IN THE
SUPREME COURT OF FLORIDA

IN RE: RULES GOVERNING CAPITAL POSTCONVICTION ACTIONS	)	Case SC96646

COMMENTS REGARDING MORRIS COMMITTEE'S PROPOSED AMENDMENT TO RULE 3.851, FLORIDA RULES OF CRIMINAL PROCEDURE

The undersigned respectfully submits the following comments respecting the Morris Committee's proposed amendment to Rule 3.851, Florida Rules of Criminal Procedure.

Statement of interest.

The undersigned is the chief of the Capital Crimes Division of the Office of Richard L. Jorandby, Public Defender of the Fifteenth Circuit. His office has represented and now represents many death row inmates.

Discussion.

A. Proposed rule 3.851(a) states in part: "The purpose of this rule is to provide the means by which a defendant under sentence of death can raise claims of constitutional error which were unavailable at the time

of trial or direct appeal. This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."

The undersigned submits that there are two problems with these statements. First, this Court has never limited post-conviction litigation solely to "constitutional issues". Second, this Court has allowed post-conviction litigation of preserved issues where the trial court and this Court had previously rejected claims (such as Hitchcock[1] claims), and subsequent decisions of the United States Supreme Court have vindicated those claims. Indeed, rule 3.850 itself arose from such circumstances. After Gideon v. Wainwright, 372 U.S. 335 (1963), this Court first established rule 3.850 (then called rule 1, In re Criminal Procedure Rule 1, 151 So.2d 634 (Fla. 1963)) for the purpose of disposing of post-conviction claims that the defendant had been deprived of counsel, even where the defendant had initially preserved

[1] Hitchcock v. Dugger, 481 U.S. 393 (1987).

the issue for direct appeal. See Bush v. State, 209 So.2d 696 (Fla. 4th DCA 1968) (granting post-conviction relief under Gideon; defendant had requested counsel before trial).

B. Proposed rule 3.851(b) provides for appointment of post-conviction counsel, and proposed rule 3.851(c)(1)(A) provides a one-year deadline for post-conviction filings, even where a certiorari petition has been filed in the Supreme Court. Apparently the Committee assumes that the grant of certiorari is so rare that there is no cause to await the outcome of certiorari review.

The undersigned respectfully submits, however, that when the Supreme Court accepts certiorari review in one Florida death penalty case, it typically holds in abeyance certiorari petitions in other Florida capital cases until the first case is decided, after which, if the original petition is successful, it will send all of these cases back to this Court for further review. This

entire process can involve a substantial number of cases over a year or longer. This situation occurred at the time of the certiorari grant in Sochor v. Florida, 504 U.S. 527 (1992). Among the cases held in abeyance was that of Henry Espinosa. Then, in Espinosa v. Florida, 505 U.S. 1079 (1992), the Court summarily held that Florida's standard jury instruction on the heinousness circumstance was unconstitutional. It then remanded the other Florida capital cases for reconsideration in light of Espinosa. In some of the Espinosa remand cases, this Court ordered resentencing. It would make no sense to commence post-conviction proceedings (with the resulting waiver of the attorney-client privilege) while the constitutionality of the sentence is still in litigation. In effect, the proposed rules would set up limited dual-tracking in certiorari cases.[2]

C. Proposed rule 3.851 (c)(2) would allow petitions

[2] Others have addressed the problems of dual-tracking in their challenges to the Death Penalty Reform Act.

for extraordinary relief only within 120 days of appointment of collateral counsel. There is no reason for such a uniform rule. The timeliness of individual extraordinary petitions should be considered case-by-case. For instance, if on the 121st day, the trial court were to enter an order that the defendant submit to deposition by the state, the defendant should be allowed to petition this Court to intervene against such an unwarranted departure from the requirements of law. Similarly, if a death warrant were signed on the 121st day, this Court should have the power to determine whether to grant a stay.

D. Proposed rule 3.851(d) would limit the motion to 50 pages. The undersigned respectfully submits that post-conviction litigation is at least as complex as direct appeal. This Court permits 100 page briefs on direct appeal in capital cases. Further, there is no page limitation on the filing of complaints under the Rules of Civil Procedure. The undersigned submits that there is no basis for limiting the post-conviction motion

to 50 pages without cogent reasons for doing so.

Since proposed rule 3.851(c)(1)(A) requires that the motion be "fully pled", a 50-page limitation on the motion is especially questionable. The undersigned respectfully submits that some trial court judges have required common law levels of specificity in the pleadings of post-conviction motions. If there is to be any rule limiting the length of post-conviction motions, it should be one of 100 pages by analogy with the number of pages allowed in capital briefs on appeal.

E. Proposed rule 3.851(e)(7) provides that "no amendment of the motion, including amendments arising from unresolved public records requests, shall be allowed after the state files its answer." It is impossible to see the policy behind letting the state sit on Brady material and then quickly file a summary answer to the motion. As the rule is written, the state could then file an amended answer at its leisure, having forever foreclosed any Brady claim. (The proposed rule does not forbid amended pleadings by the state.)

Further, the iron bar on amendments unreasonably bars filing additional pleadings where there has been a change in the law or where there is newly discovered evidence, creating substantial questions regarding the constitutionality of the rule.

F. Proposed rule 3.851(e)(9) states in part: "All of the defendant's mental status claims in the motion shall be stricken if the defendant fails to cooperate with the state's expert." The undersigned can see several problems: First, the proposal does not say who is to determine whether the defendant has failed to cooperate. Second, it does not say by what standard that determination is to be made. Third, it should not provide that all the mental status claims should be stricken if the defendant's non-cooperation is only partial.[3] Fourth, the court should consider individual

[3] Consider this example: The defense has made a claim that the defendant suffers from severe alcoholism. The state then seeks to examine the defendant as to his legal sanity at the time of the offense, even though the defendant has never made a claim of legal insanity. There is no reason that the defendant's refusal to discuss the facts of the actual homicide should bar the

situations on a case-by-case basis as they arise - instead the proposed rule would act as a sort of injunction in futuro forbidding consideration of such circumstances as might arise during the course of the litigation.

The undersigned respectfully submits that rule 3.202(e) provides a more sensible approach to problems that arise from the defendant's alleged refusal to cooperate. In such circumstances, the court is to use its discretion to frame a remedy proportional to the situation.

The striking of claims wholesale is an extreme sanction, and contrary to the prudential rule that, after an appropriate inquiry, the court should fashion a remedy commensurate with the magnitude of the violation. Cf. Richardson v. State, 246 So.2d 771, 774 (Fla.1971) (discovery; "The trial court has discretion to determine whether the non-compliance would result in harm or prejudice to the defendant, but the court's discretion

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evidence of his alcoholism.

can be properly exercised only after the court has made an adequate inquiry into all of the surrounding circumstances").

G. Proposed rule 3.851(h)(2) would apply rule 9.140(i) to cases in which the trial court had denied an evidentiary hearing. Under that rule, the appellant has only ten days in which to file an initial brief. This is an absurd requirement in a capital case where the record might not even be prepared in 10 days. The rule also provides for no oral argument. There is no basis for departing from this Court's well-established procedure for handling such appeals with appropriate briefing schedules and oral argument.

Respectfully submitted,

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