IN THE SUPREME COURT OF FLORIDA

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

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COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.

The Florida Public Defender Association, Inc. (the Association) respectfully submits the following comments to the proposed amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993.

I. INTRODUCTION

On April 14, 2000, this Court, in two opinions, proposed amendments to Rules of Criminal Procedure 3.851. 3.852 and 3.993, to implement a modified "dual track" procedure in which "the postconviction process will begin immediately after the imposition of the death sentence," at the same time or even before the direct appeal is filed. See Amendments to Rules of Criminal Procedure 3.851, 3.852 and 3.993, 25 Fla. L. Weekly S285, S286 (Fla. April 14, 2000) (hereinafter "Amendments"); Allen v. Butterworth, 25 Fla. L. Weekly S277 (Fla. April 14, 2000). In proposing to adopt a dual track procedure to "effectuate the Legislature's intent as expressed in the Death Penalty Reform Act of 2000," despite vigorous objections to the wastefulness and impracticality of such a system, the Court demonstrated its willingness to meet the Legislature half way.

At the same time, the Court attempted to ameliorate the "potential constitutional dilemmas" and "conflict of interest and privilege problems" inherent in a dual track system by giving death-sentenced prisoners six months after the mandate issues on direct appeal to file their initial state post-conviction motions.[1] Amendments, 25 Fla. L. Weekly at S286.

The Court also made clear that the viability of the modified dual track procedure was dependent on the Legislature doing two things: (1) amending the public records law, chapter 119, Florida Statutes (1999), to allow disclosure of criminal investigative information and attorney work product during the pendency of the direct appeal; and (2) providing adequate resources to the Capital Collateral Regional Representatives ("CCRCs"), the State, the Judiciary, and other bodies as appropriate, to accommodate the increased caseloads that will result from the modified dual track procedure.[2] See Allen, 25 Fla. L. Weekly at S282.

[1.] While the Court hopes its amendments will reduce the constitutional and ethical problems identified in the Association's earlier submissions, the amendments do not eliminate them entirely. See Comments of the Florida Public Defender Association, Inc., at 31-33, Amendments, 25 Fla. L. Weekly S285 (April 14, 2000) (No. SC96,646). We adhere to the views expressed in those Comments regarding the constitutional and ethical conflicts likely to be caused by having postconviction and appellate counsel operating simultaneously in the same case.

[2.] This Court warned specifically that "[a]long with the input of the Legislature, this Court is boarding a ship to set sail on a course of reform in the area of capital postconviction procedures. However, the ship's departure will be delayed until the Legislature changes the public records exemptions of chapter 119 to comply with the dual-track system. Additionally, without the necessary funding, the ship is destined to sink." See Allen, 25 Fla. L. Weekly at S282.

On May 17, 2000, in response to the Legislature's failure to make the necessary changes to chapter 119 during its regular legislative session, this Court issued an order amending its earlier proposed rules to allow post-conviction counsel six additional months -- a total of one year -- from the decision on direct appeal to file the motion for postconviction relief.[3] See Amendments to Rules of Criminal Procedure 3.851, 3.852 and 3.993, 25 Fla. L. Weekly S395 (Fla. May 17, 2000) (Order revising proposed rule amendments). As discussed further below, the Legislature also failed to appropriate sufficient resources, including staff positions, for the CCRCs to handle the increased caseloads that will result from a dual track procedure. As the Association previously emphasized, there have been egregious lapses in the quality of representation provided by the Registry, and "the Association believes that instituting a parallel track system that will necessarily rely on registry lawyers to assume most, if not all, of the substantial increase in capital postconviction cases is a recipe for disaster." Comments of the Florida Public Defender Association, Inc., at 27, Case No. SC96,646 (Fla. filed March 3, 2000).

[3.] The Senate considered a bill expressly written to remedy the public records delay, which this Court found to be one of the most substantial problems in capital postconviction litigation, but the bill got no support in the House and it died in committee without ever getting to the floor for a vote. See Legislative History of Fla. S. Comm. on Crim. J., CS for SB 2112 (draft of April 24, 2000); see also, e.g., S.V. Date, Court-House snag dooms shortened Death Row appeals, Palm Beach Post, May 11, 2000.

The Association strongly urges this Court not to adopt the proposed rules, even with the one-year deadline suggested in the May 17 order. Rather, the proposed rules should be held in abeyance unless and until the Legislature makes the necessary changes to chapter 119 and provides sufficient resources to ensure the fair and just operation of the postconviction process under a dual track system. The Association further submits that no cases should be assigned to the Registry until this Court adopts sufficiently rigorous standards to ensure the competence of postconviction counsel and cures the unethical, state-imposed restrictions on the professional independence of Registry counsel. These interdependent issues are also presented in two separate cases now pending before the Court, In re Amendment to Florida Rules of Criminal Procedure -- Rule 3.112, Minimum Standards for Attorneys in Capital Cases, No. 90,635 (hereinafter "Amendment to Rule 3.112"),[4] and Olive v. Maas, No. SC00-317. The proposed amendments to rules 3.851, 3.852,and 3.993 should be considered in tandem with these cases.

II. COMMENTS

The Association sets forth below many reasons why the proposed rules should not be adopted at this time. The Association also supplements its

[4.] Pursuant to the Court's request, its select committee on standards for capital counsel, chaired by The Hon. Philip J. Padovano, submitted proposed standards for postconviction counsel. See In re Amendment to Rule 3.112 (proposed standards filed May 11, 2000).

comments with two sets of side-by-side comments, attached to this text, to illustrate these and other concerns as they arise in the proposed amendments.

A. The Legislature's Failure to Amend Chapter 119 and Provide the Judiciary With Other Requested Assistance Rendered the Amendments Meaningless

In proposing to adopt a dual track system, this Court noted that "several attorneys and judges who appeared at oral argument" had identified "requests for public records and the litigation that follows" as "the single biggest cause for delay in the current system." Amendments, 25 Fla. L. Weekly at S286. A modified dual track procedure could reduce such delays, the Court reasoned, by initiating the "public records production . . . soon after the death sentence is imposed, in order to ensure that counsel has adequate time to review the records and that all disputes involving records production are resolved prior to the filing of the initial postconviction motion." Id. at S287. The Court explained, however, that the goal of reducing delay would be defeated if the Legislature failed to remove or amend the statutory exemptions that allow "active criminal investigative information" and work product to be withheld until the direct appeal is concluded. See id. Indeed, in Allen, the Court explained that "[i]f the Legislature does not act in this area, then we will be forced to extend the period for filing an initial postconviction motion in order to allow adequate time after mandate for public records requests. In other words, without these changes, the

dual-track system would, in essence, be meaningless." Allen, 25 Fla. L. Weekly at S282 (emphasis supplied).

