

**IN THE SUPREME COURT OF FLORIDA**

**IN RE: AMENDMENT TO FLORIDA  
RULES OF CRIMINAL PROCEDURE  
3.851**

**CASE NUMBER: SC96646**

**COMMENTS OF THE FLORIDA BAR  
CRIMINAL PROCEDURE RULES COMMITTEE**

John F. Harkness, Jr., Executive Director of The Florida Bar, and Jerome C. Latimer, Chair of The Florida Bar Criminal Procedure Rules Committee, respectfully submit these comments concerning the proposed amendment to Fla.R.Crim.P. 3.851, in response to this Court's request of February 9, 2000.

**I**

Introduction

The Criminal Procedure Rules Committee (hereinafter also referred to as the "rules committee") has examined the proposed amendment to Rule 3.851, which is the work product of the Supreme Court Committee on Postconviction Relief in Capital Cases (hereinafter referred to as the "Morris Committee") and the Death Penalty Reform Act of 2000.

The implementation of procedural rules, under Art. V, § 2(a), of the Florida Constitution is within the exclusive province of the Court. The drafting of procedural rules has been delegated by the court to various Bar rules committees. The rules committee has evaluated the Morris Committee's proposed amendments to Rule 3.851, which had been previously submitted to our Subcommittee VI for a similar evaluation.

The rules committee does not believe that it is within its province to evaluate and determine the constitutionality of this legislative enactment because this issue is presently in litigation. Therefore, this committee does not take a position on the constitutionality of the Death Penalty Reform Act of 2000. The committee recognizes, under the doctrine of separation of powers, that the Court must determine to what extent the legislation is procedural or substantive and the effectiveness of the repeal of Rules 3.851, 3.852, and portions of 3.850. See *R.J.A. v. Foster*, 603 So2d 1167 (Fla. 1992); *State v. Green*, 355 So2d 789 (Fla. 1978); *In re Clarification of the Florida Rules of Practice and Procedure*(*Florida Constitution, Article V, Section 2(a)*), 281 So2d 204 (Fla. 1973); *Roy v. Wainwright*, 151 So2d 825 (Fla. 1963). However, in the event that the Florida Supreme Court finds the Death Penalty Reform Act of 2000, or certain portions

thereof, to be substantive rather than procedural, and directs the Criminal Procedure Rules Committee to develop rules required for its implementation, the committee (if necessary , through its Fast Track Subcommittee) will take the opportunity to draft proposed procedural rules regarding postconviction matters (including public records collection and repository). Our committee would then take into account the wisdom of the Morris Committee's proposals and that of other interested capital case practitioners.

Our rules committee simply evaluated the Morris Committee's proposed amendment to Rule 3.851, taking into consideration the Court's concerns and our Subcommittee VI's previous work product. Our suggested changes, reflected in the attached proposal, assume, but do not decide, the constitutional ability of the Court to adopt the Morris Committee's proposed amendment.

Because of the limited time prescribed for our response, the rules committee, even through its fast track procedure, did not have the opportunity to address all of the Court's concerns regarding the potential application of the procedures contained in the Morris Amendment to pending cases. These concerns regarding applicability to pending cases have been additionally referred to the Fast Track Subcommittee. Shortly after their expedited meeting, their recommendations, after ratification by our full committee, will be forwarded promptly to the Court.

## II

All citations are to the Morris Committee's proposed amended rule.

### **Title and 3.851(a) proposed amendment.**

The proposal by the rules committee seeks to amend the title of this rule and subdivision (a) to conform it to the rest of the Morris Committee's proposed amendment to 3.851. Additionally, it seeks to remove a perceived ambiguity that may result when a death sentence is imposed but thereafter is reduced to a life sentence on direct appeal. In most cases, the Florida Supreme Court, after vacating a death sentence, remands the case to the trial court for the imposition of a life sentence without parole. See, *e.g.*, *Larkan v. State*, 739 So2d 90 (Fla. 1999). In these cases, no ambiguity would arise under the Morris Committee proposal. However, occasionally, the Florida Supreme Court vacates a death sentence and directly imposes a sentence of life imprisonment. See, *e.g.*, *Brennan v. State*, 1999 WL 506966 (Fla. 1999). It is in such a context that the committee feels that the present rule may produce some ambiguity and that the proposed additional language would remove that ambiguity. Under the Morris Committee proposal (subdivision (c)(1)(A)), a postconviction relief motion must be filed within one year after the final judgment and sentence of death is affirmed by the Florida Supreme Court.

The rules committee's change to the title would merely add the words, "and affirmed on direct appeal." The change to subdivision (a) would likewise simply add the words, "and whose

conviction and death sentence have been affirmed on direct appeal.”

This proposal (which will be included in our Four-Year Cycle Report) was prompted by request of Richard B. Green, Assistant Public Defender, Fifteenth Judicial Circuit. The proposal was passed unanimously by our full committee by vote of 32 in favor and 0 against. The Florida Bar Board of Governors unanimously approved this proposed amendment by vote of 32 in favor and 0 against.

