IN THE SUPREME COURT OF FLORIDA

AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.851, 3.852, AND 3.993 **No. SC96646**

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COMMENTS OF THE CAPITAL COLLATERAL REGIONAL COUNSEL

The Offices of the Capital Collateral Regional Counsels [CCRC] submit the following comments to the proposed amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, as modified by Order of this Court dated May 17, 2000.

I. INTRODUCTION.

Review afforded to capital cases is, by necessity, a complex and difficult area of the law. See, e.g., McFarland v. Scott, 512 U.S. 849, 855 (1994) ("quality legal representation is necessary in capital habeas corpus proceedings in light of the seriousness of the possible penalty and . . . the unique and complex nature of the litigation.") (internal quotations omitted); Arbelaez v. Butterworth, 738 So. 2d 326, 330 (Fla. 1999) (Anstead, J., specially concurring) ("all capital litigation is particularly unique, complex, and difficult"). This Court has always maintained a special vigilance over capital cases in light of its "primary responsibility [] to follow the law in each case and [] ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions." Allen v. Butterworth, 2000 WL 381484 at *7 (Fla. April 14, 2000).

The fair administration of justice in capital cases, however, necessarily contemplates the undeniable fact that cases involving the death penalty take longer to resolve than other

types of cases. "[T]hose who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence." Knight v. Florida, 120 S. Ct. 459, 460 (1999) (Thomas, J., concurring in denial of *certiorari*). While unwarranted delays should not be countenanced by anyone involved in the process, "we must never permit the call for prompt judicial action to overshadow the quality of the justice administered." Provenzano v. State, 750 So. 2d 597, 605 (Fla. 1999) (Lewis, J. specially concurring). See also Nixon v. Singletary, 2000 WL 63415 at *8 (Fla. 2000) (Harding, J., concurring) ("However troubling this may be, the amount of time this case has taken should in no way bear upon our ultimate decision on the merits. No defendant should be denied the relief required simply because of delay").

Efforts made by this Court to bring order to Florida's procedures for capital post-conviction review have been constantly affected by legislative action. Repeals nullify procedures before they reach fruition. New schemes are more inefficient than those they replace. Historically inadequate appropriations have forced extensions of timeframes the Court had just shortened. Statutory restructurings of an entire (barely functional) system for the provision of counsel create more problems than they solve.

This tinkering burdens a system that is already overtaxed. There are simply too many cases: cases of innocent, retarded, and severely mentally ill people being sentenced to death; cases that are indistinguishable from those in which death was not imposed or even sought; cases in which the jury has recommended life imprisonment but its recommendation was overridden by the judge; cases in which race and other arbitrary factors such as poverty, poor legal representation, and suppressed evidence, played a role

in bringing about a death sentence. Clemency review is one-sided, cursory, and arbitrary, thus playing no meaningful role in the system.

With this historical context and the serious nature of the penalty on the minds of conscientious lawyers, there are too few such lawyers to provide competent and effective post-conviction representation equally for all the 380+ men and women on Florida's death row. Many of the willing lawyers are untrained, inexperienced, and underfunded. As long as the Legislature and Executive branch refuse to provide the funding or the changes in law and policy that are necessary to cure what ails this system, particularly funding for courts and clerks, the ship of reform "is destined to sink." Allen, supra at *14.

In the comments that follow, the CCRCs respond to the Court's proposed rule changes as they would remedy the problems just addressed given the resources and statutory parameters within which the rules must operate. For example, proposed rule 3.851(f)(3) could be read to require that the state plead all procedural defenses. Such a requirement established by a rule of procedure could impair efforts to settle cases. Settlements, for example those facilitated by the adjudication of meritorious issues to which procedural defenses could be waived, should be encouraged as an efficient mechanism for clearing the backlog of cases.

Repeated studies by this Court and other experts such as former Attorney General Robert Shevin and the Spangenberg Group provide insight into solutions. From these studies there has long been consensus on the need for a sufficient number of competent, experienced, and adequately resourced lawyers at trial, on appeal and in post-conviction proceedings. While recent efforts to ensure competence and experience in the capital

defense bar will no doubt produce some benefit, there remain a large number of cases in which people sentenced to death were and are receiving ineffective legal representation. For example, a motion to vacate recently filed under rule 3.851 in the Northern Regional Counsel's jurisdiction was only three pages long. App. 1. The lawyer's bill is longer than the motion. Id. In the bill, the lawyer remarks that he is seeking no compensation for investigative costs because no investigator was appointed. Id. While this Court recently stressed the *necessity* of investigating the files of law enforcement agencies, Allen, supra at *13, the lawyer's bill reflects that no such investigation was conducted. Whatever agencies sent records to the Repository did so for no apparent purpose. This Court's efforts to provide an efficient mechanism for getting these records to post-conviction counsel are meaningless when lawyers do not obtain or review them (or do not know of their obligation to do so).

