

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULES OF CRIMINAL PROCEDURE
3.851, 3.852, AND 3.993

Case No. SC96646

Comment by The Florida Bar Criminal Procedure Rules Committee

The Criminal Procedure Rules Committee, hereinafter referred to as the “committee,” was directed by the court in its April 14, 2000, opinion to examine the proposed court amendments and to make both substantive and technical suggestions. Additionally, this court requested that the committee comment on the “proper and practical application of these rules to defendants in the various stages of the appellate and postconviction process” and the “reasonableness and impact of the time periods” contained in the proposed amendments. Finally, this court requested the committee’s view concerning the substance and placement of a proposed amendment regarding real-time transcription in capital cases.

Because the court requested that comments be filed by June 1, 2000, the committee’s fast track procedures were implemented. The matter was submitted to the Fast Track Subcommittee, chaired by the Honorable Oscar H. Eaton, Jr. Serving on this committee were Circuit Judge Dedee Costello, Assistant Public Defender Robert Wills, Professor Stephen Everhart, defense attorney Ray Rafool, Assistant State Attorney Paul Zacks, and Assistant Public Defender Howardene Garrett. (Members Melanie Ann Hines, the Statewide Prosecutor, and Susan Odzer Hugentugler, Assistant Statewide Prosecutor, were unable to attend the subcommittee meeting.) This subcommittee met on May 12, 2000, and submitted a report that is the basis of these comments. The full committee, on May 28, 2000, ratified the action of the Fast Track Subcommittee.

I

Applicability of the Proposed Rules to Capital Defendants at Various Stages

The committee believes that the court's proposed *Fla. R. Crim. P.* 3.851 appropriately anticipates the application of the rule to capital defendants in various stages of postconviction litigation. This court, in its April 14, 2000, opinion, noted three categories of capital defendants who were of specific concern:

1. those for whom counsel has not been appointed as of the effective date;
2. those who have had collateral counsel appointed but who have not yet filed a postconviction motion; and
3. those who have had collateral counsel appointed and have postconviction motions pending.

Regarding the first category, proposed Rule 3.851(b)(2) provides that capital collateral regional counsel be appointed by the chief judge within 30 days of the effective date of this rule. On the effective date of this rule, this category will include cases in which the Florida Supreme Court has not yet issued a mandate affirming the judgment and sentence of death. In this event, proposed Rule 3.851(d)(1)(A) provides that the initial postconviction motion must be filed within 1 year after the judgment and sentence becomes final. If collateral counsel is appointed after the judgment and sentence have become final, then the motion for postconviction relief must be filed within 1 year of the appointment of collateral counsel. Although the rule adequately provides for prisoners in this category, availability of sufficient numbers of qualified capital collateral regional counsel and adequate funding therefor by the legislature will be a vexing problem. However, proposed Rule 3.851(d)(1)(3) provides that these time periods are "established with the understanding that capital defendants will have collateral counsel appointed and who are available to begin addressing" the postconviction issues. In light of the above, the committee believes that proposed Rule 3.851 adequately and appropriately deals with this category.

Regarding the second category, proposed Rule 3.851(a) is clear. The postconviction rule in effect on the date of appointment of capital collateral regional counsel will govern the proceedings. The committee believes that proposed Rule 3.851 adequately and appropriately deals with this category.

Likewise, proposed Rule 3.851(a) is clear that the postconviction rules in effect at the time of appointment of capital collateral regional counsel will govern in cases in which collateral counsel, before the effective date of the new postconviction rule, had been appointed and had already filed the initial postconviction motion. The committee believes that proposed Rule 3.851 adequately and appropriately deals with this category.

Obviously, all those involved in cases in the various stages of postconviction proceedings initially will have to ascertain the appropriate postconviction rule to apply to each and govern themselves accordingly. Although this may be somewhat confusing, the confusion might be minimized by requiring the judge assigned to the postconviction proceeding to enter an order specifically declaring the appropriate postconviction rule to be applied.

One area of concern is noted by the chair. As described above, if collateral counsel has been appointed on the effective date of the proposed Rule 3.851, then the new rules specify that the postconviction proceedings will be governed by postconviction rules in effect at the time of appointment. In a relatively few cases, collateral counsel may have been appointed many years ago. In the years subsequent to the appointment and before the effective date of the proposed Rule 3.851, significant evolution of the postconviction rules, through a number of amendments, would have taken place. Is it the intent of the court that these amendments would not apply in those cases? If that is not the intent of the court, should the rule be rephrased to read that in these cases the “postconviction rules in effect immediately preceding the adoption” of the court’s proposed Rule 3.851 should govern the proceedings?