If the dual track system is "in essence . . . meaningless" without timely access to public records, see id., then there is little to be gained by partially implementing it as proposed in the May 17 order. More significantly, however, while partial implementation of the dual track system will accomplish little or nothing in reducing delay,[5] it will still greatly increase the burden on the state's already overtaxed system of providing postconviction counsel. As discussed further below, the problem of providing adequately-funded, competent post-conviction counsel to every death-sentenced defendant -- including those whose sentences will be reversed on direct appeal -- is an even more significant obstacle to the successful implementation of a dual track system than immediate public records disclosure.[6]

B. The Legislature Failed to Provide Adequate Resources for Competent Postconviction Counsel

1. The Legislature Failed to Allocate Sufficient Resources to the CCRCs to Accommodate Dual Track.

[5.] The Legislature also refused to fund 43 new judgeships that this Court identified as necessary to ease case overloads that now exist even without a dual track system. 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.

[6.] If the counsel problems were solved, the Court's proposed solution to the public records delay might be appropriate.

As this Court emphasized in Allen, "adequately funded and trained public defenders, conflict counsel, and CCR and registry counsel . . . are vital to the reliability and efficiency of the trial, appellate, and postconviction process." Allen, 25 Fla. L. Weekly at S282. Elsewhere, this Court has stressed that "the quality of lawyering is critical" in "our procedural and adversarial system of justice." In re Amendment to Rule 3.112, 24 Fla. L. Weekly S512, S513 (Oct. 28, 1999). Recognizing that a dual track system, "if adopted, will require additional judicial resources, as well as additional resources for the Capital Collateral Regional Representatives and the State," Amendments, 25 Fla. L. Weekly at S287, this Court explained that "[a]dequate funding is . . . a prerequisite to justify the imposition of the dual-track system articulated in the rules proposed by this Court pursuant to this opinion." Allen, 25 Fla. L. Weekly at S282 & n.7 (emphasis supplied).

The impact of the dual track system will be immediate and severe. It will require appointment of postconviction counsel in approximately 85 "pipeline" cases that are presently pending on direct appeal. In addition, the number of new cases entering the postconviction process each year will roughly double to 30 or 40 cases.[7] As is set out more fully in the comments of the Capital Collateral

[7.] The Association understands that death sentences have been imposed in Florida at an average rate of about 40 cases a year in the post-Furman era. Historically, about half of those cases would be affirmed on direct appeal and enter the postconviction process, while the other half would be reversed. But

Regional Counsels, the Legislature has not appropriated the resources, including authorization of additional staff positions, necessary to allow the CCRCs to handle the increased caseload under a modified dual track system. The CCRCs therefore will be forced to withdraw from most, if not all, of those cases.

When the CCRCs cannot take or keep a case, the case is assigned to a private attorney on the list of Registry counsel maintained by the Capital Case Commission. See §§ 27.703, 27.710, Fla. Stat. (1999). But because of the myriad problems that persist in Florida's posconviction process, not even an increase in Registry resources would satisfy the prerequisites for introducing a dual track procedure.

As the Association emphasized repeatedly during the Allen litigation and in its in its prior comments in this case, there are grave problems with the quality of representation being provided by Registry lawyers. In at least six instances, Registry counsel missed the deadlines for filing their clients' federal habeas petitions; they have in several instances filed grossly inadequate pleadings;[8] and

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under the modified dual track system, all of the cases would enter postconviction immediately after sentencing, thereby doubling the annual number of incoming cases requiring immediate appointment of postconviction counsel. This, of course, is in addition to all the death cases now in the appellate pipeline.

[8.] For example, in its January 6, 2000 memorandum regarding the DPRA, the Director of the ABA Death Penalty Representation Project cited the case of Richard Eugene Hamilton, whose Registry attorney filed a three-page motion for postconviction relief, containing "no citations to the trial or appellate record nor to any judicial authority." Memorandum from Elisabeth Semel, Director, ABA

they are, on average, "working far fewer hours than is considered necessary by professional standards." ABA DPRA Memo, at 8. In addition, Registry counsel are subject to improper statutory and contractual restrictions on their professional independence and effectiveness. See Initial Brief of Appellant, Olive v. Maas, No. SC00-317 (initial brief filed March 20, 2000). These deficiencies prompted the Director of the ABA's Death Penalty Representation Project to express concern that "Florida is already following Texas' bad example" in failing adequately to ensure the competence of postconviction counsel. ABA DPRA Memo, at 8.[9] This Court initially contemplated that trial courts would be able to "monitor the performance of assigned counsel to ensure that the capital defendant is receiving quality representation," Arbelaez v. Butterworth, 738 So.2d 326, 328 (Fla. 1999) (Anstead, J., concurring) (citing § 27.711(12), Fla. Stat. (1999)), but such decentralized judicial oversight has proven to be demonstrably inadequate.

Increasing the state's reliance on Registry counsel, given these gross deficiencies, is completely contrary to this Court's commitment to improve the

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Death Penalty Representation Project, Jan. 6, 2000, at 8 (hereinafter "ABA DPRA Memo") (App. 1).

[9.] The gross inadequacies of Texas' appointed counsel system have received even more attention since the Association previously submitted its comments in this case in March. See, e.g., Jonathan Alter & Mark Miller, A Life or Death Gamble, Newsweek, May 29, 2000; Sara Rimer & Raymond Donner, On the Record/Capital Punishment in Texas; Bush Candidacy Puts Focus on Executions, N.Y. Times, May 14, 2000; Paul Duggan, In Texas, Defense Lapses Fail to Halt Executions, Washington Post, May 12, 2000, at A1 (App. 2).

reliability of the death penalty process, and it will only take Florida further down the path of Texas' bad example. The Association therefore urges this Court not to permit any cases be assigned to Registry counsel until the Court takes decisive action to correct the deficiencies in representation afforded by Registry counsel, including adopting standards for postconviction counsel that are sufficiently rigorous to ensure competent representation, and abolishing statutory and contractual restrictions on effective representation. This Court already asked its select committee on standards for attorneys in capital cases to submit proposed standards for postconviction counsel,[10] and the committee did so on May 11, 2000.

2. Counsel Standards Are Not an Adequate Substitute for Full Funding of the CCRCs

The Association emphasized in its prior comments in this case that counsel standards, while necessary, are not always sufficient to ensure quality representation. See Note, Tinkering with the Machinery of Death: An Examination and Analysis of State Indigent Defense Systems and Their Application to Death-Eligible Defendants, 37 WM. & MARY L.REV. 1617, 1653 (1996) (discussing limitations of standards as sole mechanism for regulating quality of representation). Most experts on indigent defense agree that quality representation can be more readily assured by adequately-funded, professional

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[10.] In re Amendment to Rule 3.112, 24 Fla. L. Weekly S512, S515 n.9 (Oct. 28, 1999).

defender offices where attorneys receive on-going supervision and training, such as the CCRCs, than by a private, court-appointed counsel system.[11] National indigent defense expert Robert Spangenberg compared Florida to Texas and California, both of which rely heavily on private court-appointed counsel, and concluded that "[t]he Texas and California experiences demonstrate that, in states with very high death row populations, a system that relies primarily upon private court-appointed counsel to handle postconviction cases will simply fail." Affidavit of Robert L. Spangenberg ¶¶ 16, filed in Arbelaez, supra (hereinafter "Spangenberg Aff.") (App. 4). Spangenberg stated that a Florida legislative proposal to rely on "private court appointed counsel to handle a substantial number of these cases . . . is a prescription for disaster" -- particularly without "backup resources such as the Volunteer Lawyer Resource Center." Id. ¶ 18. Spangenberg "remain[ed] convinced" that "the only option in Florida to assure competent representation and the orderly processing of the cases is to fully fund a full-time, state wide state post conviction and federal habeas corpus public defender system," to be supplemented by qualified, adequately compensated private counsel. Id. ¶19.