II. Legislative Intent Should Not Influence Court's Rulemaking Authority.

In its proposed amendment to Rules 3.851 and 3.852, the Court adopted a modified dual-track system of postconviction review patterned after the version created by the legislature in the Death Penalty Reform Act [DPRA]. Despite striking the DPRA on constitutional grounds,[1] the Court issued its proposed rules "in response to the Legislature's express acknowledgement . . . that the Florida Supreme Court is to develop rules to implement death penalty reform consistent with the Legislature's purpose behind the DPRA." Allen, supra at *12. According to the Court, however, several

[1] See Allen v. Butterworth, 2000 WL 381484 (Fla. April 14, 2000).

conditions precedent requiring legislative action needed to be met "if the proposed dual-track system is to work." Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, 2000 WL 381496 at *5 (Fla. April 14, 2000). For example:

- **"the dual-track system we propose, if adopted, will require additional judicial resources for the Capital Collateral Regional Counsel and the State"[2]**

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[2] Amendments, supra at *5.

- **"there is a serious problem in the DPRA's handling of public records production which would preclude collateral counsel from effectively investigating potential postconviction claims immediately upon appointment. . . . Recognizing that the aims of our proposed amendments cannot be achieved if the above referenced exemptions remain in place, we call this problem to the attention of the Legislature and seek assistance as to its resolution."[3]**

- **"We have also identified the transcription of trial proceedings and evidentiary hearings as a significant source of delay in capital cases. Accordingly, we have proposed an amendment, which likely should be included in the Rules of Judicial Administration, which requires real-time transcription for all trials in which the State seeks the death penalty."[4]**

Despite attempting to embrace the legislature's intent so that "the postconviction process will begin immediately after the imposition of the death sentence." Amendments, supra at *3, the Court explicitly recognized that "without these changes, the dual-track system would, in essence, be meaningless." Allen, supra at *13. See also id. ("Our proposed rules cannot take effect until the Legislature takes these steps").

[3] **Amendments, supra at *3-4.**

[4] **Amendments, supra at *4.**

The legislature failed to appropriate sufficient additional funding and, more importantly, positions for the CCRC offices to be able to absorb the vast number of cases currently in the "pipeline." In addition, despite the acknowledgement by the Court that "[a]dequate funding is also needed for the court system, including informed judges, trained judicial support staff, and other important resources, such as real-time court reporting and case management systems," Allen, supra at *14,[5] it is CCRCs' understanding that no additional funding was appropriated to the judiciary or other actors involved in ensuring that the capital postconviction process work as fairly and efficiently as possible.[6]

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[5] In the proposed rule of Judicial Administration, the Court provided that real-time court reporters "shall be arranged for and paid for by the state attorney." Amendments, supra at *25. The CCRCs are unaware whether the State Attorney offices have been funded for such an expense by the legislature.

[6] See In Re: Certification for the Need of Additional Judges, 25 Fla. L. Weekly S181 (Fla. Feb. 29, 2000); Jo Becker, High Court Denied Funds for Judges, *The St. Petersburg Times,* April 25, 2000.

When the DPRA was announced, the CCRCs submitted documentation in the form of fiscal impact statements reflecting the resources they would need in order to comply with the immediate effective date of the Act in light of the large number of cases falling within their respective regions.[7] Based on the estimated thirty-four (34) cases on direct appeal as well as five (5) estimated cases in which death would be imposed in the remainder of FY 1999-2000, and eleven (11) in FY 2000-01, CCRC-South requested an additional eight (8) attorney and eight (8) investigator positions, as well as four (4) support positions and appropriations for additional office and storage space which would be needed for the additional staff (App. B). For the fiscal year 2000-01, CCRC-South requested an additional two (2) attorney and two (2) investigator positions, as well as one (1) support position (Id.). However, despite these requests and despite this Court's explicit warning that "without the necessary funding, the ship is destined to sink," Allen at *14, CCRC-South received no new positions for either the current fiscal year or for the next fiscal year. Thus, a prerequisite for implementation of any dual-tracking model has not been met. See Allen, supra at n.7 ("Adequate funding is also a prerequisite to justify the imposition of the dual-track system articulated in the rules proposed by this Court pursuant to this opinion").

In September 1999, CCC-NR submitted its budget request for fiscal year 2000-2001 (AFY 2000-01"). Based on the number of cases believed to be moving through the

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[7] Even prior to the DPRA, the CCRCs had requested additional lawyer and investigator positions for the upcoming fiscal year. .

normal sequence of direct appeal-certiorari-postconviction, CCC-NR anticipated an additional caseload that would require four (4) attorney positions (two (2) experienced lead attorneys and two (2) second chairs), two (2) full-time investigators, and a secretary (App. 3).