II

Reasonableness of the Impact of the Time Periods in Proposed Rule 3.851

The primary concern of our committee has been the reasonableness of the time

for filing the initial brief under the Death Penalty Reform Act of 2000 and under the Morris Committee's proposed Rule 3.851. Because of the various points of view within the committee on this matter that was currently being litigated, the committee chose to take no position. The May 17, 2000, order modifying the current proposed Rule 3.851 to extend the time for filing from 180 days to 1 year from the date on which the judgment and sentence become final (disregarding certiorari to the United States Supreme Court unless it is granted), was issued too recently for our committee, even under its fast track procedure, to address the reasonableness of its impact.

III

Substance and Placement of a Proposed Rule Regarding Real-Time Transcription in Capital Cases

The Court proposes a Rule of Judicial Administration regarding real-time transcription in capital cases when the state is seeking the death penalty and in Rule 3.851 proceedings. It requires the state attorneys to arrange and pay for these transcripts. This cost imposition on the state may have substantial impact on the state attorney budgets. Legislatively, and when the defendant is discharged or indigent, ordinary transcripts presently are paid for by the county in which the criminal case is prosecuted. See, e.g., *Fla. Stat.* §27.0061 (2000) (Transcripts in criminal cases taxed as costs) and *Fla. Stat.* §§939.07 and 939.15 (2000) (Costs paid by County). The committee feels that imposition of costs on the state attorneys is unwise. If real-time transcription is essential for proper administration of justice in capital cases, the committee suggests that the costs be taxed as other costs to the county in which the prosecution was instituted. In *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978), this court stated:

The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts's ability to make effective their jurisdiction. [court's citation omitted] The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function

at issue is the safe-guarding of fundamental rights. [court's footnote omitted]

The court in *Rose* noted that this inherent power should be invoked only in situations of clear necessity and when the matter has not been addressed or provided for by the legislature.

The legislature generally has designated the county as the entity responsible for court costs in criminal cases and not the state attorneys. It would seem that the proposed Rule of Judicial Administration should give deference to that legislative preference.

The committee feels that the placement of this rule in the Rules Of Judicial Administration is appropriate.

The chair notes that, in some counties, real-time reporting of cases is not presently available. Therefore, any proposed rule should make some accommodation for a transition to or exception from a requirement of real-time reporting of capital case proceedings. In the time available for this comment, the committee has not been able to fully address this concern.

IV

Substantive and Technical Suggestions Regarding Proposed Rule 3.851

In the form of a technical suggestion, it appears that provisions relating to required contents of a successive postconviction motion should be moved from subdivision 3.851(e) to the specific rule addressing successive postconviction motions — subdivision 3.851(g)(1). Of course, renumbering will be necessary.

Additionally, the committee believes that the proposed Rule 3.851(f)(9) prohibiting motions for rehearing is unwise. The committee believes that some vehicle should be provided by which obvious errors and oversights that occur in drafting orders can be addressed and corrected. The committee feels that allowing a motion for rehearing procedure (without argument at the discretion of the court) would cause minimal delay and actually may save significant time in some cases.

To assist the court, our committee has incorporated these technical and substantive suggestions into this court's proposed Rule 3.851 (May 17, 2000) on Attachment A.

Respectfully submitted on _____.

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ATTACHMENT A

Rule 3.851. COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED AND AFFIRMED ON DIRECT APPEAL

(a) **Scope and Purpose.** This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by defendants in state custody who have been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. A defendant under sentence of death imposed by a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that any plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, to vacate, set aside, or correct the judgment or sentence. The purpose of this rule is to provide the means by which a defendant under sentence of death can raise claims of error which were unavailable at the time of trial or direct appeal. Unless otherwise provided herein, a defendant who had postconviction counsel appointed prior to the effective date of this rule shall proceed in accordance with the rules in effect at the time counsel was appointed.

(b) **Appointment of Postconviction Counsel.**

(1) Within 15 days after sentencing a defendant to death, the sentencing court shall issue an order appointing the appropriate office of the Capital Collateral Regional Counsel.

