IN THE

SUPREME COURT OF FLORIDA

AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.851, 3.852, AND 3.993	No. SC 96,646

COMMENTS OF

THE FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

The Florida Association of Criminal Defense Lawyers ("FACDL") submits the following comments to the proposed amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993.

A. Introduction

FACDL consists largely of members of the private criminal defense bar in Florida. Some of its members participate in postconviction proceedings under the auspices of the Registry Act codified in sections 27.710 and 27.711 of the Florida Statutes (1999). According to recent legislative action and filings by the Offices of the Capital Collateral Regional Counsels ("CCRCs") in *Allen v. Butterworth*, Nos. SC00-113, SC00-154, SC00-410, private contract counsel will be responsible for a large portion of the cases that would be affected by the dual-track system set forth in the Court's proposed rules. Those

rules would necessarily interact with the provisions of sections 27.710 and 27.711 in ways that will deny effective postconviction representation to inmates sentenced to death.

B. The increased ethical and financial burdens on private counsel operating in the proposed dual-track system are unworkable.

This Court's proposed rule amendments are designed to implement a modified dual-track procedure whereby postconviction counsel must initiate representation shortly after the death sentence has been imposed. In the Court's view, this should benefit our clients because "[a]lthough the postconviction process will begin earlier than it currently does, we are actually lengthening the time postconviction counsel has to prepare." *Amendments to Rules of Criminal Procedure 3.851, 3.852 and 3.993*, 25 Fla. L. Weekly S285, 286 (Fla. April 14, 2000) (hereinafter "Amendments to Rules"). However, this Court apparently overlooked the ethical and economic consequences of this extended period of pre-filing litigation on counsel who must operate under the restrictions of the Registry Act and sections 27.710 and 27.711.

"[I]t is the defendant's right to effective representation rather than the attorney's right to fair compensation which is our focus." *Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986). While this Court recognized that "the dual-track system we propose, if adopted, will require additional … resources for the Capital Collateral Regional Representatives," it apparently did not consider the impact on private contract

counsel. CCRCs can allocate time and resources as they see fit through the exercise of their independent professional judgment. An increase in their overall budget could be used to cover some of the costs of a dual-track system. But private contract counsel are limited to working the number of hours set forth in the statutory fee and payment schedule prescribed by the Registry Act.

Subsection 27.711(3) provides that "[t]he fee and payment schedule in this section is the exclusive means of compensating a court-appointed attorney who represents a capital defendant." The Act requires private counsel to enter into a third-party fee contract with the Comptroller, *see* section 27.710(4), which includes an agreement to abide by the statutory limits on the numbers of compensable hours counsel may work on a given stage of the litigation. § 27.711(2), Fla. Stat. (1999). Private counsel may receive no more than "$2,500, after accepting appointment and filing a notice of appearance." § 27.711(4)(a), Fla. Stat. (1999). Regardless of the time spent on the case, counsel can receive no further compensation until *after* timely filing of "the capital defendant's complete original motion for postconviction relief under the Florida Rules of Criminal Procedure." § 27.711(b), Fla. Stat. (1999).

The withholding of compensation during what would be years[1] of constant

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[1]In part because death is sought and imposed in far more cases than it can constitutionally be upheld by this Court, the direct appeal process can be lengthy. No one can deny that the magnitude of the issues raised in capital cases rightly demands a great

litigation under the proposed rules, "interferes with the right to counsel … [by] creat[ing] an economic disincentive for appointed counsel to spend more than a minimum amount of time on the case." *Bottoson v. State*, 674 So. 2d 621, 626 (Fla. 1996) (Kogan, J., dissenting, joined by Shaw and Anstead, JJ.). If this disincentive were not enough, section 27.711(4)(b), and the contract entered into by private counsel, strictly limit private counsel to 200 compensable hours between the time of appointment and filing the "complete" postconviction motion.

Just how damaging the interplay between the proposed dual-track rule and the restrictions of section 27.711 would be becomes obvious when one considers how the system will function. The direct appellate process is just being initiated at the time postconviction counsel is appointed. Because of the unwarranted number of capital cases that this Court must review, and the inadequate resources available to courts and clerks, the direct appeal process takes *at least* a couple of years before a mandate is issued by this Court. Postconviction counsel will have to begin working on the case at the very beginning of that appellate period. Then, postconviction counsel would have a year after

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deal of this Court's attention. *See Knight v. Florida*, 120 S. Ct. 459, 460 (2000) (mem.) (Thomas, J., concurring) ("those who accept our death penalty jurisprudence as a given also accept the lengthy delay between sentencing and execution as a necessary consequence"). The problem of case overload has been exacerbated by delays in the production and transmission of the record on appeal caused by inadequate funding and resources.

mandate issues to file the initial motion. Proposed Fla. R. Crim. Pro. 3.851(d)(1)(A). Consequently, postconviction counsel will be working on the case for three or more years before obtaining additional compensation under section 27.711(4).

Not only will the proposed dual-track procedure require that counsel provide uncompensable services for a longer period of time, but the proposed rule increases the number of proceedings counsel must prepare for and attend during the pre-filing period. Under the proposed rule, periodic status conferences will be held at least once every three months. Proposed Fla. R. Crim. Pro. 3.851(c)(2). "Pending motions … and disputes involving public records, shall be heard at the status conferences, unless otherwise ordered by the court." *Id.* Public records litigation commonly involves the taking of evidence either in hearings, through depositions, or both. Preparation time and expenses for these quarterly proceedings will be high in large part because the relevant public records will be stored at the repository in Tallahassee.

