000, it requires postconviction procedures to be conducted at the same time as the direct appeal. The Association strongly opposes any parallel track procedure.

First, such a procedure wastes scarce judicial and attorney resources on postconviction proceedings that will, in a substantial number of cases, be rendered moot by the disposition of the direct appeal.

Second, any parallel track procedure will overtax the criminal justice system's ability to provide qualified counsel in postconviction cases. The Association notes with alarm that, despite the enactment of the Death Penalty Reform Act, the budget submitted by the Governor for this legislative session does not include any additional positions for the CCRC offices. See *The Florida Bar News*, at 13, February 15, 2000. Rather, it is apparently expected that the entire increase in postconviction cases will be assumed by private counsel on the Registry managed by the Commission on Capital Cases.

As the American Bar Association has noted, there have already been more instances in Florida than in Texas (which is notorious for its failure to provide competent counsel at any stage of capital proceedings) of private court-appointed lawyers missing their clients' federal habeas

deadlines; some Registry lawyers have filed grossly inadequate pleadings; and they are, on average, "working far fewer hours than is considered necessary by professional standards." Memorandum from Elisabeth Semel, Director, ABA Death Penalty Representation Project ("ABA Memo"), Jan. 6, 2000, at 7-8. (Attached as Appendix 1.)

In light of these concerns, the Association believes that instituting a parallel track system that will necessarily rely on Registry lawyers to assume most, if not all, of the substantial increase in capital postconviction cases, is a recipe for disaster. Justice Anstead noted with approval that the Legislature, when it first created the Registry, "specifically mandated that courts 'shall monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation. The court shall also receive and evaluate allegations that are made regarding the performance of assigned counsel.'" Arbelaez v. Butterworth, 738 So. 2d 326, 328 (Fla. 1999) (Anstead, J., concurring) (citing § 27.711(12), Fla. Stat. (1999)).

While there are some highly qualified attorneys on the Registry, recent experience underscores that it is difficult for trial courts throughout the state to ensure consistent standards of representation in an expanding pool of private counsel, many of whom have little or no experience in state or federal postconviction litigation. Judicial monitoring, moreover, has proved too little and too late in the (at least) six cases in which lawyers forfeited their clients' rights to federal habeas corpus relief. See ABA Memo, at 7. The offending lawyers can be removed from the Registry, but the clients have been irreparably harmed.

Setting higher qualifications for appointed counsel would help, but is not a panacea.[35]

Quantitative experience standards, while an important safeguard, cannot ensure the quality of representation provided. Qualitative standards are subjective and difficult to administer. See Note, Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants, 37 WM. & MARY L.REV. 1617, 1653 (1996) (discussing limitations of standards as sole mechanism for regulating quality of representation). Consequently, most experts agree that indigent defendants are generally best served by adequately-funded, professional defender offices where attorneys receive on-going supervision and training, with private, assigned counsel assuming responsibility for a limited number of overflow cases. See Stephen B. Bright, A Smooth Road to the Death House, THE NEW YORK TIMES, February 7, 2000 (comparing Texas' assigned counsel system with Illinois' public defender system) (Attached as Appendix 2); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.2 & Commentary (3d ed. 1992); NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, STANDARDS FOR DEFENSE SERVICES 1.2.a (1976); see also Affidavit of Robert L. Spangenberg, filed in Arbelaez, 738 So. 2d at 326. (Attached as Appendix 3 without exhibits) (comparing Florida with California and Texas and concluding that an adequately-funded state-wide postconviction defender organization is the best way to assure competent representation and orderly processing of cases).

As national indigent defense expert Robert Spangenberg has concluded, in states with a very high death row population, a system that relies primarily on private court-appointed counsel to handle postconviction cases will fail. See Affidavit of Robert L. Spangenberg, supra. The experience of Texas and California, the two other states with Death Row populations similar to

that of Florida, is instructive. Both employ a variation of the parallel track procedure. Neither is a particularly successful model.

When the California Supreme Court in 1989 suddenly imposed on direct appeal counsel the additional responsibility of handling postconviction proceedings simultaneously with the direct appeal, the state-wide public defender's office was unable to handle the increased caseload. Because there were not enough qualified private attorneys to take on the remaining cases, an enormous backlog of cases developed at the direct appeal level. In 1998, the California Supreme Court amended its rules to allow for the appointment of separate habeas counsel, at the same time as direct appeal counsel, and to provide that a state habeas petition is timely if filed within 90 days of the reply brief, or two years from the appointment of habeas counsel, whichever is later.[36] California also recently established a state-funded office -- similar to the CCRCs -- to provide postconviction representation. The Crisis in Postconviction Representation, supra, at 25. Even with these changes, there are still 150 cases awaiting appointment of direct appeal counsel and 200 awaiting appointment of collateral counsel. The shortage of qualified lawyers to meet the demands of the parallel track system has meant that it typically takes four years from the date of conviction for a defendant to be assigned postconviction counsel.

