

September 30, 1999

Chief Justice Major B. Harding  
The Supreme Court of Florida  
Supreme Court Building  
500 South Duval Street  
Tallahassee, FL 32399-1925

Dear Mr. Chief Justice:

As chairperson of the Supreme Court Committee on Postconviction Relief in Capital Cases I submit to you a proposed new rule 3.851, Collateral Relief After Death Sentence Has Been Imposed. This rule is the primary recommendation of the Committee in response to the twelve subject areas set forth in the Court's Administrative Order, as amended March 31, 1999. Matters not touched on in the proposed rule will be addressed in this letter. The proposed rule and answers to questions proposed to us by the Court are the collective work product of the Committee, all of whom vigorously participated in the process.

After our initial meeting with you on March 17, 1999, we met again in the Judicial Meeting Room at the Court on May 6, 1999 to take remarks from interested parties. The governor's counsel and assistant counsel attended, as did representatives of the Florida Senate Criminal Justice Committee; the Florida House Criminal Justice and Corrections Council; the Commission on Capital Cases; the Florida Public Defender's Association; the Florida State Archives; the State Attorney's Association; all three Regional Collateral Counsel offices; and the Attorney General. We were favored with written proposals or responses from the Attorney General and Regional

Collateral Counsel, from the State Attorneys in Miami, Orlando and Tampa, as well as suggestions from the Clerk of the Sixth Judicial Circuit Court and a letter from the Holland and Knight Law Firm.

A letter was distributed to all chief judges and members of the criminal law section of the Conference of Circuit Court Judges by the chairperson of the section and the chairperson of the conference with the Administrative Order attached and a request for responses from any interested circuit judge. I attended the criminal section meeting at the Circuit Judges' Conference on June 27, 1999, to allow additional input from the conference and individual judges. The Committee met at Naples, immediately after the section meeting, in Tampa July 16, 1999, and in Tallahassee August 18, 1999.

I will proceed by addressing the matters reviewed in the same sequence as they are set out in the Administrative Order.

We examined the Death Row Postconviction Status Report forms. We suggest that if the new proposed rule, or some substitute, is adopted, that a new form be drafted to match the steps set out in the new rule to track each case. This would allow a report of the progress of each case to be made to the chief judge of each circuit who, in turn, could report to you. At any given moment, the last event recorded as occurring and the next scheduled would serve as a measure of compliance with the timetable of the rule. There would always be a scheduled event, even if only a status conference at intervals of no more than ninety (90) days. The form would be a fund of information for the Court to make an overall assessment of the time periods of the rule to see if those periods are realistic. The forms collectively would reveal information identifying at what point undue delay most often occurs. Finally, both a chief judge and the Chief Justice could more effectively manage the cases by being aware of and addressing undue delay. Chief Judge John Kuder of the First Judicial Circuit has agreed to be responsible for the creation of the form with the assistance of the staff of the Office of State Courts Administrator.

The matters raised in issues two (2)(a) through (e) and the time standards addressed in the first half of issue three (3) are directly addressed by the proposed rule. The consensus of the Committee was to begin the process as early as possible. You will

see that the issuance of a mandate by the Florida Supreme Court sets the case into postconviction relief management immediately. The appropriate Capital Collateral Regional Counsel is appointed when the mandate issues, and within 30 days that office either appears by notice or moves to withdraw. The Committee assumes the continued existence of the Commission on Capital Cases with its up-to-date attorney list to assist the trial judge with rapid appointment and processing of a counsel should Capital Collateral Regional Counsel withdraw. The rule does not directly address this procedure.

After much discussion, the Committee recommends that the issuance of mandate by the Florida Supreme Court be the commencing event of the one-year time period allowed by the rule. The additional time previously afforded for denial of certiorari by the United States Supreme Court was seen as an unnecessary delay for two reasons. First, it is a rare exception for that court to grant review so early in the process. Secondly, the matters raised are often the same as those raised in the state action and so concurrent petitions for federal relief and motions for state relief are not an undue burden on the defendant. This is the first reduction of delay inherent in the old procedures.

The second delay inherent in the old process was the prior conflict with preparation of the motion and acquisition of public records. Hopefully, the recently adopted Rule 3.852, Florida Rules of Criminal Procedure, will eliminate the confusion and delay in that process. It too is triggered by the issuance of the Florida Supreme Court mandate. The Committee, after much discussion, has not allowed acquisition of public records to encroach on the one-year time period for filing the motion.