[11.] See Stephen B. Bright, A Smooth Road to the Death House, THE NEW YORK TIMES, February 7, 2000 (comparing Texas' assigned counsel system with Illinois' public defender system) (App. 3); ABA STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.2 & Commentary (3d ed. 1992).

Former Attorney General Robert Shevin reached the same conclusion in his 1996 report to this Court:

> The institutionalization of capital collateral representation [in a professional defender office] serves three purposes: specialization, centralization, and continuity. It helps in training future death penalty qualified attorneys, in maintaining an "institutional memory" of the historical development of the law, in developing a central registry of postconviction capital cases, and in assuring whenever possible that the same lawyer is assigned to a case throughout the postconviction process. CCR thus appears to me to be a more efficient means of representing capital defendants than a private Bar model.

Shevin Report, reprinted as Attachment A, Hill v. Butterworth, 941 F. Supp. 1129, 1159-60 (N.D. Fla. 1996) (emphasis supplied). The Shevin Report likewise found that California's experiment in relying on the private bar had not been successful, and noted that California was contemplating creating a "CCR-type program" instead. See id. at 1159 n.16. California has since created a new state-funded postconviction defender office. See Administrative Office of the United States Courts, Office of Defender Services, The Crisis in Postconviction Representation in Capital Cases Since the Elimination by Congress of Funding for the Postconviction Defender Organizations 25 (June 1999) (hereinafter "Crisis in Postconviction Representation") (App. 5).[12]

[12.] Ironically, before the U.S. Congress defunded the resource centers, a subcommittee of the Committee on Defender Services of the United States Judicial Conference (the Cox Committee), concluded that it would be more cost-effective for the resource centers to increase their direct representation of clients, like the CCRC model, rather than merely assisting private counsel. Crisis in Postconviction Representation at 7-9.

The California system has failed because of a dramatic shortage of private lawyers qualified and willing to take postconviction cases, resulting in delays of up to four years for a defendant to be assigned an appellate or postconviction lawyer. Id. at 24-25. The Texas system -- in which speed is a priority, counsel standards are minimal, and compensation is poor -- has failed by becoming synonymous with abysmal legal representation: "Because of the appointment of unqualified counsel, filing deadlines are being missed, and all too often state postconviction petitions are submitted that make a mockery of legal representation." Id. at 67-68.[13]

The experience of other states thus underscores that reliance on private counsel for postconviction representation is doomed to fail, and full funding of professional defender offices, such as the CCRCs, is the most efficient and effective way to provide competent postconviction representation in capital cases. This is even more true when the system must absorb an increased number of cases. Unlike the Registry, which allows the appointment of only one lawyer per case, the CCRCs are able to hire, train, and supervise less experienced lawyers who serve as co-counsel. Thus, if properly funded, the CCRCs would be

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[13.] See also Jonathan Alter & Mark Miller, A Life or Death Gamble, Newsweek, May 29, 2000; Sara Rimer & Raymond Donner, On the Record/Capital Punishment in Texas; Bush Candidacy Puts Focus on Executions, N.Y. TIMES, May 14, 2000; Paul Duggan, In Texas, Defense Lapses Fail to Halt Executions, Washington Post, May 12, 2000 (App. 2); Stephen B. Bright, Death in Texas -- Not Even the Pretense of Fairness, THE CHAMPION (July 1999) (App. 6).

in a much better position than the Registry to effectively handle additional cases.

3. The Proposed Standards for Postconviction Counsel Must Be Strengthened to Ensure the Reliability of the Postconviction Process

Whether counsel is provided privately or through a professional defender office, this Court "has an inherent and fundamental obligation to ensure that lawyers are appointed to represent indigent capital defendants who possess the experience and training necessary to handle the complex and difficult issues inherent in death penalty cases." In re Amendment to Rule 3.112, 24 Fla. L. Weekly at S512. Indeed, "[t]he integrity of the process and our society's confidence in the outcome of capital proceedings rests on our allegiance and commitment to the highest standards of our justice system." Id.

The Association fully supports the Court's effort to develop standards for postconviction counsel -- whether private or public.[14] See id. at S515 n.9. Because meaningful standards are essential to the feasibility of any dual track system, the Association offers preliminary comments on the select committee's

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[14.] Unfortunately, professional defender offices are not immune from providing deficient representation. See, e.g., Peede v. State, 748 So. 2d 253, 256 n.5 (Fla. 1999). The Association therefore fully supports the application of counsel standards to the CCRCs as well as to Registry counsel, just as the Association endorsed the application of standards to public defender offices as well as to private counsel at the trial and direct appeal levels. See Comments of the Florida Public Defender Association, Inc. at 1, In re Amendment to Rule 3.112, No. 90,635 (comments filed Dec. 29, 1999).

proposed standards, even though they have not yet been separately published for comment.[15]

While the committee is to be commended for taking as its starting the point the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, these minimum standards must be strengthened to prevent further, unacceptable deficiencies in the quality of representation by postconviction counsel.[16] First, the ABA Guidelines state expressly that they are intended to "enumerate the minimal resources and practices necessary to provide effective assistance of counsel." AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES ("ABA GUIDELINES"), at 2 (February 1989) (emphasis added) (App. 7). Since these standards were adopted 11 years ago, capital postconviction litigation has become even more "specialized and demanding." Id.; see also Letter from Lawrence J. Fox, Chair & Elisabeth Semel, Director, ABA Death Penalty Representation Project to Hon. Major B. Harding,

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[15.] These preliminary comments are not intended to be exhaustive. The Association would expect to submit additional comments during the formal comment period, including on several matters not addressed here, that affect public defenders.

[16.] The improper statutory and contractual restrictions on fees and hours at issue in Olive v. Maas, supra, also must be eliminated to ensure competent representation by Registry counsel.

Chief Justice, Florida Supreme Court (May 31, 2000) (Comments on Proposed Amendments to Rules 3.851, 3.852, and 3.993) (hereinafter "ABA Comments").

Second, the ABA Guidelines require a minimum of two lawyers for every stage of a capital case, from trial through postconviction proceedings. See ABA GUIDELINE 2.1. The CCRC offices routinely assign at least two lawyers to each case. The Registry statute, however, allows the appointment and compensation of just one attorney to handle the entire postconviction process. See § 27.710(6), Fla. Stat. (1999).