Texas, at the other extreme, is notorious for appointing lawyers at all stages of capital cases with little or no regard for their qualifications. See Stephen B. Bright, Death in Texas -- Not Even the Pretense of Fairness, THE CHAMPION (July 1999) (Attached as Appendix 5). When Texas adopted its parallel track system, effective September 1995, it agreed for the first time to compensate attorneys in state postconviction proceedings.[37] See id. Unable to find enough willing lawyers, the Texas Court of Criminal Appeals drafted members of the Bar, without regard

to their experience. See id. As a result "of the appointment of unqualified counsel, filing deadlines are being missed, and all too often state postconviction petitions are submitted that make a mockery of legal representation." The Crisis in Postconviction Representation, supra, at 67. The Association submits that Texas is manifestly not an example that Florida should seek to follow. See ABA Memo, supra, at 7 (characterizing Texas as a "bad example").

As this Court is well aware, Florida has had to struggle to provide qualified collateral counsel in a timely manner even under the sequential method of postconviction review, in which a substantial number of cases are winnowed out during the direct appeal process. To burden the already fragile state of collateral representation with a huge increase in the number of postconviction cases -- many of which will ultimately be rendered moot by disposition of the direct appeal -- is folly, and it will inevitably lead Florida into a more severe crisis than it has faced to date.

A parallel track procedure also inevitably raises a host of logistical and ethical difficulties. Two attorneys must represent the same client simultaneously, but the very structure of the parallel track requires them to work at cross purposes. Collateral counsel is required to prepare an ineffectiveness claim against the direct appeal attorney *while the direct appeal is still in progress*. This necessarily undermines appellate counsel's ability to establish the "relationship of trust and confidence with the accused" that is essential to effective representation.[38] STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE (hereinafter CRIMINAL JUSTICE STANDARDS), Standard 4-3.1(a).[39]

As Judge Padovano recognizes, requiring a defendant to assert an ineffective assistance of counsel claim against his trial attorney during the pendency of the direct appeal will also give the

state access to privileged information that it could potentially use against him in the event he receives a new trial or new sentencing on direct appeal.[40] As this Court has stated, "a waiver [as a result of an ineffectiveness claim] includes not only privileged communications between defendant and counsel, but also must necessarily include information relating to strategy ordinarily protected under the work-product doctrine." Reed v. State, 640 So. 2d 1094, 1097 (Fla. 1994). Consequently, the state will be free not only to question trial counsel about confidential communications with the client, but also to delve through trial counsel's files to discover all discussions of strategy and trial tactics.[41]

If the defendant wins a new trial or sentencing on direct appeal, this information -- to which the state would never have been entitled absent the parallel track system -- could be devastating to the client. See, e.g., Gore v. State, 614 So. 2d 1111, 1114 (Fla. 4th DCA 1992) (granting certiorari to prohibit disclosure of defense counsel's work product where defendant facing resentencing). While the Padovano rule, as discussed further below, properly provides that the state be prohibited from introducing testimony or records disclosed pursuant to a waiver of the privilege or derived therefrom, enforcing that provision is likely to be costly and cumbersome.

The parallel track system will also create conflicts of interest that will likely result in additional delay. For example, if a defendant receives a new trial or sentencing as a result of his direct appeal, the ineffective assistance of counsel claim already lodged against the trial attorney will preclude her from representing the client further. If the defendant was represented by an assistant public defender, the entire office will be barred from representing the client. See, e.g., Bouie v. State, 559 So. 2d 1113, 1115 (Fla.1990) (public defender's office is "functional equivalent

of a law firm" for purposes of imputed disqualification rules) . Thus, in every case in which a client receives a new trial or sentencing, he will have to be represented by a new attorney with no prior familiarity with the case. Similarly, a defendant facing multiple, severed charges could no longer be represented by one attorney because, if the defendant received a death sentence on one case, triggering the parallel track proceedings, trial counsel would be disqualified, by the inevitable ineffectiveness claim, from representing the defendant in the remaining cases.