In December 1999, immediately after DPRA was proposed, CCC-NR submitted a fiscal impact statement informing the Legislature about what would be needed to handle the influx of cases under the statutory deadlines (App. 4). In order to handle the 24 cases on direct appeal which would become the responsibility of the Northern Region within the current fiscal year, plus those coming in FY 2000-01, CCC-NR would need funding to hire an additional six (6) attorneys, six (6) investigators, and three (3) support persons, in addition to those all ready requested (Id.). In total, CCC-NR required an additional 22 positions in order to absorb pending direct appeal cases and those that would become final in FY 2000-01. The Legislature failed to provide any additional positions to the CCC-NR.

In response to dual-tracking, the CCRC for the Middle Region estimated an influx of 20 new cases in FY 2000-01 "which requires 3 teams, each consisting of 2 attorneys, 1 investigator, and 1 supp[ort person]" (App. 5). With anticipated increase of 60 cases over the next three years, the Middle Regional Counsel also sought funds to move to larger offices that would be needed to accommodate the 50 additional employees the agency would need to hire by the third fiscal year of dual-track review. For FY 2000-01, the Middle Region requested six (6) attorney positions (three lead and three second-chair attorneys), three (3) investigators, and three (3) legal secretaries, for a

total of 12 positions for the first fiscal year of dual-tracking. Id. No new positions were made available to the CCRC-M for FY 2000-01.

Additionally, in spite of its pledge to ensure that the Chapter 119 problem would be remedied,[8] the legislature failed to make the changes to Chapter 119 without which "the dual-track system would, in essence, be meaningless." Allen, supra at *13. In response, the Court, by Order dated May 17, 2000, modified the proposed amendment to require agencies with exempt records to deliver such records under seal to the clerk of court, which in turn will unseal and forward the records to the records repository within thirty (30) days after the notice of mandate. The time period to file the Rule 3.851 motion was also extended from six (6) months to one (1) year after finality. The CCRCs submits that this modification is but a band-aid on a hemorrhaging wound or, in the analogy of the Court, plugging a hole on a sinking ship. Allen, supra at *14. The proposed modification would add more burdens to an already overburdened and underfunded clerk of court.[9] Moreover, CCRC-South has experienced significant

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[8] See Transcript of Oral Argument, March 14, 2000 (comments of Tom Feeney) ("We will consider everything that this Court has done and that happened during special session, and will take guidance from this Court, the PD's office, the CCR and the Attorney General's Office, with respect to making the importance of these records open as quickly as possible, in order for the process to move forward").

[9] The CCRCs are not aware that the clerks of court were provided any staff or funds to implement what would become a rather significant and sizeable "repository" for all exempt records in cases pending on direct appeal. In fact, in Miami-Dade County, a meeting was held in October, 1999, with members of the clerk's office, the Attorney General's Office, representatives of CCRC-South, and various court reporters to discuss delays associated with preparing records on appeal from Miami-Dade County. Assistant Attorney General Fariba Komeily suggested that a separate file room be maintained for capital collateral cases. The response from the Clerk was:

problems with some clerks offices, presumably due to lack of adequate staffing and funding. For cases arising out of Miami-Dade County, for example, putting together a record on appeal is a monumental and time-consuming task for the Clerk's Office, and this Court often has to order numerous supplementations of the record.[10] Confusion reigns with some court reporters as to how to properly prepare a record on appeal for a direct appeal as opposed to a record for a postconviction appeal.[11] Records which have been sealed by a court following *in camera* inspections are sometimes lost or misplaced.[12] In short, placing the burden on the Clerks of Court to house sensitive documents during the pendency of the direct appeal process is fraught with danger and uncertainty.[13] For all the above reasons, the dual-track system envisioned by the Court in its proposed rules will simply not work. The Regional Counsels thus respectfully urge the Court not to

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> **[A] conservative estimate of current space provided for Capital Collateral files at the Records Center has determined that this [suggestion] would entail acquiring an additional 1,450 cubic feet for space and file shelving within this Division as well as staffing to retrieve/refile files and file pleadings into the files. At this time, the Criminal Division has no additional space or funds to accommodate this suggestion.**

(App. 6).

[10] **Serious problems have also been encountered with court reporters; in some instances, court reporters have actually been jailed for failing to timely comply with orders to transcribe proceedings in capital cases.**

[11] **See App. 6 (Memorandum from Barbara Fernandez, Senior Deputy Clerk, Eleventh Circuit, Miami-Dade County, to Harvey Ruvin, Clerk of Courts, November 9, 1999).**

[12] **See, App. 7 (Letter from Assistant State Attorney Penny Brill to Judge Carol Gersten, July 10, 1996) (explaining that Clerk's Office could not locate four large manila folders containing exempt materials despite "exhaustive search").**

[13] **The CCRCs would imagine that the agencies themselves would want to ensure that these records are maintained in the proper manner in case of a reversal on direct appeal and the records would remain exempt and presumably would be needed for further proceedings.**

adopt the proposed rules.[14]

III. THE PROPOSED RULES.

a. Any New Rules Should be Applied Prospectively Only.