This will probably be the most controversial part of our proposed rule. However, we later address the contents of the motion itself and limitations on successor motions and amendments. When taken as a whole, it is apparent the Committee believes it is essential to have a fully formulated pleading at the time of filing, not a shell. Anything less will fail to conform to the rule and will be subject to summary dismissal. It is presumed collateral counsel will avail themselves of the opportunity presented for timely acquisition of public records in Rule 3.852 and reflect the result, when appropriate, in the motion. The Committee finds the previous practice of pleading

something, then acquiring records and filing amended or successor motions, as unacceptable because it engenders both confusion and delay.

Our state rules of procedure should effectuate timely and thorough review of these cases. It should be left to the federal government to determine the procedures appropriate for that forum on these issues. The Committee feels the timeliness of state proceedings is a matter separate and apart from those federal decisions. In this, we are guided by both the federal and state constitutions, and by our desire to eliminate delay without sacrificing the intense scrutiny we believe both constitutions demand.

This proposed rule, when considered with the reporting requirements of Florida Rule of Judicial Administration 2.050, forms a type of case management system. We have provided that clerks of court shall deliver a copy of the motion to the chief judge of the circuit, who then makes the assignment of the case and the clerk, in turn, delivers a copy of the motion to the assigned judge. A status conference in no less than ninety (90) days is mandated and a sixty (60) day time limit set for the state to answer the motion from the date of its filing. The court then holds a hearing to determine the need for an evidentiary hearing within thirty (30) days and to schedule one, if necessary, within ninety (90) days or enter a detailed order denying such hearing within forty-five (45) days. There are provisions for filing the names and addresses of the witness not previously disclosed, with their affidavits or testimonial proffers, within ten (10) days of the order scheduling the hearing. If a hearing is held, a transcript is ordered to be provided within thirty (30) days, and a detailed order addressing each allegation must be entered within thirty (30) days of receipt of the transcript.

The second half of the question posed to the Committee in section number three (3) was: What enforcement tools could be implemented to insure compliance? The rule provides for sanctions in two instances. If a motion is stricken because of a failure to comply with the requirements of completeness of the contents, a defendant must respond within thirty (30) days or the motion is denied with prejudice. If a defendant raises mental illness issues, but refuses to cooperate with an examining state expert, the mental illness claims in the motion will be stricken. In general, denial of claims or an opportunity to proceed are the ultimate sanctions.

The Committee is aware of the Court's concern with dilatory practices of counsel. The sanctions currently available for lawyer misconduct can be utilized. Likewise, we are mindful of our duties as judicial officers and understand we are subject to judicial sanctions by the Supreme Court under our current disciplinary rules.

Setting aside the first issue of mandatory evidentiary hearing, the explanation above answers the questions raised in the order's fourth inquiry. The mandate of complete and detailed motions and answers requires a high degree of preparation prior to the filings of the parties. The Committee believes the detail of the pleadings, the separation of public records acquisition and the status conference timetable would make pretrial conference and pre-evidentiary conference unnecessary as standard procedures. Nothing in the proposal prohibits the trial judge from setting any hearing necessary, so long as the overall time requirements are met. The provision of the proposal will impose considerable burdens on counsel and the trial judge. The Committee sees mandatory pre-hearing hearings as needlessly time-consuming, burdensome and creating increased potential for error.

The provisions for amendments to the motion are strict; they are not allowed after an answer is filed. The Committee is of the opinion that a thoroughly researched and prepared motion and answer eliminates the need to amend. Part of the problem creating the need for the Committee is the current practice of pleading unsubstantiated claims, commonly called "shell pleadings", which are later abandoned or bolstered. The Committee hopes this proposal will end this pattern. It is confusing, burdensome, wasteful of precious resources and ultimately impedes, rather than facilitates, a thorough review and thoughtful order resolving the issue at the trial level.

If matters arise after the motion is filed, they must be dealt with under our provisions for successive motions. That standard is strict and necessary. It provides for both closure and fairness. It applies the doctrine of newly-discovered evidence in capital cases which includes matters relating to both guilt and imposition of a death sentence. This is a strict rule, and the provisions for amendment and successive motions taken together are a measure to prevent and sanction dilatory practice.