In light of the foregoing problems, it is not surprising that at least two other states, Arkansas and Missouri, that have tried a similar unitary procedure, ultimately abandoned it.[42]

2. Specific Comments. The following are comments on specific aspects of the Padovano Rule.

1. Motions filed in Supreme Court. Sections (c) and (g) of the proposed rule require all motions for postconviction relief in capital cases to be filed directly in the Florida Supreme Court and require the Court to decide whether an evidentiary hearing is warranted. This will dramatically and unnecessarily increase the Court's caseload. The case law regarding when an evidentiary hearing is warranted is not unduly complex. Trial courts are also in a better position to afford the parties the necessary opportunity to be heard regarding on the question whether an evidentiary hearing should be granted. See Huff v. State, 622 So. 2d 982, 983 (Fla. 1993). There is no reason properly trained and conscientious trial judges cannot continue to make the threshold determination whether to grant an evidentiary hearing.

2. One year time limit. Section (d) of the proposed rule requires defendants to file *fully-pled* motions for postconviction relief within one year of the imposition of the death sentence. This rigid one-year deadline does not allow for significant variations in how long it

takes to prepare transcripts and compile records in capital cases. As the Court is well aware, in Miami-Dade County, for example, it has often taken nearly a year to prepare the transcripts and records for lengthy capital trials, due to a combination of antiquated court reporting technology, inadequate funding, and a resulting shortage of competent court reporters. In these cases, a defendant's postconviction motion would be due before the initial brief is filed and, in some instances, before collateral counsel has had sufficient opportunity even to review the transcripts and record on appeal. Since postconviction motions are supposed to raise only claims that have not or could not have been raised on direct appeal, it is far more sensible to tie the date for filing the motion for postconviction relief to the date the initial brief is filed.

3. Fully Pled Requirement. Like the Morris Committee proposal, section (d) of the Padovano Rule requires the motion to be "fully pled" when filed; provides that an extension of time may be granted only upon a showing of manifest injustice; and provides that "[t]he pendency of public records requests or litigation . . . shall not constitute cause for extending or tolling the time for the filing of any postconviction pleading." As discussed above, these requirements are unfair and unworkable.

Public records requests have, in many cases, produced documents that entitled the defendant to postconviction relief. See, e.g., State v. Riechmann, no. SC89564, slip op. at 12 n.10; Young v. State, 739 So. 2d 553, 556 (Fla. 1999). This Court has therefore held repeatedly that the state's failure to produce public records must be grounds for amending or extending the time for filing a motion. See, e.g., Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994); Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993);

Mendyk v. State, 592 So. 2d 1076, 1082 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991). There is no valid reason to overrule these cases.

4. Page Limit. Like the Morris Committee proposal, section (e) of the Padovano Rule sets a 50 page limit for motions, including the supporting memorandum of law. As discussed above, that page limit may not be adequate in all cases. Section (f) of the Padovano Rule does, however, impose reciprocal page limits on the state.

5. Hearing Procedures. Section (g) of the Padovano Rule regarding hearing procedures is unclear as to (1) whether counsel will be heard, pursuant to Huff, supra, before this Court decides whether to grant an evidentiary hearing; (2) whether and when the issues are argued on the merits if the Court concludes that an evidentiary hearing is unnecessary; and (3) what happens when the Court decides a hearing is warranted as to some issues but not others. Section (h) governing review procedures is likewise unclear as to how such mixed resolutions would be handled.

6. Mental Health Claims. Section (g)(4) of the Padovano Rule provides that a defendant's failure to comply with orders pertaining to a mental health examination "shall be resolved in accordance with Rule 3.202(e)." This is a substantial improvement over the Morris Committee proposal.

7. Public Records Disputes. Section (i) of the Padovano Rule would require this Court to also resolve all public records disputes. Again this is a needless burden to add to this Court's workload.

8. Discovery. Section (i) of the proposed rule bars any discovery in a capital postconviction proceeding. This Court has recognized that discovery may be appropriate and,

indeed, essential to some postconviction claims. State v. Lewis, 656 So. 2d 1248, 1249-50 (Fla. 1995). The Court found that the power to allow discovery in postconviction proceedings did not derive from any express provision of the Rules of Criminal Procedure but rather that it was within the "inherent authority" of trial judges to allow discovery upon a showing of good cause. Id. There is no reason to depart from this standard, which gives the trial courts considerable discretion to regulate what limited discovery is permitted.

9. Successive Motions. Section (j) of the Padovano Rule regarding successive motions is worse than the problematic Morris Committee proposal. Like the DPRA, this rule eliminates all free-standing claims of innocence and has no provision for a defendant to obtain relief if he or she can demonstrate innocence of the death penalty.