(2) In cases in which the death sentence has been imposed prior to the effective date of this rule but postconviction counsel has not been appointed, the chief judge of the circuit court in which the defendant was sentenced shall appoint the appropriate office of the Capital Collateral Regional Counsel by 30 days after the effective date of this rule.

(3) Within 30 days from the appointment, the Capital Collateral Regional Counsel shall file a notice of appearance in the trial court or a motion to withdraw based on a conflict of interest or some other legal ground.

(4) Within 15 days after the Capital Collateral Regional Counsel files a motion to withdraw, the chief judge or assigned judge shall appoint new postconviction counsel.

(c) **Preliminary Procedures.**

(1) **Judicial Assignment.** Upon appointment of postconviction counsel, the chief judge shall assign the case to the judge who presided over the defendant's capital trial if that judge is active and otherwise available to serve or a trial judge qualified to conduct capital proceedings under the Rules of Judicial Administration.

(2) **Status Conferences.** The assigned judge shall conduct a status hearing not later than 90 days after the assignment, and shall hold status conferences at least every 90 days thereafter until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. The attorneys may appear by telephone at such status conferences, with leave of the trial court. Such requests shall be liberally granted. Pending motions, except those requiring the presence of the defendant, and disputes involving public records, shall be heard at the status conferences, unless otherwise ordered by the court.

(3) **Trial Record.** The clerk of the trial court shall serve copies of the trial record on postconviction counsel, the state attorney, and the attorney general at the time the clerk serves copies of the record pursuant to rule 9.140(e)(4).

(4) **Duties of Defense Counsel and Prosecuting Attorney.** Within 15 days of appointment of postconviction counsel, the defendant's trial counsel shall provide to postconviction counsel all information pertaining to the defendant's capital case which was obtained during the representation of the defendant. Postconviction counsel shall maintain the confidentiality of all confidential information received. Within 15 days of appointment of postconviction counsel, the state attorney's office that prosecuted the defendant shall provide to postconviction counsel copies of all pretrial and trial discovery and all contents of the state's file, except for information that the prosecuting attorney has a legal right under state or federal law to withhold from disclosure.

(5) **Defendant's Presence Not Required.** The defendant's presence

shall not be required except at the evidentiary hearing on the merits of any claim and at any hearing involving conflict with or removal of collateral counsel.

(d) Time Limitations.

(1) **Initial Postconviction Motions.** A motion filed under this rule is an initial postconviction motion if no court has previously ruled on a postconviction motion challenging the same judgment and sentence.

(A) **Time for Filing.** An initial motion to vacate judgment of conviction and sentence of death shall be filed by a defendant who is sentenced to death on or after the effective date of this rule within 1 year after the judgment and sentence become final. A defendant who was sentenced to death and did not have postconviction counsel appointed before the effective date of this rule shall file an initial postconviction motion within 1 year after the judgment and sentence become final or one year of the appointment of postconviction counsel under subdivision (b)(2), whichever occurs last. An initial motion shall not be filed or considered beyond the time limitation of this subdivision unless an extension has been granted by the trial judge or the motion alleges that:

(i) the facts on which the claim is predicated were unknown to the defendant or the defendant's attorney and could not have been ascertained by the exercise of due diligence;

(ii) the fundamental constitutional right asserted was not established within the period provided for by this rule and has been held to apply retroactively; or

(iii) the defendant retained counsel to timely file a 3.851 motion and counsel, through neglect, failed to file the motion.

(B) **Finality.** For the purposes of this rule, a judgment is final when the Florida Supreme Court issues a mandate affirming the judgment and sentence of death on direct appeal. The availability of or the filing of a petition for writ of certiorari in the United States Supreme Court shall not affect the finality of the judgment and sentence. However, if the United States Supreme Court accepts certiorari, then the judgment and sentence is final upon disposition of the petition for

writ of certiorari by the United States Supreme Court.

(C) Extensions. An extension of time to file an initial postconviction motion may be granted by the circuit court 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.

(2) Extraordinary Remedies. Any petition for habeas corpus claiming ineffective assistance of appellate counsel shall be filed in the Supreme Court of Florida simultaneously with the initial brief filed on behalf of the death-sentenced defendant in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

(3) The time limitations in this subdivision are established with the understanding that each defendant sentenced to death will have counsel appointed and available to begin addressing the defendant's postconviction issues within the time periods provided in subdivision (b) of this rule.