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[14] The CCRCs would refer to the comments of other parties who have set forth arguments against the wisdom of a dual-track process in Florida. The CCRCs would also note that it is not just the parties on the defense side which question the efficacy of a dual-track system. Mike Erickson of Florida Senate's Committee on Criminal Justice authored a memorandum dated November 18, 1999, in which a comparison between Florida's system and Texas' system is made (App. 8). The memorandum notes that there are "several important distinctions between the Florida and Texas capital postconviction process," concluding that "it is unclear whether adopting Texas' unitary system (parallel proceedings) would speed up [] Florida's postconviction process." The memorandum goes on to state that in cases where there is a reversal on direct appeal, "the work done on the collateral relief motions may be wasted effort in this event, the state's costs are increased without any certainty that the death case processing time will experience an overall decrease." The memorandum further noted that "Texas' successes would not necessarily follow in Florida of it adopted the Texas model" because the Texas courts "are among the most conservative in the nation," "judges are elected and, more often than not, campaign on a `tough on crime' platform," and Texas courts on direct appeal "do not undertake comparative proportionality review." Moreover, "Texas does not have a public defender system," and that counsel are appointed by the trial judge, who "determines how much the state will pay, if anything, and the county foots the rest of the bill." In terms of successors in Texas, "the defendant is on his own as far as filing any claims; counsel may be appointed if an evidentiary hearing is required." In contrast, "Florida collateral counsel would certainly have more experience and investigative resources than a pro se Texas capital defendant raising successor claims." In sum, the memorandum is far from an overwhelming endorsement of a dual-track system in Florida.

The Court also sought specific comments on "which of the proposed provisions can be applied to defendants who were sentenced prior to the effective date of the rule." Amendments, supra at *5. The CCRC offices submit that any proposed rules affecting the procedures should be applied prospectively only, that is, to cases in which a death sentence is imposed after the effective date of any rule change. The CCRC offices concur with the Court that "changing the applicable time periods and procedures while the postconviction process is underway will only cause more confusion and delay." Id. Due to the numerous rule and procedural changes occurring over the past several years, "confusion and delay" have plagued the capital postconviction system, contributing in large part to the present situation. Any attempt to apply new rules to pending cases will assuredly result in attempts by the State to search for a reason to deny a capital defendant's right to review of his or her case because one of the new rules was not satisfied in a particular case. Making any new rules applicable prospectively only may prevent this from occurring again.

If the Court were to consider making any of the rules applicable to pending cases, there must be a reasonable grace period afforded to defendants to comply. In proposing new rules, the Court was operating under the assumption that adequate funding and staffing for all parties involved in this process would be forthcoming. Even were the Court to adopt any new rules and they were applied prospectively only, the problem still remains that the various players in this process − the CCRCs, the State, the judiciary − have not been properly funded and staffed to make these rules have any meaning. It is a

vicious cycle which, in the view of the CCRCs, requires that no new rules be adopted at this point in time until fiscal matters are addressed by the Florida Legislature.

b. Reasonableness and Impact of Time Periods.

The Court specifically requested comments on "the reasonableness and impact of the time periods contained in our proposals." Amendments, supra, at *5. Aside from the modified rule extending the filing deadline to one (1) year from issuance of mandate, see Order, Case No. 96646 (May 17, 2000), the CCRC offices would take the position that many of the time periods are unrealistic in practice. Of course, expedited time frames effect not only CCRC attorneys; "[t]he judicial system, whose resources are already taxed, will be particularly impacted by the proposed rules." Amendments, supra at *5. In light of the legislature's failure to appropriate funding to any of the parties to postconviction proceedings, including the judiciary, no expedited time frames should be adopted.

Moreover, as noted, some of the time frames are, based on experience, unrealistic in a practical sense. For example:

Prop. R. 3.851 (b)(3) provides that CCRC shall have thirty (30) days from appointment to either enter a notice of appearance of move to withdraw due to a conflict of interest "or some other legal ground." Such a short period of time is inadequate to determine whether a conflict of interest might exist. At that early stage, CCRC counsel would not even have the record of the trial, which often forms the basis of a conflict or

"some other legal ground" which would require withdrawal.

Prop. R. 3.851 (c)(4) places a duty on trial counsel to provide his or her files to postconviction counsel "within 15 days of appointment of postconviction counsel." This too is an unrealistically short period of time, and also conflicts with Prop. R. 3.851 (b)(3) in the sense that trial counsel would be obligated to turn over the files to CCRC counsel while the time is still running for CCRC counsel to determine if a conflict or "some other legal ground" exists requiring CCRC to withdraw.