By requiring constitutional error in addition to evidence of innocence, the proposal is apparently intended to track federal law. See Herrera v. Collins, 506 U.S. 390, 404 (1993) ("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."). As noted above, however, adopting federal habeas standards for use in state court ignores the fact that access to federal court has been restricted due to concerns of federalism and comity that do not and should not apply to the state's regulation of its own procedures.

The proposed rule is even narrower than the federal standard in omitting innocence of the death penalty as a ground for relief. See Sawyer v. Whitley, 505 U.S. 333 (1992). Thus, newly discovered evidence that would establish a defendant's ineligibility for the death penalty as a matter of law is no longer grounds for a successive petition; nor is the discovery of evidence that

establishes fundamental unfairness in the sentencing process, as opposed to the guilt/innocence phase of the trial. See Porter v. State, 723 So. 2d 191, 196 (Fla. 1998) (deprivation of right to an impartial judge); Scott v. Dugger, 604 So. 2d 465, 469 (Fla. 1992) (co-defendant's subsequent life sentence rendered defendant's death sentence disproportionate).

Like the Morris Committee proposal and the DPRA, the Padovano Rule also dramatically raises the bar for obtaining relief even when the defendant does present a cognizable claim. As noted above, a capital defendant previously was entitled to relief (and a non-capital defendant is still entitled to relief) if he demonstrates that the newly discovered evidence "would probably produce an acquittal on retrial." Jones v. State, 591 So. 2d 911, 915 (Fla. 1991); accord Scott v. Dugger, 604 So. 2d 465, 468 (1992) (applying same standard to sentencing phase). As discussed above, the requirement of clear and convincing evidence that would preclude a finding of guilt is equivalent to the "conclusiveness test" that this Court previously characterized as "almost impossible to meet." Jones, 591 So. 2d at 915. These standards shrink, to the point of eliminating, the safety net of successive motions for postconviction relief.

10. Disposition. The intent and effect of section (k) governing the disposition of claims is unclear. Apparently, if the direct appeal would render the entire postconviction proceeding moot (by, for example, granting an entirely new trial), the Court may go ahead an issue its mandate on direct appeal. On the other hand, if the case is affirmed on direct appeal or affirmed in part and reversed in part, it appears that the Court is to delay issuing its mandate until the collateral proceedings are also concluded. Presumably, this means, for example, that collateral counsel is to complete litigation of guilt/innocence phase claims even if a client receives a new sentencing on direct appeal.

11. Habeas. The first sentence of section (l) is substantially similar to section (h) of current Rule 3.850. The second sentence, however, has no parallel in Rule 3.850. It provides that any petition for habeas corpus filed by a death-sentenced defendant would be subject to the time limits of the new Rule 3.851. Habeas relief, which traditionally is not subject to time limits, is a residual constitutional right, including only those claims not now subsumed in Rules 3.850 and 3.851. See Haag v. State, 591 So. 2d 614, 616 (Fla. 1992). As such, it serves as a safety net and should not be subject to time limits. The law is already well settled that "[a] petition for habeas corpus cannot be used to circumvent the two-year period for filing motions for postconviction relief." E.g., Calloway v. State, 699 So. 2d 849 (Fla. 3d DCA 1997). The defense of laches is also available "where the movant has engaged in inordinate and prejudicial delay." Anderson v. Singletary, 688 So. 2d 462, 463 (Fla. 4th DCA 1997). The imposition of time limits, which do not presently apply to habeas actions in noncapital cases, is therefore unnecessary and would, moreover, arguably constitute an improper suspension of the writ in violation of article I, section 13 of the Florida Constitution, as well as the access to courts guarantee of article I, section 21 of the Florida Constitution.

12. Ineffective Assistance of Appellate Counsel. Section (m) requires claims of ineffective assistance of appellate counsel to be asserted within 30 days of the issuance of an opinion on direct appeal. This time frame is not feasible, because it would create a conflict of interest between the defendant and his direct appeal lawyer while that lawyer is still representing the defendant on motion for rehearing in the Florida Supreme Court and in applying for certiorari to the U.S. Supreme Court. As a practical matter, no claim of ineffective assistance of appellate

counsel should be due to be filed until the time for applying for certiorari has expired or the petition for certiorari, if filed, has been denied.