Third, there is no longer any equivalent of the Volunteer Lawyer Resource Center to provide advice and assistance to private counsel. Thus, each individual Registry lawyer must be sufficiently experienced and knowledgeable to competently handle every aspect of a complex capital case, from conducting factual investigations to handling evidentiary hearings and prosecuting appeals in state and federal court. It is therefore not only entirely reasonable, but necessary, to require these lawyers to meet standards that are somewhat higher than those suggested by the ABA 11 years ago, when it was expected that private counsel would continue to have the guidance of federally-funded death penalty resource centers.

a. Prior Postconviction Experience

The committee proposal, like the ABA Guidelines, requires postconviction counsel to have, in addition to five jury or bench trials of serious or complex cases, "prior experience as postconviction counsel in at least three cases in state or federal court." Proposed Standards, Rule 3.112(i)(3);[17] ABA GUIDELINE 5.1.III.iii. While prior postconviction experience is indispensable, a standard requiring prior experience, as lead or co-counsel, in at least one capital postconviction proceeding in state court and one capital federal habeas corpus proceeding would more reliably ensure that counsel is competent to handle a capital postconviction case in both state and federal court.

An attorney who has handled just three uncomplicated, noncapital postconviction matters in state court is not qualified to factually investigate a capital postconviction case, handle an evidentiary hearing, prosecute appeals, and file a federal habeas petition. Not only are there very substantial differences between capital and noncapital postconviction proceedings in state court, but federal habeas law is extremely complex and completely distinct from state postconviction law. Lead postconviction counsel should therefore be required to have federal and state postconviction experience in a capital case. This is analogous to the requirement, already adopted by this Court, that lead trial counsel in a capital case must have "prior experience as lead defense counsel or cocounsel

[17.] All citations are to the "First Alternative" version of proposed rule 3.112 submitted by the select committee on May 11, 2000.

in at least two cases tried to completion in which the death penalty was sought." Proposed Rule 3.112(e)(3) in Amendments to Rule 3.112, 24 Fla. L. Weekly at S515.

b. Lead and Co-Counsel

The Association agrees with the ABA that the appointment of two attorneys should be mandatory in capital postconviction cases. The more stringent standard proposed above, requiring prior capital postconviction experience, would be applicable only to lead counsel. Distinguishing between lead and co-counsel would recognize the necessity of training less experienced attorneys, while they serve as co-counsel, thereby gradually expanding the pool of lawyers qualified to serve as lead counsel.

c. Appellate Experience

The committee's proposal also omits a proviso in the ABA standards that "it is desirable that at least one of the two postconviction counsel also possesses appellate experience at the level" prescribed for appellate co-counsel. ABA GUIDELINE 5.1.III. Because postconviction representation typically requires extensive appellate work in both state and federal court and substantial research and writing at the trial level, requiring appellate experience would improve the overall quality of postconviction representation. This Court itself has been "constrained to comment" that poor quality representation on appeal is not only

highly prejudicial to the client, but also makes it "very difficult and burdensome for this Court to conduct a meaningful review." Peede v. State, 748 So. 2d 253, 256 n.5 (Fla. 1999).

d. Continuing Legal Education

The committee's proposed standard requires annual continuing legal education in a program "devoted specifically to the defense of capital cases." Proposed Rule 3.112(i)(6). The ABA Guidelines provide that the training should be "focused on the postconviction phase of a criminal case" or on "the trial of cases in which the death penalty is sought." ABA GUIDELINE 5.1.III.v.

Given the increased complexity of postconviction law at both the state and federal level, training that focuses specifically on capital postconviction work should be a mandatory component of the continuing legal education requirement. There are several programs around the nation geared specifically to postconviction work in capital cases, including annual conferences held by the NAACP Legal Defense and Education Fund, the National Legal Aid and Defender Association, and other defender organizations.

C. If the Proposed Rules Are Adopted, They Should Be Applied Prospectively Only

The Court specifically requested comments "as to the proper and practical application" of the proposed rules "to defendants in the various stages of the appellate and postconviction process." Amendments, 25 Fla. L. Weekly at S287.

The Association urges this Court not to adopt the proposed rules at this time because the Legislature has neither appropriated sufficient resources to ensure competent counsel for a modified dual track system, nor has it made the necessary changes to chapter 119.

If the Court nevertheless decides to implement the proposed rules, the rules should be applied only to cases in which the death penalty is imposed after the effective date of the rules. As discussed above, the CCRCs do not have sufficient resources to absorb the additional cases, and it is unclear whether there is a sufficient number of qualified Registry counsel available to handle them. To avoid stretching the pool of qualified postconviction counsel beyond its breaking point, the Court should not apply the new rules to pipeline cases.

III.

CONCLUSION

For the reasons stated above and in the supplementary side-by-side comments that follow, the Association urges this Court not to adopt the proposed amendments to Rules of Criminal Procedure 3.851, 3.852, and 3.993 at this time. If the Court does decide to adopt the new rules, the rules should apply only to cases in which the death sentence is imposed after the amendments take effect. Finally the Association urges this Court to strengthen the proposed standards for

capital postconviction counsel and to invalidate improper restrictions on the professional independence and effectiveness of Registry counsel.

The following attachment is intended to supplement the FPDA's attached written comments regarding Rule 3.851. The Court's proposed amendments to Rule 3.851 appears in the left-hand column, with particular words or phrases italicized by the FPDA. Comments regarding those italicized words or phrases appear in the adjacent column.

[current rule 3.851 deleted; the following language added]

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

"and whose conviction and death sentence have been affirmed on direct appeal" is inconsistent with remainder of rule.

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.

"**effective date"** should not occur until all the necessary conditions are met by the Legislature and until sufficiently rigorous standards for counsel are put in place.

(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*.

"new postconviction counsel": Qualified replacement counsel? By what standards? If this means Registry lawyers under the present inadequate statutory standards, this is unacceptable. Also, finding qualified, available counsel may be impossible to do in such a short period of time. The rule also should contain provisions for extending/tolling all times under 3.851 and 3.852 when counsel withdraws, is removed, or disqualified. For example, counsel may discover a conflict or other reason to withdraw after being appointed. Rule 3.851(b)(3) gives CCRC 30 days from appointment to file an appearance or move to withdraw. The rule is silent about withdrawal based on subsequent developments.

(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

"status hearing"and **"motion"** assume one motion only, presumably the initial postconviction motion It does not take into account possibility that subsequent motions also may require hearings.
Also, was this rule intended to overrule Huff v. State, 622 So. 2d 982 (Fla. 1993), which required a hearing on a postconviction

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*.

motion before it can be denied? No such requirement now appears to exist, and overruling Huff would be inappropriate.

Use of the phrase **"the court"** here and throughout the rule suggests the "trial" court, but sometimes "trial court" is expressly used. Do all references to "the court" in this rule mean "the trial 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).

"**record**" should be clarified to also include all supplements thereto, with a continuing duty to serve copies as supplements are filed.

(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.*

"except for information that the prosecuting attorney has a legal right under state or federal law to withhold from disclosure" is problematic because the rule does not expressly direct the court to examine <u>in camera</u> or hold hearings on validity of alleged exemptions or exceptions under chapter 119 or <u>Brady</u>. Rule 3.852 (f)(2) says the court's unsealing and inspection is without ex parte communications; but some hearing is needed for the court to know whether the information should have been disclosed. Also, notice must be provided to defense counsel that some exemption or exception is being claimed.

(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.