Prop. R. 3.851(f)(5) provides that a "case management conference"[15] shall be held within thirty (30) days after the state files its answer to the postconviction motion. This time period is very short, and the scheduling of such a conference should be left to the discretion of the trial court in view of the circumstances of the case. Particularly in light of the specific tasks that are to be completed at the conference − disclosure of all documentary exhibits the parties intend to offer at an evidentiary hearing, exhibits lists, witness lists, expert witness reports − this time frame is inadequate.[16]

Prop. R. 3.851(f)(5)(B) requires that an evidentiary hearing be held within ninety

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[15] It appears that the "case management conference" replaces what has been referred to as the Huff hearing. See Huff v. State, 622 So. 2d 982 (Fla. 1993).

[16] Prop. R. 3.851(f)(5)(B)(6) does provide that a trial court may grant leave to amend an exhibit or witness list on a showing of "good cause." However, it remains to be seen what "good cause" constitutes. Because of the strict thirty (30) day period to prepare for the case management conference, CCRC can imagine that witnesses or exhibits might be inadvertently overlooked. Then CCRC would have to establish "good cause." Whether "oversight" or other neglect would satisfy the "good cause" requirement remains to be seen, but it would certainly generate additional litigation when a court denies leave to amend. CCRC submits that discovery matters are adequately handled on a case-by-case basis among the parties and with the assistance of the trial court if needed. See State v. Lewis, 656 So. 2d 1248 (Fla. 1994).

(90) days of the case management conference. This time frame might be reasonable in some cases, but it might not in other cases. The timing of the evidentiary hearing should be left to the discretion of the trial court with the involvement of the parties.[17]

Prop. R. 3.851(f)(8) provides that a transcript of an evidentiary hearing shall be filed within thirty (30) days of the conclusion of the hearing. Based on experience, in

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[17] Scheduling matters are often more difficult in larger counties with enormous caseloads and limited resources. Scheduling an evidentiary hearing, especially in a long and complex case, only adds to the difficulty. Furthermore, some trial judges are on the civil bench at the time of the postconviction proceedings, and in the experience of the CCRC-South office, lengthy hearing times are even more difficult to obtain on a civil calendar than a criminal calendar. Even the Miami-Dade County State Attorney's Office, in previously-submitted comments to this Court, recognized the importance of reasonable time limits in light of the fact that "each case is different; while some are complex, others are not." Comments of Katherine Fernandez Rundle, April 29, 1999, to John Hogenmuller, Staff Counsel, Committee on Postconviction Relief in Capital Cases. The Attorney General likewise has taken the position in previously-submitted comments that "the setting of formalized time standards to encompass every aspect of capital litigation would not seem practical." Comments of the Attorney General pursuant to Administrative Order of March 31, 1999. Immovable deadlines for a proceeding as important as an evidentiary hearing can only result in further litigation should the parties not be able to be prepared within ninety (90) days or should the court be unable to schedule the hearing in that period of time. See, e.g. Provenzano v. State, 750 So. 2d 597 (Fla. 1999) (judge abused discretion in denying a continuance of a "reasonable delay" in order to procure attendance of witness); Jones v. Butterworth, 695 So. 2d 679 (Fla. 1997) (additional evidentiary hearing ordered when defendant could not present expert witnesses due to short time frame for hearing); Spaziano v. State, 660 So. 2d 1363 (Fla. 1995) (granting stay of execution to allow more time for evidentiary hearing to be conducted).

addition to the lack of funding for court reporters, this time frame is likewise unrealistic in many situations.

In sum, it is respectfully submitted that time frames should be flexible and that the scheduling of "milestone" events such as case management conferences and evidentiary hearings be left to the lower courts with the involvement of the respective parties.

c. Proposed Rule 3.852 is Unconstitutional

Under current law, upon notification by the Attorney General that this Court has issued its mandate affirming a death sentence, the state attorney and each law enforcement agency involved in the investigation or prosecution of the case is required to copy, seal, and deliver its records to the records Repository within 90 days. § 119.19(3), Fla. Stat. (1999). Similar duties exist for the Department of Corrections. § 119.19(4), Fla. Stat. (1999). These responsibilities were imposed by the Legislature in Chapter 98-198, Laws of Florida, which also repealed this Court's original rule 3.852.

Proposed Rule 3.852 purports to impose new and different duties on the state attorneys and law enforcement agencies. Apparently, the proposed rule would relieve the Attorney General of the responsibility placed on him by the Legislature to provide notice of the issuance of this Court's mandate, and give state attorneys responsibility for notifying agencies of what is required of them. The proposed rule would change the responsibilities of law enforcement agencies, too. In place of the statutory duty to send records to the Repository following issuance of the mandate, the Court would require

agencies to send records to the clerk of court. Prop. R. 3.852(d)(2). Law enforcement agencies would be required to carry out their judicially imposed responsibilities less than three months after a death sentence is imposed, years before the Legislature requires them to do anything. Compare Prop. R. 3.852(d) & (e) with § 119.19(3) & (4), Fla. Stat. (1999). This Court has previously declined to "write into the [public records] statute something that is not there." Tribune Company v. Cannella, 458 So. 2d 1075, 1078 (Fla. 1984).