The most difficult issue in the questions presented in this section was the

appropriateness of mandatory evidentiary hearings on all motions. The Committee is cognizant of Justice Wells' suggestion in his concurring opinion in Mordenti v. State, 711 So. 2d 30, 33 (Fla. 1998), that Rule 3.851 be amended to require an evidentiary hearing on "initial motions which assert ineffective assistance of counsel, Brady, or other newly discovered evidence claims, or other legally cognizable claims which allege an ultimate factual basis." Additionally, we are familiar with the concurring opinion of Justice Pariente in Gaskin v. State, 24 Fla. Law Weekly S341 (Fla. July 1, 1999), agreeing with Justice Wells. Justice Pariente was joined by Justices Shaw and Anstead. The Committee rejected this for the following reasons: 1) There are recent cases such as LeCroy v. Dugger, 727 So. 2d 236 (Fla. 1998), in which the Court affirmed a denial of a Rule 3.850 motion alleging ineffective assistance of counsel in a death case without an evidentiary hearing. 2) The Supreme Court routinely affirms summary denials where ineffective assistance of counsel, etc., is raised as to the guilt phase of the trial, while reversing summary denials of these same issues in the penalty phase of the trial.

The Committee felt if evidentiary hearings were mandated for the issues raised in Mordenti, they would have to be mandated for both the guilt and penalty phases, thus increasing the overall workload of trial courts by requiring evidentiary hearings not currently required. In order to accommodate the concerns of the justices who feel trial courts do not hold evidentiary hearings when required, the Committee drafted section (h)(2) of Rule 3.851, which allows the Supreme Court to review the summary denial of original or successive motions and remand for an evidentiary hearing by an order, but without opinion. The Committee feels this will ameliorate the concerns of the justices, but not add unnecessary evidentiary hearings to the workloads of trial court.

The explanations thus far given answer question five (5). The Committee seeks to maintain the current one (1) year period for the filing of these motions. The Committee believes the recent adoption of Rule 3.852 will hopefully create an effective timetable for acquiring public records and ameliorate the delays attributable to that process. This proposal does not create any new discovery rights. It incorporates prior rules allowing for examination by mental health experts for the state. The proposal mandates material disclosure of witness names and addresses as well as affidavits or proffers of testimony. It requires detail on claims or answers. The Committee feels formal discovery rules in excess of mutual disclosure will consume time and resources

beyond that necessary to fully and fairly litigate the issues. We are mindful of the extent of discovery enjoyed by both sides during the guilt and penalty phases. Postconviction procedures should not become a second full-blown trial. The Committee has included a fifty (50) page (exclusive of attachments and exhibits) limit to the motion which should be sufficient.

As to six (6), the successive motions section offered speaks for itself. Though strict, the Committee believes it meets all the requirements of state and federal law on the issue while preserving the concept of procedural bars.

As to ineffective assistance of appellate counsel claims, the Committee did not deem it appropriate to include in the rule any more than the brief provision for habeas corpus. Since this is a matter for appellate court consideration, the Committee felt our advice to the Court would not be centered on our experience as trial court judges (except for Judge Padovano, who has experience at both levels) and therefore we respectfully decline to advise you.

The Committee did not spend much of its time on the question raised in number eight (8). There was no objection to the current practice of the Supreme Court setting forth a time limit for lower court compliance with resentencing, relinquishments and remands. The Committee understood such time limits are made by the Court after its own in-depth review and thus, the Court is in a superior position to know what is reasonably required to answer the question or to readdress or reassess the matters remanded. The important point is that the Court has created a case-specific time table for compliance and that is in keeping with our general approach of event-specific time limitations in the proposed rule.<sup>1</sup>

Question nine (9) concerns the relationship between the time periods of the rule and the availability of counsel. As touched on earlier, the triggering mechanism of this

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<sup>1</sup> It is this judge's opinion that if the trial court cannot comply with a mandated time period, the judge should request an extension of time from the Chief Justice with detailed explanation for the cause of delay, just as a judge would do if acting as a referee in a bar discipline matter.

proposed rule is the issuance of the mandate by the Florida Supreme Court. However, we also suggested a simultaneous order issue appointing counsel. If Capital Collateral Regional Counsel withdraws, it is within 30 days and the Court would then utilize the 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.

Issues number ten (10) and eleven (11) were the subject of much discussion. The Committee generally agreed that the concept of a limited pool of highly skilled trial judges, combined with continuing judicial education for them in the handling of capital trials and postconviction proceedings, would improve the quality of the process. The Committee concluded that each chief judge should recommend to the Chief Justice a limited number of judges from their respective circuits (no less than two and more in large circuits) to be certified in these matters. This would maintain the constitutional scheme of circuit jurisdiction without interfering with the current authority of the Chief Justice under the Rules of Judicial Administration to make individual appointments the Chief Justice deems appropriate.