(e) **Contents of Motion.** A motion filed under this rule shall not exceed 50 pages exclusive of attachments, including the judgment and sentence and exhibits. The motion shall be under oath and shall include:

(1) the judgment and sentence under attack and the court which rendered the same;

(2) a statement of each issue raised on appeal and the disposition thereof;

~~(3) if a previous postconviction motion has been filed, the disposition of all previous claims raised in postconviction litigation and the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;~~

~~(4)~~(3) the nature of the relief sought;

~~(5)~~(4) a detailed allegation of the factual basis for any claim for which

an evidentiary hearing is sought; and

~~(6)~~(5) a detailed allegation as to the basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been or was not raised on direct appeal.

The motion shall be accompanied by a separate memorandum of law not to exceed 25 pages as to the applicable case law supporting the granting of relief as to each separately-pled claim. As to claims that were raised on appeal or should have or could have been raised on appeal, the memorandum shall contain a brief statement as to why these claims are being raised on postconviction relief.

(f) Procedure; Evidentiary Hearing; Disposition.

(1) Filing and Service. All pleadings in the postconviction proceeding shall be filed with the clerk of the court and served on the assigned judge, opposing party and the attorney general. Upon the filing of any original court paper in the postconviction proceeding, the clerk of the court shall determine that the assigned judge has received a copy. All motions other than the postconviction motion itself shall be accompanied by a notice of hearing.

(2) Duty of Clerk. Upon the filing of a motion for postconviction relief, the clerk of court shall immediately forward the motion and file to the assigned judge.

(3) Answer. Within 45 days of the filing of an initial motion, the state shall file its answer. The answer shall not exceed 50 pages exclusive of attachments and exhibits. The answer shall address the legal insufficiency of any claim in the motion, respond to the allegations of the motion and address any procedural bars. As to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.

(4) Amendments. An initial motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not set forth earlier and attaches a copy of the claim sought to be added. Granting a motion under this subdivision shall not be

a basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

(5) Case Management Conference. Within 30 days after the state files its answer to an initial motion, the trial court shall hold a case management conference. At the case management conference, both parties shall disclose all documentary exhibits they intend to offer at the evidentiary hearing; provide an exhibit list that includes all such exhibits; and exchange a witness list with the names and addresses of any potential witnesses. All expert witnesses shall be so designated with copies of all expert reports attached. The trial court also shall:

(A) review the witness and exhibit lists with the parties;

(B) schedule an evidentiary hearing, to be held within 90 days, on claims listed by the defendant as requiring a factual determination; and

(C) hear argument on any purely legal claims not based on disputed facts.

(6) Amendment of Witness or Exhibit Lists. Prior to the evidentiary hearing, the trial court may grant leave of either party to amend the exhibit or witness list upon a showing of good cause.

(7) Mental Health Expert. If the defendant intends to offer expert testimony of his or her mental status, the state shall be entitled to have the defendant examined by its own mental health expert. If the defendant fails to cooperate with the state's expert the court may, in its discretion, proceed as provided in rule 3.202(e). Reports provided by any expert witness shall be disclosed to opposing counsel upon receipt.

(8) Transcript and Final Order. Immediately following the evidentiary hearing, the court shall order a transcript of the hearing which shall be filed within 30 days. Within 30 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to

allow for meaningful appellate review. The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal. The clerk of the court shall promptly serve upon all parties a copy of the final order, with a certificate of service.

(9) Rehearing. ~~No motion for rehearing shall be permitted.~~ A motion for rehearing, if filed, must be filed within 10 days from the date of the final order. The court must rule on the motion within 30 days of its filing or it shall be deemed denied. It shall not be necessary for a hearing to be scheduled on the motion.

(g) **Successive Motions.** This subdivision applies to all successive postconviction motions filed after the effective date of this rule. A motion filed under this rule is successive if a court has previously ruled on a postconviction motion challenging the same judgment and sentence. Successive motions pending on (the effective date) are governed by the rules in effect prior to that date.