"**presence shall not be required except**" is too narrow and constitutionally deficient. Right of personal presence of defendant must be presumed for all proceedings, subject to knowing, intelligent, voluntary waiver on the record

(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.

"**no court**" means no **state** court?

(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.

"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." This provision should be deleted because, given the counsel problems and the Legislature's failure to support the dual track-- both discussed in the text of our comments -- these new rules should not apply to pending cases in any manner. Appellants in the "pipeline" should not have foisted upon them any Registry counsel until all the ethical, financial, and other issues alluded to in the comments are fully and adequately resolved.

"**has been held to apply retroactively**" is too narrow. What if the case is the first attempt -- and a successful one -- to make a precedent retroactive? Is it barred because nobody else did it first?

"**retained counsel"** suggests after-time filing due to negligence of appointed or pro bono counsel should not be permitted. The U.S. and Florida Constitutions make no distinction between effectiveness of retained verses appointed counsel If anything, the doubts about competency of Registry

lawyers and inadequacy of CCRC funding require more leeway for defendant represented by appointed counsel.

(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.

"**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**" is wasteful. Cert. has been granted many times after this Court's direct appeal decision, see Proffit v. Florida, 428 U.S. 242 (1976); Gardner v. Florida, 430 U.S. 349 (1977); Dobbert v. Florida, 432 U.S. 282 (1977); Enmund v. Florida, 458 U.S. 782 (1982); Barclay v. Florida, 463 U.S. 939 (1983); Spaziano v. Florida, 468 U.S. 447 (1984); Hildwin v. Florida, 490 U.S. 638 (1989); Sochor v. Florida, 504 U.S. 527 (1992); Espinosa v. Florida, 505 U.S. 1079 (1992). Also, direct appeal counsel, and perhaps trial counsel, are still working on cert. petition and may not/should not be available to cooperate with postconviction counsel. Also, what happens if CCRC moves to withdraw, but there is no immediately available qualified counsel to take the case? A delay of months to find substitute counsel means months of wasted time weighing against the defendant's ability to prepare, with no countervailing opportunity to seek an extension of time due to the late appointment of counsel. Finality should not come about until cert. petition denied if filed, or time for filing expires. Finality should be the same as the Virginia standard, which this Court otherwise relied

upon. See 25 Fla. L. Weekly at S287 n.1. Furthermore, the rule does not contemplate the possibility that a decision on a cert. petition may in some instances take a long time, such as when petitions are held over due to the summer recess, see Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, Kenneth S. Geller, Supreme Court Practice, §§ 5.2 (7th ed. 1993), or when the Court delays its decision until other relevant pending cases are decided -- sometimes a matter of years, see id. § 5.9.

(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.

"**manifest injustice**" is vague and undefined. When is an injustice "manifest"? What injustices should be permitted, and relief denied? An injustice by definition requires relief; "**manifest injustice**" should be replaced with "good cause." Certainly, delays not attributable to the defendant, such as delays in producing public records or in obtaining qualified counsel, should warrant extensions, but cf. Proposed Rule 3.852(a)(1) ("this rule... does not alter or change the time periods specified in" Rule 3.851).

(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

"**Any petition for habeas corpus claiming ineffective assistance of appellate counsel**" should be qualified to apply only when a defendant's postconviction motion is denied. If trial court grants relief and state files an appeal, does defendant have to file habeas alleging ineffective assistance of appellate counsel to preserve the claim? What if trial

postconviction relief filed under this rule.

court grants relief only in part, e.g. penalty phase, but ineffectiveness in appeal of guilt is alleged?

(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.

"**counsel**" should be conditioned on counsel being experienced and well qualified in capital postconviction trial and appellate litigation in state and federal courts, meeting high professional standards and equipped with adequate resources, funding, and training. Statutory Registry standards are woefully inadequate.

(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:

" **shall not exceed 50 pages**" is inadequate because postconviction motions often are more complex -- and have more appellate records and procedural history to reference -- than direct appeals.

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

"**the court**" should be "name of the court"

(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*;

Explaining the **"reason or reasons the claim or claims in the present motion were not raised**" in (e)(3) & (e)(6) should not fall upon defendant in the motion. It should be the state's burden to assert these bars, which may be waived by the state's

(4) the nature of the relief sought;

(5) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and

(6) 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 appea*l.

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

failure to object. The court should not be allowed to raise such bars *sua sponte*. Or if the court on its own raised a procedural bar, the rule should require that the defense have an opportunity to respond before the court rules. This is also addressed in Rule 3.851(f)(3) under Answer. Furthermore, bars should not defeat a claim unless the state can show specific and substantial prejudice; prejudice should not be presumed.

"**not to exceed 25 pages**" is inadequate because postconviction motions often are more complex -- and have more appellate records and procedural history to reference -- than direct appeals. The motion and memorandum combined should be permitted to be at least 100 pages.

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.

"**the state shall file its answer**" should not eliminate the opportunity for a right of reply to the state's answer. A right of reply should be given. These cases are even more complicated than direct appeals.

(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

"**Amendments"** does not distinguish -- as it should -- between those to existing claims and those adding new claims. Those affecting existing claims should be freely allowed at any time if there is no substantial prejudice to the state.

"**up to 30 days prior to the evidentiary hearing upon motion and good cause shown**" is too narrow for it does not take into account extraordinary circumstances that may arise within 30 days of the hearing, such as a new witness who gives rise to a new claim or a different argument of an existing claim.

allowed, *the state shall file an amended answer* within 20 days after the amended motion is filed.

"**the state shall file an amended answer**" again should not be read to prevent a right of reply to the state's amended answer. Defendant should be permitted to reply.

(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:

"copies of all expert reports attached" may imply that the expert furnish a written report to counsel, but there exists no such requirement. Also, there is no provision for deposing the experts of either party.

(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.

"**purely legal claims**" does not encompass mixed questions of law and fact.

(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.

"**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**" is vague and too narrow if construed not to recognize the distinction between experts who examined the defendant and those who did not, a distinction this Court has already accepted, see Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994); Fla. R. Crim. P. 3.202; State v. Hickson, 630 So. 2d 172 (Fla. 1993); Fla. R. Crim. P. 3.201. If Defendant's expert did not examine defendant, state's expert has no right to examine defendant.

(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.

"transcript of the hearing which shall be filed within 30 days" may not be possible in all jurisdictions and at all times.

"the court shall render its order" should state that the court must write its own order if it denies relief, and it should not solicit or accept draft orders from the state, as is now the requirement regarding sentencing orders.
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(9) Rehearing. *No motion for rehearing shall be permitted*.

"No motion for rehearing shall be permitted" is inefficient as ironclad rule

because sometimes new decisions have been issued or new circumstances arise warranting judicial discretion to consider. For example, trial court applying new FSC decision could save time and expense of appealing trial court's decision only to have it remanded for consideration in light of the new case.

(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 and, if based upon newly discovered evidence, Brady, or Giglio, 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.

The following attachment is intended to supplement the FPDA's attached written comments regarding Rule 3.852. The Court's proposed amendments to Rule 3.852 appear in the left-hand column, with particular words or phrases italicized by the FPDA. Comments regarding those italicized words or phrases appear in the adjacent column.