The Committee understands that the pool of judges will change from time to time, but the current need for all criminal trial judges to participate in the "Handling Capital Cases" course would end. Furthermore, the focus and direction of the course itself, while still providing basic instruction, could shift to more in-depth analysis of issues and sharing of experiences amongst a smaller cadre of judges. This issue is not addressed in our proposed rule, but rather should be considered by the court in its Rules of Judicial Administration. Ultimately, this process will lead to a more focused trial judiciary, both as to the initial trial and the inevitable postconviction proceedings. For the time being, we believe the method of assignment of postconviction matters should remain unchanged.

The Committee does recommend more formal involvement of State Attorneys and the Attorney General as is evident in the proposed rule. Many larger circuits have the benefit of specialized divisions of their state attorneys' offices dedicated to capital matters. Many smaller jurisdictions do not. We realize both are constitutional officers and the judicial branch must be careful in matters affecting their internal operations and



organization. However, we have no hesitation to ask the Attorney General to help in providing assistance to the smaller circuits to ensure that the state's answer, as contemplated by the proposed rule and its presentation of evidence, be in keeping with the latest pronouncement of our Supreme Court in capital cases. The Attorney General is uniquely qualified to offer this assistance and must ultimately advocate the position taken by the state attorney in the lower court proceedings. Coordination, cooperation and mutual assistance can only enhance the state's presentation, which should likewise enhance the quality of the work product of the trial court.

The Chief Justice asked the Committee in his letter of April 26, 1999, if a presentence investigation should be mandatory in all capital cases. The Committee understood the need for such reports in those cases where the defendant refuses to cooperate with counsel in penalty matters and denies his counsel the opportunity to offer mitigation. However, the Committee does not recommend mandatory presentence investigations in all capital cases.

In those cases where counsel is presenting mitigation at the penalty phase, the Committee's experience is that counsel expends much time, effort and resources to that end. Often, two counsel are retained or appointed, with one counsel responsible primarily for these issues. Strategic decisions are often made concerning what is to be presented and what, if anything, avoided. The general experience of the Committee is that a mandatory presentence investigation would add time and expense to every case. It may result in a later challenge to the strategy of trial counsel without adding truly beneficial (to the defendant) facts for the court's consideration. These reports are done by the local probation office utilizing the same sources of information available to trial counsel. The Committee believes the resources of these offices are often less than those of trial counsel's and will seldom reveal information trial counsel has not already procured and reviewed. In plain terms, the cost in time and resources will far exceed any benefit.

If the will of the Supreme Court is to the contrary, the Committee strongly recommends that any notion of confidentiality be excised. Additionally, each party should be allowed the time and opportunity to offer objections and contrary evidence

Letter to Chief Justice Harding  
Supreme Court Committee on Postconviction Relief - Report  
September 30, 1999  
Page 10

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to the report or evidence in support of the report.

It is our hope that this proposed rule and these remarks are of some assistance to the Court. Each of us has suffered the constraints of our daily judicial duties in this task, but as chairperson I assure you much thought, consideration and shared experience went into this matter. It has been a privilege to serve with each member of this committee. Despite the gravity of the task, each member maintained a sense of proportion and purpose along with a healthy sense of humor and humility. I do wish to separately thank John Hogenmuller, our staff counsel. He not only coordinated the details of each meeting, but contributed to the substance of our discussions. I hope his efforts do not go unnoticed.

Our goal was to assist the Court in creating a proposed rule that eliminates unnecessary delay, directs thoughtful, professional practice, implements a high degree of judicial attention and management and ensures the highest level of judicial scrutiny and integrity that capital cases demand and deserve. If in doing so we have contributed to the public's continued belief in the rule of law and the independence of the judiciary, then our work was indeed worth the effort.

Sincerely,

Stan R. Morris  
Circuit Judge

SRM/sgt

CC: John Hogenmuller, Esquire  
Committee Members:

Honorable Philip J. Padovano  
Honorable O. H. Eaton, Jr.  
Honorable Joseph P. Farina  
Honorable John P. Kuder  
Honorable Belvin Perry, Jr.  
Honorable Susan F. Schaeffer

Letter to Chief Justice Harding  
Supreme Court Committee on Postconviction Relief - Report  
September 30, 1999  
Page 11

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