Imposition of these substantive duties on executive agencies is an unconstitutional encroachment upon legislative and executive authority. See Benyard v. Wainwright, 322 So. 2d 473, 475 (Fla. 1975) ("Substantive law prescribes the duties and rights under our system of government. The responsibility to make substantive law is in the legislature . . . ."). This Court has previously recognized the important distinction between its authority to regulate the maintenance of judicial records that are in the custody of the courts and the Legislature's authority to regulate maintenance of non-judicial records in the custody an executive agency. State v. D.H.W., 686 So. 2d 1331, 1334-35 (Fla. 1996); Johnson v. State, 336 So.2d 93 (Fla. 1976).

Article I, section 24 (c) of Florida's Constitution, authorizes one and only one branch of Florida government to enact policies and impose duties to regulate the maintenance of public records and to create exemptions from the presumption that records are available to all from the agencies that created them. The Legislature

> **may provide by general law for the exemption of records from the requirements of subsection (a) . . . provided that**

> **such law shall state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law. The legislature shall enact laws governing the enforcement of this section, including the maintenance, control, destruction, disposal and disposition of records made public by this section.**

Art. I, § 24(c), Fla. Const. (emphasis added). It is clear that "courts may not pass upon the wisdom of legislative determinations" related to the handling of criminal investigation files. Rose v. D'Alessandro, 380 So. 2d 419 (Fla. 1980).

When the people of the State of Florida decided to give constitutional stature to the hitherto statutory right to public records, a decision was made to give only the Legislature the authority (1) to create exemptions under strictly limited circumstances, and (2) to "enact laws governing . . . the maintenance [and] control" of public records. Art. I, § 24(c), Fla. Const. (emphasis added). Courts may not expand or contract statutory terms related to public records. Rose, supra; Wait v.Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).

In 1998, the Legislature exercised its authority under Article 1, section 24(c), and enacted section 119.19 of the Florida Statutes (hereinafter "Repository law"). The constitutional aspects of that section[18] required agencies to send records to the Bureau of

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[18] As this Court clearly recognized when it adopted a rule with procedural provisions different from those of section 119.19, not all of the 1998 act was constitutional. Enactment of provisions that would have governed the *process* through which people sentenced to death obtained judicial enforcement of their records requests in post-conviction proceedings constituted an unconstitutional encroachment upon this Court's exclusive rule-making authority. Cf. Allen v. Butterworth, supra.

Archives records Repository in Tallahassee, and to notify each other of their obligation to send records there. See § 119.19(4), Fla. Stat. (1999).

During the Death Penalty Reform Act (DPRA) litigation, CCC-NR did not take issue with the Legislature's authority to enact substantive directives to state agencies regarding the maintenance and disclosure of records that qualify as statutorily exempt. See Asay, et al v. Butterworth (Reply to Response to Petition for Writs of Mandamus and Prohibition and Other Extraordinary Relief and Petition Invoking this Court's All-Writs Jurisdiction), p.11-12. In fact, CCC-NR stated: "the Legislature may regulate the maintenance and *disclosure* of public records . . . to laws 'for the exemption of records from the [disclosure] requirements of [Article I, section 24](a)' of the Florida Constitution." Id. (emphasis in original).

In Allen, this Court held that while the Legislature has the authority to define the substantive right to public records, the Legislature does not have the right to adopt time limitations and procedures governing the production of public records. Allen, supra at *13. However, while the Legislature does not have the authority to govern the production of public records, the Legislature does maintain the constitutional authority to govern the procedures regarding records that are statutorily exempt from production. Art. I, § 24(c), Fla. Const.

DPRA section ?3 was held unconstitutional so the pre-DPRA version of section 119.19 must govern the maintenance and control of the public records. See B.H. v. State, 645 So. 2d 987, 995 (Fla. 1994)("Florida law has long held that, when the legislature approves unconstitutional statutory language and simultaneously repeals its predecessor,

then the judicial act of striking the new statutory language automatically revives the predecessor unless it, too would be unconstitutional); State ex rel. Boyd v. Green, 355 So. 2d 789, 795 (Fla. 1978)(holding where a repealing act is adjudged unconstitutional, the statute it attempts to repeal remains in force).

Additionally, proposed rule 3.852 would further complicate the already byzantine and unconstitutional process through which records are funneled to death-sentenced habeas petitioners. Although this Court has held that people sentenced to death have the same rights as others under the Public Records Act, State v. Kokal, 562 So. 2d 324 (Fla. 1990), and that agencies may not place preconditions on the right to review nonexempt records, Wait, 372 So. 2d at 425, or delay timely disclosure by the custodian of a particular record, Tribune Company, 458 So. 2d at 1078, Rule 3.852 institutionalizes delay and preconditions. Although cases interpreting Chapter 119 hold that agencies may not play a shell game with their records to forestall disclosure, see, e.g., Tober v. Sanchez, 417 So. 2d 1053 (Fla. 3d DCA 1982), that is precisely what the Repository system does. By interposing the clerks of courts in this process, the proposed rule would only make matters worse.