(1) Contents of Motion. A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include all of the pleading requirements of an initial motion as well as a statement of the nature and disposition of all previous claims raised and the reason why the successive claim or claims were not raised in a former motion. ~~and, if~~ If based upon newly discovered evidence, Brady, or Giglio, the motion shall also contain the following:

(A) the names, addresses and telephone numbers of all witnesses supporting the claim together with any affidavits obtained by defendant from such witnesses;

(B) a statement that the witness will be available to testify under oath to the facts alleged in the motion or affidavit;

(C) if evidentiary support is in the form of documents, copies of all documents shall be attached; and

(D) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available.

(2) Answer. Within 10 days of the filing of a successive motion, the state shall file its answer. The answer shall not exceed 25 pages exclusive of attachments and exhibits. The answer shall specifically respond to each claim in the motion and state the reason(s) that an evidentiary hearing is or is not required.

(h) **Appeals.** An appeal may be taken to the Supreme Court of Florida within 30 days from the entry of a final order on a motion for postconviction relief. However, a timely filed motion for rehearing shall toll the time until the motion is ruled upon or it is deemed denied.

Court Commentary

1993 Adoption. This rule is consistent with the recommendation of the Supreme Court Committee on Postconviction Relief in Capital Cases, which was created because of the substantial delays in the death penalty postconviction relief process. The committee was created because of the inability of the Capital Collateral Representative to properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delays in those cases. That committee recognized that, to make the process work properly, each death row prisoner should have counsel available to represent him or her in postconviction relief proceedings. The committee found that one of the major problems with the process was that the triggering mechanism to start or assure movement of the postconviction relief proceedings was the signing of a death warrant. In a number of instances, the courts were not aware of the problems concerning representation of a defendant until a death warrant was signed. In other instances, the committee found that, when postconviction relief motions had been filed, they clearly had not moved at an orderly pace and the signing of a death warrant was being used as a means to expedite the process. The committee recommended that specific named counsel should be designated to represent each prisoner not later than 30 days after the defendant's judgment and sentence of death becomes final. To assure that representation, the committee's report noted that it was essential that there be adequate funding of the capital collateral representative and sought temporary assistance from The Florida Bar in providing pro bono representation for some inmates.

There is a justification for the reduction of the time period for a capital prisoner as distinguished from a noncapital prisoner, who has two years to file a postconviction relief proceeding. A capital prisoner will have counsel immediately available to

represent him or her in a postconviction relief proceeding, while counsel is not provided or constitutionally required for noncapital defendants to whom the two-year period applies.

In the event the capital collateral representative is not fully funded and available to provide proper representation for all death penalty defendants, the reduction in the time period would not be justified and would necessarily have to be repealed, and this Court will forthwith entertain a petition for the repeal of the rule. In this context, it is important to emphasize that the governor agrees that absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, provided that counsel for death penalty defendants is proceeding in a timely and diligent manner. This Court agrees that the initial round of post-conviction proceedings should proceed in a deliberate but timely manner without the pressure of a pending death warrant.

Subdivision 3.851(b)(4) above addresses concerns of The Florida Bar and The Florida Bar Foundation.

The provisions of the present rule 3.851 providing for time periods where a 60-day warrant is signed by the governor, are abolished because they are unnecessary if the guidelines are followed. The proceedings and grounds for postconviction relief remain as provided under Rule of Criminal Procedure 3.850, which include, as one of the grounds, the opportunity for a defendant to present newly discovered evidence in accordance with *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), *Jones v. State*, 591 So. 2d 911 (Fla. 1991), and *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989).

1996 Amendment. Subdivision (c) is added to make the Court's decision in *Huff v. State*, 622 So. 2d 982 (Fla. 1993), applicable to all rule 3.850 motions filed by a prisoner who has been sentenced to death. Florida Rule of Judicial Administration 2.071(b) allows for telephonic and teleconferencing communication equipment to be utilized “for a motion hearing, pretrial conference, or a status conference.” Teleconferencing sites have been established by the Department of Management Services, Division of Communications at various metropolitan locations in the state. The “Shevin Study” examined, at this Court's request, the issue of delays in capital postconviction relief proceedings and noted that travel problems of counsel cause part of those delays. The Court strongly encourages the use of the new telephonic and

teleconferencing technology for postconviction relief proceedings that do not require evidentiary hearings, such as the hearing required under subdivision (c) of this rule. Only the attorneys need be involved in a hearing held under subdivision (c) of this rule; attendance of the postconviction defendant is not required.