[deletions indicated by struck-through type; new language is underscored]

Rule 3.852 Capital Postconviction Public Records Production

(a) Applicability and Scope.

(1) This rule is applicable only to the production of public records for capital postconviction defendants and *does not change or alter the time periods specified in Florida Rules of Criminal Procedure ~~3.850 and~~ 3.851. Furthermore, this rule does not affect, expand, or limit the production of public records for any purposes other than use in a proceeding held pursuant to ~~rule 3.850 or~~ rule 3.851.*

"does not change or alter the time periods specified in Florida Rules of Criminal Procedure ~~3.850 and~~ 3.851. Furthermore, this rule does not affect, expand, or limit the production of public records for any purposes other than use in a proceeding held pursuant to rule 3.851" does not contemplate that delays in public records production could affect the time provisions of rule 3.851.

(2) This rule shall not be a basis for renewing requests that have been initiated previously or for relitigating issues pertaining to production of public records upon which a court has ruled prior to ~~October 1, 1998~~(effective date of rule).

(3) This rule is to be used in conjunction with the forms found at Florida Rule of Criminal Procedure 3.993.

(b) Definitions.

(1) "Public records" has the meaning set forth in section 119.011(1), Florida Statutes ~~(1997)~~.

(2) "Trial *court*" means:

"court" is used in various forms throughout R 3.852, such as in (b)(2) where modified by word "trial," and below in (b)(6) where modified by "clerk of" but without "trial." The use of the word "court" here and elsewhere in rule should be scrutinized so as to clarify, if needed, when the "court" means the "trial court" or any "court" of proper jurisdiction.

(A) the judge who imposed the sentence of death; or

(B) the judge assigned by the chief judge pursuant to rule 3.851.

(3) "Records repository" means the location designated by the secretary of state pursuant to section 119.19(2), Florida Statutes ~~(Supp. 1998)~~, for archiving capital postconviction public records.

(4) "*Collateral counsel*" means a capital collateral regional counsel from one of the three regions in Florida; a private attorney who has been appointed to represent a capital defendant for postconviction litigation; or a private attorney who has been hired by the capital defendant or who has agreed to work pro bono for a capital defendant for postconviction litigation.

"collateral counsel" does not contemplate that counsel must meet sufficiently rigorous qualifications to act in postconviction proceedings.

(5) "Agency" and "person" mean an entity or individual as defined in

section 119.011(2), Florida Statutes ~~(1997)~~, that is subject to the requirements of producing public records for inspection under section 119.07(1)(a), Florida Statutes ~~(1997)~~.

(6) "Index" means a list of the public records included in each container of public records sent to the records repository, or to the clerk of court.

(c) Filing and Service.

(1) The original of all notices, requests, or objections filed under this rule must be filed with the clerk of the trial court. Copies must be served on the trial court, the attorney general, the state attorney, collateral counsel, and any affected person or agency, unless otherwise required by this rule.

(2) Service shall be made pursuant to Florida Rule of Criminal Procedure 3.030(b).

(3) In all instances requiring written notification or request, the party who has the obligation of providing a notification or request shall provide proof of receipt.

(4) Persons and agencies receiving postconviction public records notifications or requests pursuant to this rule are not required to furnish records filed in a trial court prior to the receipt of the notice.

(d) *Action* Upon ~~Issuance of Mandate~~Imposition of Death Sentence.

(1) *Within 15 days after ~~receiving written notification of the Supreme Court of Florida's mandate affirming the sentence of death, the attorney general shall file with the trial court a written notice of the mandate and serve a copy of it upon the state attorney who prosecuted the case, the Department of Corrections, and the defendant's trial counsel. The notice to the state attorney shall direct the state attorney to submit public records to the records repository within 90 days after receipt of written notification and to notify each law enforcement agency involved in the investigation of the capital offense to submit public records~~a sentence of death is imposed,* the state attorney who prosecuted the case shall provide written notice to each law enforcement agency involved in the investigation of the capital case and the Department of Corrections. The notice shall direct the agencies and the department to submit public records to the records repository or, if the records are confidential or exempt, the clerk of the court in the county in which the capital case was tried within ~~90~~60 days after receipt of

"Action[s]" required by rule 3.852 and chapter 119 should invoke a continuing obligation, so that whenever a prosecutor learns of an agency that may have records, the prosecutor has a continuing obligation to notify the agencies of their obligations; and agencies likewise have a continuing obligation to disclose in the event records turn up at some later time.

"**Within 15 days after a sentence of death is imposed"** is the trigger used throughout this amended rule. However, as noted in the comments, this is largely a pointless endeavor because the Legislature failed to amend the exemptions to chapter 119, which lay at the heart of the dual track process and, as this Court noted, are the chief cause of delays. For the reasons more fully explicated in the attached comments, the main rationale behind these amendments has been thoroughly undermined by the Legislature, making the amendments unnecessary.

~~written notification~~ the notice. If available, the notice shall include the defendant's date of birth, sex, race, and police-case numbers included in the state attorney's file. ~~The notice to the Department of Corrections shall direct the department to submit public records to the records repository within 90 days after receipt of written notification.~~

(2) Within ~~90~~60 days after ~~receiving written notification of issuance of the Supreme Court of Florida's mandate affirming a death sentence~~ a sentence of death is imposed, the state attorney who prosecuted the case shall:

(A) copy, index, and deliver to the records repository, or if the records are confidential or exempt from disclosure, to the clerk of the court in the county in which the capital case was tried all public records that were produced in the state attorney's investigation or prosecution of the case, and;

(B) provide written notification to the attorney general of compliance with subdivision (A), certifying that, to the best of the state attorney's knowledge or belief, all public records in the state attorney's possession have been copied, indexed, and delivered to the records repository, or if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried; and bear the

costs of compliance with this subdivision;

(C) provide written notification to the attorney general of the name and address of any additional person or agency that has ~~public records~~information pertinent to the case which has not previously been provided to collateral counsel.

(3) Within ~~90~~60days after ~~receiving written notification of issuance of the Supreme Court of Florida's mandate affirming a death sentence~~a sentence of death is imposed, *the defendant's trial counsel shall provide written notification to the attorney general of the name and address of any additional person or agency with information pertinent to the case which has not previously been provided to collateral counsel*.

"the defendant's trial counsel shall provide written notification to the attorney general of the name and address of any additional person or agency with information pertinent to the case which has not previously been provided to collateral counsel" is problematic because it may invade confidentiality and the attorney client and work product privileges.

(4) Within 15 days after receiving written notification of any additional person or agency pursuant to subdivision (d)(2) or (d)(3) of this rule, the attorney general shall notify all persons or agencies identified pursuant to subdivisions (d)(2) or (d)(3) that these persons or agencies are required ~~by section 119.19(65)(b), Florida Statutes (Supp. 1998),~~ to copy, index, and deliver to the records repository, or if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried all public records pertaining to the case that are

in their possession. ~~The~~Each person or agency shall bear the costs ~~related to copying, indexing, and delivering the records~~of its own compliance.

(e) Action Upon Receipt of Notice of ~~Mandate~~Imposition of Death Sentence.