This Court's original Rule 3.852 had enforcement provisions. The old rule held out the carrot of courts enforcing defendants' rights to prompt disclosure. It also gave courts a stick to wield. The failure of collateral counsel to timely file requests or motions to compel, or the failure agencies to timely produce records or assert exemptions, could result in a waiver. Under the current and proposed rules, people sentenced to death have no right to inquire of state agencies in the first instance (except

the rights they retain under Article 1, section 24, of course). If the Attorney General or state attorney fails to notify an agency of its obligation to send records to the repository, there are no records for collateral counsel to review, and the provisions of the rule are useless. Rule 3.852(g) and (h) and proposed rules 3.852(h) and (i) allow only for requests to agencies that previously sent records to the Repository. If no records were sent, for example, because notices were not sent, is the defendant out of luck? There is no penalty for agency non-compliance as there was in the old rule. For that reason, and those previously discussed, the proposed rule is unworkable and unconstitutionally infringes upon the right of death-sentenced persons to obtain public records

d. Other Comments.

The CCRC offices have concerns about other provisions of the proposed rules. Under the proposed rules and the statutory and fiscal environment in which they will operate, the Regional Counsels will have the primary responsibility for all cases. However, the Legislature has exercised its power over the public fisc to prevent the Regional Counsel's from handling all but a few of the incoming cases. Thus, the Regional Counsels must decide which of the death-sentenced persons to whom they owe a duty of loyalty and diligence will not receive CCRC representation.[19]

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[19] **The duty of loyalty which the CCRCs owe their clients is particularly important in the context of whether cases will be channeled to the Registry. Neither the Commission on Capital Cases nor the Executive Director who recruits and recommends particular lawyers for appointment in individual cases, see, e.g., App. 9, owes any duty to people on death row. See App. 10 at 21(Transcript of Hearing**

in State v. Elledge, No. 75-000087 (Fla. 17th Jud. Cir. Nov. 17, 1999)).

People sentenced to death whose cases remain the responsibility of a CCRC will be represented by two attorneys and at least one investigator who do not face the economic disincentives and restrictions on their representation that are imposed on private contract counsel operating under sections 27.710 and 27.711 of the Florida Statutes. Clients of government contractors receive less representation; they are represented by only one lawyer who is prohibited from conducting investigations and litigation that CCRC attorneys may and do conduct. Under this Court's well-established law, the equal protection rights of clients whose cases are relegated to representation by government contractors will be violated. Green v. State, 620 So. 2d 188 (Fla. 1993). Under proposed rule 3.851(b)(3), the Regional Counsels will be required to participate in this equal protection violation by choosing which clients will receive their representation and which clients will be represented by registry counsel.[20] The proposed rule thus presents serious ethical problems for the Regional Counsels.[21]

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[20] CCRC-South is aware of at least two (2) cases where registry attorneys have been removed from cases yet they are still on the list of available attorneys to take more cases.

[21] As previously noted, the CCC-NR has submitted two examples of post-conviction motions filed by government contractors that were less than five pages long. See App. 1, and Appendix E to Petition in Asay v. Butterworth, SC00-154.

Prop. R. 3.851 (d)(1)(C) provides that an extension of time for filing a postconviction motion may be granted "only upon a showing that a manifest injustice would result absent such relief and that counsel's inability to timely file the motion is not the result of lack of cooperation by the defendant or lack of due diligence on the part of counsel." CCRC submits that the "manifest injustice" standard is too high and too vague. Moreover, this provision conflicts with Prop. R. 3.851 (d)(1)(A)(iii), which provides that a motion can be filed outside the time period if an extension has been granted by the judge and "the defendant retained counsel to timely file a 3.851 motion and counsel, through neglect, failed to file the motion."[22] The "manifest injustice" standard also conflicts with pronouncements by the Court in Steele v. Kehoe, 747 So. 2d 931, 934 (Fla. 1999), where it was held that "due process entitles a prisoner to a hearing on a claim that he or she missed the deadline to file a rule 3.850 motion because his or her attorney had agreed to file the motion but failed to do so in a timely manner. . . . [I]f the prisoner prevails at the hearing, he or she is authorized to belatedly file a rule 3.850 motion challenging his or her conviction or sentence." Further, in Medrano v. State, 748 So. 2d 986 (Fla. 1999), the Court reiterated its holding in Steele, again emphasizing that "Medrano should have his claim concerning counsel's failure to timely file a postconviction motion heard in the circuit court." Id. at 988.