13. Subsequent Trial. Unlike the DPRA, the Padovano Rule properly provides in section (n) that any testimony or records produced by the defendant's attorney in a postconviction proceeding following a waiver of the attorney-client privilege, and any evidence derived therefrom, may not be admitted against the defendant in a subsequent trial or sentencing proceeding. Such a rule is essential to the constitutionality of any parallel track proceeding. Otherwise, a capital defendant would be forced to choose between vindicating his right to the effective assistance of counsel in a collateral proceeding and vindicating his right to a fair trial and sentencing in his direct appeal. As the United States Supreme Court has held, it is "intolerable that one constitutional right should have to be surrendered in order to assert another." Simmons v. United States, 390 U.S. 377, 394 (1968) (defendant's testimony at suppression hearing, necessary to vindicate Fourth Amendment rights, could not be used against him at trial); see also Hayes v. State, 581 So. 2d 121, 125-26 (Fla. 1991) (Simmons analysis "applie[s] to any situation in which the 'benefit' to be gained is that afforded by another provision of the Bill of Rights.") (quoting Johnson v. State, 537 So. 2d 1116, 1117-18 (Fla. 4th DCA 1989)). The choice in this instance is all the less voluntary since the state has compelled the defendant to assert his Sixth Amendment claims, thereby waiving the attorney-client and work product privileges, before his direct appeal is concluded or lose his right to postconviction relief altogether. Consequently, immunity is essential to the constitutionality of the scheme.

Moreover, given the far-reaching disclosures of privileged information and work product, to which the state would not otherwise be entitled, the state should have an obligation, analogous

to that under Kastigar v. United States, 406 U.S. 441, 460-61 (1972), to establish that new evidence presented at a subsequent trial or sentencing is "derived from a legitimate source wholly independent of the compelled testimony" or documents. As noted above, the difficulty of ensuring that a new trial or sentencing is not tainted by compelled disclosures is yet another unnecessary logistical complexity inherent in a parallel track system.[43] Cf. United States v. North, 920 F.2d 940, 941-42 (D.C. Cir. 1990) (reversing conviction tainted by witnesses' exposure to immunized testimony despite prosecution's efforts to insulate itself).

14. Effective Date. Unlike the DPRA, the Padovano Rule does not attempt to make the parallel track procedure immediately applicable to pending direct appeal cases, and does not make the new procedures applicable to motions that are pending at the time of the rule's adoption. On the whole, this is a far more sensible method of phasing in a parallel track system than the DPRA's wholly unrealistic attempt to sweep in all pending direct appeal and pending postconviction cases. The Padovano Rule does, however, fail to address the category of cases in which a conviction and death sentence have been affirmed but no collateral counsel appointed or motion filed.

CONCLUSION

The Association does not say that the current rules for postconviction capital litigation should remain inviolate. Those who criticize the status quo have reason to do so. But the Proposed Rules go too far in the direction of blocking access to the courts for legitimate claims. The process of change should be more orderly, less drastic, and provide more opportunity for constructive criticism before presentation. For example, the proposed rule was not the product of

the full Criminal Rules Committee of the Florida Bar, whose members represent a cross-section of the prosecution, defense, and judiciary.

The Proposed Rule is far too dramatic a change from existing practice. No one can predict the ramifications of these changes, except to be sure that subsequent litigation will follow that could be more time consuming than under the present scheme.

Worst of all, by adopting these rules the court will have enacted substantive law changes contrary to the enlightened death penalty law which has evolved over the decades. Rule changes which are so summarily devised are not a substitute for the deliberative process that has been the hallmark of the decisional law of this state.

CERTIFICATE OF SERVICE

We certify that a copy of this reply has been furnished by delivery to: Robert A. Butterworth, Attorney General, Carolyn M. Snurkowski, Assistant Deputy Attorney General, and Richard A. Martell, Chief of Capital Appeals for Office of the Attorney General, the Capitol, Plaza Level, Tallahassee, FL, 32301; and by mail to: The Hon. Stan R. Morris, Chairperson, Supreme Court Committee on Postconviction Relief in Capital Cases, 201 E. University Ave., Gainesville, FL, 32601, The Hon. O.E. Eaton, Jr., Committee Member, Seminole County Courthouse, Sanford, FL 32771, Jerome C. Latimer, Chair, The Florida Bar Criminal Procedure Rules Committee, 1401 61st St. South, St. Petersburg, FL 33707-3246, and John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399, on this __ day of _____, 2000.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENT TO RULE OF
FLORIDA CRIMINAL PROCEDURE
3.851 (COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED)
_____/

No. SC96646

APPENDIX TO COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.