~~(1) Within 15 days after receipt of a written notice of the mandate from the attorney general, the state attorney shall provide written notification to each law enforcement agency involved in the specific case to submit public records to the records repository within 90 days after receipt of written notification. A copy of the notice shall be served upon the defendant's trial counsel.~~

~~(2) Within 90 days after receipt of a written notice of the mandate from the attorney general, the state attorney shall copy, index, and deliver to the records repository all public records that were produced in the state attorney's investigation or prosecution of the case . The state attorney shall bear the costs. The state attorney shall also provide written notification to the attorney general of compliance with this section, including certifying that, to the best of the state attorney's knowledge or belief, all public records in the state attorney's possession have been copied, indexed, and delivered to the records repository as required by this rule.~~

(~~3~~1) Within ~~90~~60 days after receipt of written notification of the ~~mandate~~imposition of sentence from the ~~attorney general~~state attorney, the Department of Corrections shall copy, index, and deliver to the records repository or, if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried all public records determined by the department to be relevant to the subject matter of a proceeding under ~~rule 3.850 or~~ rule 3.851, unless such copying, indexing, and delivering would be unduly burdensome. The department shall bear the costs. The secretary of the department shall provide written notification to the attorney general of compliance with this ~~section~~subdivision, certifying that, to the best of the secretary of the department's knowledge or belief, all such public records in the possession of the ~~secretary of the~~ department have been copied, indexed, and delivered to the records repository or, if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried.

(~~4~~2) Within ~~90~~60 days after receipt of written notification of the ~~mandate~~imposition of sentence from the state attorney, a law enforcement agency shall copy, index, and deliver to the records repository or, if the records are confidential or exempt, to the clerk of the court in the county in

which the capital case was tried all public records which were produced in the investigation or prosecution of the case. Each agency shall bear the costs of its own compliance. The chief law enforcement officer of each law enforcement agency shall provide written notification to the attorney general of compliance with this ~~section~~subdivision, ~~including~~ certifying that, to the best of the chief law enforcement officer's knowledge or belief, all such public records in possession of the agency or in possession of any employee of the agency, have been copied, indexed, and delivered to the records repository or, if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried.

(~~5~~3) Within ~~90~~60 days after receipt of written notification ~~of the mandate~~ from the attorney general pursuant to subdivision (d)(4) of this rule, each additional person or agency identified pursuant to subdivision (d)(2) or (d)(3) of this rule shall copy, index, and deliver to the records repository all public records which ~~were produced during the prosecution of~~pertain to the case, except those which have been previously provided to collateral counsel. ~~The~~Each person or agency shall bear the costs of its own compliance. The person or agency *shall provide written notification to the attorney general of compliance with this subdivision and*

"shall certify, to the best of the person or agency's knowledge and belief, all such

shall certify, to the best of the person or agency's knowledge and belief, all such public records in the possession of the person or agency, except those which have been previously provided to collateral counsel, have been copied, indexed, and delivered to the records repository or, if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried.

(f) Action Upon Issuance of Mandate.

(1) *Within 15 days after receiving written notification of the Supreme Court of Florida's mandate* affirming the sentence of death, the attorney general shall file with the trial court a written notice of the mandate and serve a copy of the notice on collateral counsel.

(fg) *Exempt or Confidential Public Records*.

(1) Records Delivered to Clerk of Court. Any public records ~~delivered to the records repository pursuant~~subject to these rules that are confidential or exempt from the requirements of section 119.07(1), Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The container

public records in the possession of the person or agency" may not adequately cover records known to exist but not known or believed to be in the possession of an agency, such as records in transit, or the knowledge that records once existed but are believed to have been destroyed.

"Within 15 days after receiving written notification of the Supreme Court of Florida's mandate" is problematic for the same reasons noted in comments to the "finality" standard of rule 3.851. The Court should make the public records disclosure rules effective upon finality, which in turn should be when cert. is denied, cert is granted and the case is decided, or if not filed, when the time for filing cert. has expired.

"Exempt or Confidential Public Records" provisions throughout Rule 3.852 are inadequate. They do not spell out notice to counsel as to the claimed exemptions; provide for procedures for moving for or getting in camera review; or for hearings on the validity of alleged exemptions or exceptions. Rule 3.852 (f)(2) says the court's unsealing and inspection is without ex parte communications; but some hearing is needed for the court to know whether the information should have been disclosed.

must be delivered to the clerk of court in the county in which the capital case was tried. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption. Records that are exempt from public records production under section 119.07(3)(b) or (3)(l), Florida Statutes, must be delivered to the clerk of court in a separate container, the outside of which must specifically identify the section(s) under which the records are exempt.

(2) In Camera Inspection. ~~Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court.~~ The containers may be opened only for inspection by the trial court in camera. ~~The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court.~~ The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.

(3) After Mandate Issues on Direct Appeal. Within 30 days after the filing of the notice of mandate on direct appeal by the attorney general,

Also, the court should be required to write its findings as to claimed exceptions or exemptions, and should do so without counsel drafting the findings and order for the court.

the trial court shall issue an order unsealing all records that were identified as being exempt from public records production under sections 119.07(3)(b) or (3)(1), Florida Statutes, and the clerk of court shall forward the records to the records repository.

(gh) ~~Upon Designation of Collateral Counsel~~Demand for Additional Public Records.

(1) Within ~~90~~180 days after ~~collateral counsel is appointed, retained, or appears pro bono~~ receipt of written notification of the mandate from the attorney general, or at such later time as may be set by the trial court, ~~such~~collateral counsel ~~shall~~may send a written demand for additional public records to each person or agency submitting public records or identified as having information pertinent to the case under subdivisions (d)(2) or (d)(3) of this rule. If the written demand includes requests for records associated with particular named individuals, the demand shall also include:

(A) *a brief statement describing each named person's role in the capital case and relationship to the defendant*; and

"a brief statement describing each named person's role in the capital case and relationship to the defendant" compromises attorney work-product privilege. No such specificity should be required, and if any such information is required, it should be subject to ex parte, in camera review and not disclosed to the state.

(B) the race, sex, and date of birth of each named person, if collateral counsel has such information.

(2) Within ~~90~~60 days of receipt of the written demand, each person or agency notified under this subdivision shall deliver to the records repository or, if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried any additional public records in the possession of the person or agency that pertain to the case and shall certify to the best of the person or agency's knowledge and belief that all additional public records have been delivered to the records repository~~;~~ or, if the records are confidential or exempt, to the clerk of the court in the county in which the capital case was tried. If no additional public records are found, the person or agency shall recertify that the public records previously delivered are complete.

(3) Within ~~60~~25 days of receipt of the written demand, any person or agency may file with the trial court an objection to the written demand described in subdivision (~~g~~h)(1). The trial court shall hold a hearing and issue a ruling within 30 days after the filing of any objection, ordering a person or agency to produce additional public records if the court determines each of the following exists:

(A) Collateral counsel has made a timely and diligent search as provided in this rule.

(B) Collateral counsel's written demand identifies, with specificity, those additional public records that are not at the records repository.