The only way counsel can keep up to date on the status of public records disclosure, and thus seek to compel production or inform the court that a production deficiency has been cured, is by reviewing the records received by the repository.[2] Even the labor involved in learning when records trickle into the repository and requesting

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[2]There is no guarantee that records can or will be copied by the repository and shipped to counsel in time for these status hearings. Thus, counsel must either make periodic trips to Tallahassee or constantly keep tabs on the inflow of records there, request copies, and arrange shipment.

copies as they arrive in will erode a considerable piece of the already inadequate 200 hours counsel may work in preparing a client's motion.

This is an onerous and unreasonable financial burden. It is a lose-lose proposition for the defendant: counsel must prepare for and appear at the required hearings, draining the pool of compensable hours, while knowing he or she is contractually bound not to seek additional compensation and not to seek any compensation until the complete motion for relief has been filed. This is an ethically untenable position for private contract counsel.

Florida Rule of Professional Conduct 4-6.1 provides that the imposition of such an unreasonable burden constitutes "good cause" for avoiding appointment. The financial and ethical disincentives of chapter 27–some of which are discussed in FACDL's Amicus Curiae Brief in *Olive v. Maas*, No. SC00-317–warrant this Court's intervention regardless of whether dual-tracking is implemented. But the proposed rule, by increasing the financial disincentives and depleting the available hours for counsel to investigate and research claims, will make the problem far worse. This is sure to prove unworkable for any lawyer who has to support the operation of a law practice, rising to the level of a conflict that could require counsel to withdraw. *See* R. Regulating Fla. Bar 4-1.7 ("lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the … lawyer's

own interest"); 4-1.8(f) ("lawyer shall not accept compensation for representing a client from one other than the client unless … there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship").

Moreover, section 27.710(6) prohibits courts from appointing more than one lawyer to any given case. That means private counsel, unlike the CCRCs, will not be able to spread the burdens of representation to another lawyer who would also receive a retainer and at least the prospect of future compensation.[3] CCRC attorneys who receive regular compensation and have no overhead will not face the disadvantages and disincentives which the Registry system will force on private counsel. Thus, the clients of Registry counsel are not receiving equal access to counsel. *See Green v. State*, 620 So. 2d 188 (Fla. 1993) (equal protection violation where private conflict counsel could not receive compensation for performing same tasks as publicly retained counsel).

As previously mentioned, use of the public records repository poses additional problems and barriers to effective representation by private counsel. *See* Proposed Fla.

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[3]Some cases require the work of co-counsel, and a proposal now pending before this Court in a separate but related proceeding permits the appointment of two counsel at one time. *See In re Amendment to Florida Rules of Criminal Procedure–Rule 3.112, Minimum Standards for Attorneys in Capital Cases (Rule 3.112)*, No. 90,635 (proposal filed May 11, 2000). Standards of the American Bar Association would make the two-counsel rule mandatory. *See* ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 2.1 (Feb. 1989). It is hard to square the statute with rules allowing for corepresentation.

R. Crim P. 3.852(f)(3). The repository located in Tallahassee, for example, is grossly inconvenient for postconviction counsel living elsewhere in the state. A posctonviction lawyer in Miami, who could have viewed the relevant records of a Miami case a few blocks from his or her office, now will have to bear the additional burdens of time and expense to travel to a distant city to view and copy public records, or to have them shipped. At the time of the status hearings, counsel will be required to know what records have been produced and, based on review of those records, what is missing. Considering that counsel will have no more than 200 hours in which to operate during the critically important initial investigation of the postconviction case, this additional burden is unreasonable, and unworkable if effective representation is to be protected. As this Court has acknowledged, impediments placed on this critical aspect of counsel's work "would preclude collateral counsel from effectively investigating potential postconviction claims …." *Amendments to Rules*, slip op. at 8.

Finally, the proposed rules do not take into account the unreasonable restrictions imposed on counsel by the Registry statute, *see Olive v. Maas*, No. SC00-317 (pending), and the problems involved in obtaining a sufficient number of qualified counsel to handle the burdens of some of the most important and complex litigation imaginable, *see In re Amendment to Florida Rules of Criminal Procedure -- Rule 3.112, Minimum Standards for Attorneys in Capital Cases (Rule 3.112)*, No. 90,635 (proposal filed May

11, 2000).

C. Conclusion

This Court should elect not to adopt the proposed amendments to rules 3.851, 3.852, and 3.993. The procedure envisioned by these rules is unworkable, will impose intolerable restrictions on private counsel, and operate to deny capital postconviction defendants effective legal representaiton. The Legislature has not responded to what this Court recognized was a necessary precondititition to the adoption of a dual-track procedure: adequate funding.[4] Unless and until the Legislature furnishes the resources needed to operate a dual-track procedure, this Court should resist the temptation to adopt these rules.

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[4] As this Court said,

> A reliable system of justice depends on adequate funding at all levels. Obviously, this means adequate funding for competent counsel during trial, appellate, and postconviction proceedings for both the State and the defense, including access to thorough investigators and expert witnesses. It is critical that this state provides for adequately funded and trained public defenders, conflict counsel, and CCR and registry counsel, as these are vital to the reliability and efficiency of the trial, appellate, and postconviction process. Adequate funding is also needed for the court system, including informed judges, trained judicial support staff, and other important resources, such as real-time reporting and case management systems. There have been increasing demands on the courts of this state–particularly in the criminal and juvenile divisions--and the judicial branch needs the proper resources to meet these demands and manage these cases.

Allen v. Butterworth, 25 Fla. L. Weekly S277, 282 (Fla. April 14, 2000).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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