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[22] **This is the standard currently codified at Fla. R. Crim. P. 3.850 (b) (1999), with respect to noncapital cases.**

Prop. R. 3.851 (c) (4) requires that within fifteen (15) days of appointment of postconviction counsel, the prosecutor "shall provide to postconviction counsel copies of all pretrial and trial discovery and all contents of the state's file . . ." This conflicts with the duty of state agencies to provide their records to the records repository, in particular, Prop. R. 3.852 (d)(2)(A), which requires prosecutors send their records to the repository within ninety (90) days of imposition of the death penalty in the trial court.

Prop. R. 3.851 (e) provides that an initial postconviction motion not exceed fifty (50) pages exclusive of attachments, and that any accompanying memorandum of law not exceed twenty-five (25) pages. Prop. R. 3.851 (g) provides a twenty-five (25) page limit to successive motions, and requires that additional matters be pled in addition to those required in an initial motion. See Prop. R. 3.851 (g) (1) (A) – (D). The CCRCs submit that any page limitations are an undue and unreasonable restriction on a defendant's ability to plead his or her claims for relief, particularly in light of the requirement that the motion contain "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought." See also Amendments, supra at *4 ("the motion should give adequate notice of the issues requiring an evidentiary hearing").

[23] Moreover, page limits on the memorandum of law are likewise unduly restrictive and only run the risk that the one particular matter not raised in the memorandum will be alleged by the State to be waived and so found by the Court on appeal. See, e.g. Way v.

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[23] Noncapital defendants under Rule 3.850 are not subject to any page limitations.

State, 2000 WL 422869 at *10 (Fla. April 20, 2000) (claim that materiality of suppressed evidence should be considered cumulatively "has not been preserved for review because it was not raised in the trial court"). The proposed page restrictions are even more problematic with successive motions. In considering a successive motion alleging either newly-discovered evidence or a violation of Brady

[24] **and/or Giglio,**

[25] **a trial court is required to consider the cumulative effect of all previous errors in the case, as well as the evidence at trial, in order to conduct the proper legal analysis. See, e.g. Lightbourne v. State, 742 So. 2d 238 (Fla. 1999).**

Prop. R. 3.851 (g) (1) (B) requires that, for successive motions, "a statement that the witness will be available to testify under oath to the facts alleged in the motion or affidavit" be included as a pleading requirement. The CCRCs fear that this requirement will be used in a manner not intended by the plain language of the rule. For example, the "availability" of a witness to testify often depends on when a hearing is scheduled; if a witness cannot be "available" on a particular day, the plain language of the rule might be construed to mean that the defendant cannot establish his claim. Moreover, witnesses often live out of state, and counsel cannot force an out-of-state witness to submit to the jurisdiction of Florida without a certificate of materiality from the Florida

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[24] **Brady v. Maryland, 373 U.S. 83 (1963).**

[25] **Giglio v. United States, 405 U.S. 763 (1972).**

court and a subpoena issued by the witness' home state. See Fla. Stat. 942.03. Thus, CCRC submits that this requirement not be put in a rule of procedure, or that the rule be clarified.

[26]

Prop. R. 3.851 (f) (1) requires that "[a]ll motions other than the postconviction motion itself shall be accompanied by a notice of hearing." CCRC submits that this should not be a rule of court. In the experience of the CCRC offices, each judge has his or her own way of scheduling hearings in cases. Many judges have expressely told counsel that the judge, not counsel, will set hearings. Moreover, many motions do not require hearings at all. Rather than a rule requiring a notice of hearing, CCRC would submit that a better resolution would be to require that a request for a hearing be put in a motion. Because Prop. R. 3.851 (f) (1) also requires that all pleadings be served on the

[26] CCRC-South in particular has had to secure certificates of materiality and out-of-state subpoenas in a number of cases. On some occasions, the Florida courts have refused to issue a certificate of materiality. In other cases, despite issuance of a Florida certificate of materiality, the other state refuses to honor it. In some cases, the process works, but not without substantial efforts. For example, in the evidentiary hearing on the FBI Laboratory issue in George Trepal's case, the FBI employees were not permitted to voluntarily appear, and thus counsel had to (1) obtain certificates of materiality in Florida, and (2) go to Washington DC to litigate the issues before a Washington judge. This matter is pointed out because occasionally is not enough for counsel to allege that a witness will be "available" when witnesses from out of state are entitled to process and, in some occasions, to challenge the Florida subpoena. How these particular circumstances affect the cases is, of course, not at issue in these proceedings and will be addressed in the respective cases.

assigned judge, the judge will then be on notice that a hearing is requested, and thereafter will set a hearing in accordance with available times and dates.

IV. CONCLUSION.

For the foregoing reasons, the three regional offices of the Capital Collateral Regional Counsel request that the Court not adopt the proposed amendments at issue in the above-captioned case at this time.

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