(C) The additional public records sought are relevant to the subject matter of a proceeding under rule ~~3.850 or rule~~ 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence.

(D) The additional public records request is not overly broad or unduly burdensome.

(~~h~~i) Cases in Which ~~Mandate was Issued~~ Death Sentence was Imposed Prior to Effective Date of Rule.

(1) ~~If the mandate affirming a defendant's conviction and sentence of death was issued prior to October 1, 1998, and no initial public records requests have been made by collateral counsel by that date, the attorney general and the state attorney shall file notifications with the trial court as required by subdivisions (d) and (e) of this rule.~~*In cases in which the death sentence has been imposed but collateral counsel has not been appointed, been retained, or appeared pro bono prior to [effective date of rule], the time periods for providing written notification*

"In cases in which the death sentence has been imposed but collateral counsel has not been appointed, been retained, or appeared pro bono prior to [effective date of rule], the time periods for providing written notification pursuant to subdivisions (d)(1), (d)(2), and (d)(3)of

pursuant to subdivisions (d)(1), (d)(2), and (d)(3)of this rule shall run from the date collateral counsel is appointed pursuant to rule 3.851, retained, or appears pro bono.

~~(2) If on October 1, 1998, a defendant is represented by collateral counsel and has initiated the public records process, collateral counsel shall, within 90 days after October 1, 1998, or within 90 days after the production of records which were requested prior to October 1, 1998, whichever is later, file with the trial court and serve a written demand for any additional public records that have not previously been the subject of a request for public records. The request for these records shall be treated the same as a request pursuant to subdivisions (d)(3) and (d)(4) of this rule, and the records shall be copied, indexed, and delivered to the repository as required in subdivision (e)(5) of this rule.~~ In cases in which the death sentence has been imposed and collateral counsel has been appointed, been retained, or appeared pro bono prior to [effective date of rule], public records production shall be governed by the rules in effect prior to that date.

this rule shall run from the date collateral counsel is appointed pursuant to rule 3.851, retained, or appears pro bono."

The FPDA firmly opposes the application of amended rules 3.851, 3.852, and 3.993 to "pipeline" cases because no adequate measures have been taken to assure the availability of a sufficient number of properly qualified postconviction counsel, and to assure that they be permitted to act without undue and unethical restrictions. Nearly 100 such lawyers will be required immediately under this proposed rule, and scores of others will be required as additional death sentences are imposed.

~~(3)~~ **(j) After Death Warrant Signed.**

(1) Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:

(A) that was not previously the subject of an objection;

(B) that was received or produced since the previous request; or

(C) that was, for any reason, not produced previously.

The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the person or agency shall file with the trial court and serve on the parties an affidavit stating that no other records exist and that all public records have been produced previously. A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.

~~(4)~~**(k) Proof of Receipt of Notice.** In all instances ~~in subdivision (h)~~

which require written notification, the receiving party shall provide proof of receipt by return mail or other carrier.

(il) Limitation on Postproduction Request for Additional Records.

(1) In order to obtain public records in addition to those provided under subdivisions (e), ~~(f), (g),~~ (h), (i), and ~~(h)~~ (j) of this rule, collateral counsel shall file an affidavit in the trial court which:

(A) attests that collateral counsel has made a timely and diligent search of the records repository; and

(B) identifies with specificity those public records not at the records repository; and

(C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and

(D) shall be served in accord with subdivision (c)(1) of this rule.

(2) Within ~~30~~15 days after the affidavit of collateral counsel is filed, the trial court shall order a person or agency to produce additional public records only upon finding each of the following:

(A) collateral counsel has made a timely and diligent search of the records repository;

(B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;

(C) the additional public records sought are either relevant to the subject matter of a proceeding under ~~rule 3.850 or~~ rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and

(D) the additional records request is not overly broad or unduly burdensome.

(~~j~~m) Copying of Public Records. ~~Collateral counsel~~The Secretary of State shall provide the personnel, supplies, and any necessary equipment to *copy records* held at the records repository.

"**copy records**" does not necessarily indicate the form of the records being turned over to counsel. For example, electronic copies of the records provided to collateral counsel on DVD or CD may or may not be in a form sufficient to meet counsel's needs because of technology, resources of counsel, and because counsel may want to examine the original "records" which could contain light marks or other things not copied adequately into an electronic form.

(~~k~~n) Authority of the Court. In proceedings under this rule the trial court may:

(1) compel or deny disclosure of records;

(2) conduct an in-camera inspection;

(3) *extend the times in this rule upon a showing of good cause*;

"extend the times in this rule upon a showing of good cause" creates a "good cause" standard that conflicts with the "manifest injustice" standard proposed for extensions in Rule 3.851(d)(1)(c). Both rules should apply "good cause" standards.

(4) impose sanctions upon any party, person, or agency affected by this rule including initiating contempt proceedings, taxing expenses, extending time, ordering facts to be established, and granting other relief; and

(5) resolve any dispute arising under this rule unless jurisdiction is in an appellate court.

(~~l~~o) Scope of Production and Resolution of Production Issues.

(1) Unless otherwise limited, the scope of production under any part of this rule shall be that the public records sought are not privileged or immune from production and are either relevant to the subject matter of the proceeding under ~~rule 3.850 or~~ rule 3.851 or are reasonably calculated to lead to the discovery of admissible evidence.

(2) Any objections ~~or~~to production of public records under this rule shall

be filed within 30 days of receipt of the notice or demand which is the subject of the objection, unless otherwise provided herein. Any motions to compel production of public records pursuant to this rule shall be filed within 30 days after the end of the production time period provided by this rule. Counsel for the party objecting or moving to compel shall file a copy of the objection or motion directly with the trial court. The trial court shall hold a hearing on the objection or motion on an expedited basis.

(3) The trial court may order mediation for any controversy as to public records production pursuant to this rule in accord with Florida Rules of Civil Procedure 1.700, 1.710, 1.720, 1.730, or the trial court may refer any such controversy to a master in accord with Florida Rule of Civil Procedure 1.490.

(mp) ***Destruction of Records*** **Repository Records.** Sixty days after a capital sentence is carried out, after a defendant is released from incarceration following the granting of a pardon or reversal of the sentence, or after a defendant has been resentenced to a term of years, the attorney general shall provide written notification of this occurrence to the secretary of state with service in accord with subdivision (c)(1). After the expiration of the 60 days, the secretary of state may then destroy

"**Destruction of Records**" does not state whether that includes actual physical evidence. In light of DNA testing and other technological advances, physical evidence that may later prove to contain evidence of innocence should not ever be destroyed.

the copies of the records held by the records repository that pertain to that case, unless an objection to the destruction is filed in the trial court and served upon the secretary of state and in accord with subdivision (c)(1). If no objection has been served within the 60-day period, the records may then be destroyed. If an objection is served, the records shall not be destroyed until a final disposition of the objection.

CERTIFICATE OF SERVICE

We certify that copies of these comments have been furnished, without the attached appendix, by delivery to the office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and by U.S. Mail to those on the following attached list, on this _____ day of June, 2000.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

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

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APPENDIX TO COMMENTS OF
FLORIDA PUBLIC DEFENDER ASSOCIATION, INC.