**3.851(b)(2)–(3) proposed amendment.**

**3.851(c)(1)(A) proposed amendment.**

The rules committee believes that a “gap” exists regarding the appointment of Capital Collateral Regional Counsel in situations in which certiorari review is pending before the United State Supreme Court on the effective date of the proposed rule. The rules committee’s corrective amendment would provide that the Florida Supreme Court, at that time, should appoint appropriate counsel in such cases.

**3.851(c)(1)(C) proposed amendment.**

The Morris Committee’s proposed amendment provides that an extension of time for filing postconviction motions may be granted on a “showing that a manifest injustice would result absent such relief.” The Morris Committee then proceeds to delineate some circumstances that will not be considered as a basis for an extension of time (and presumably that would not be deemed to create “manifest injustice”). Pendency of public records requests, other litigation, or the lack of due diligence on the part of capital collateral counsel are specified. The rules committee believes these specifically designated circumstances should be deleted and be replaced by an all encompassing exclusionary circumstance: when the reasons necessitating an extension of time resulted from “the defendant’s or collateral counsel’s failure to exercise due diligence.” When “manifest injustice” would result from the nonproduction of records and such nonproduction occurred, in spite of the collateral counsel’s exercise of due diligence, the rule committee feels that an extension of time would be warranted. However, collateral counsel’s failure to timely pursue remedies provided for the noncompliance of records production would preclude an extension of time under the rules committee’s proposed change. The rules committee believes its proposed change would give the court greater flexibility to guarantee that manifest injustice would not result.

**3.851(2) proposed amendment.**

**3.851(i) proposed amendment.** (Under the rules committee’s proposed changes to be renumbered to 3.851(j).

The purpose of these amendments is to remove the possibility that collateral counsel may be pursuing habeas corpus, claiming incompetency of appellate counsel, at the same time that appellate counsel may be actively involved in pending certiorari review before the United States

Supreme Court. The language regarding certiorari review is taken, in part, from the current rule 3.851 (b)(1).

### **3.851(e)(6) proposed amendment.**

The Morris Committee proposed rule in subdivision (d) provides that the postconviction motion filed on behalf of the death-sentenced prisoner shall not exceed 50 pages, exclusive of attachments and exhibits. The rules committee believes that the appearance of a “level playing field” should likewise require that the government’s answer be limited to 50 pages. This proposed change simply provides that limitation regarding the government’s answer.

### **New 3.851(f) proposed amendment.**

This proposed change would add a subdivision to the Morris Committee’s proposed rule. This subsection seeks to supply procedures for the determination of competency issues during capital postconviction relief proceedings. The Death Penalty Reform Act of 2000 and the Morris Committee’s proposal do not address this issue.

The Florida Supreme Court, in *Carter v. State*, 706 So. 2d 873 (Fla. 1997), directed the rules committee to adopt rules governing the determination of competency in postconviction proceedings in capital cases. In the *Carter* opinion, substantial guidance was given as to the general content and tenor of the rules desired by the court. The court directed that a hearing to determine competency be held in a postconviction proceeding in capital cases only when there are “factual matters at issue that require the defendant to competently consult with counsel.” 706 So. 2d at 875. This, the court suggests, would occur only when there are “reasonable grounds to believe that a capital defendant is incompetent to proceed” and when the postconviction proceeding involves “factual matters at issue, the development or resolution of which require the defendant’s input.” 706 So. 2d at 875. Proposed Rule 3.851(f)(2)(A) and (C) incorporate these court-delineated precepts.

To aid the trial court in a determination as to whether these criteria for a competency determination, set forth above, are met, the committee requires the motion for examination under subdivision (f)(2)(B) to be specific. In this, the committee was influenced by the concurring opinion in *Carter* of Justice Wells, in which Justice Grimes joined, which suggested that the motion for competency determination “must allege with specificity the factual matter at issue and the reasons that competent consultation is necessary in respect to each factual matter specified.” Additionally, the committee was guided by current provisions in the comparable pretrial competency Rule 3.210(b)(1)–(b)(2), which requires similar specificity. A few members of the committee voiced concern that such a requirement placed an unfair burden on defense counsel.

The court, in *Carter*, expressly declared that matters or issues involved in a postconviction proceeding, which are purely legal in nature or do not require factual input from the defendant, should continue to be addressed in a timely manner by counsel and the court

regardless of the suggested incompetency or actual incompetency of the defendant. 706 So. 2d at 876. The committee incorporates this mandate in proposed subdivision 3.851(f)(1)(A).

The court concluded in *Carter* that the time periods for filing a postconviction motion in a capital case should not be delayed because of the possible incompetency of the defendant and his or her apparent inability to sign and verify the motion (as presently required). Additionally, the court concluded that the filing by counsel of a motion for postconviction relief together with a certificate in that he or she in good faith has reason to believe that the client is incompetent would be equivalent to the defendant verifying the postconviction motion. These conclusions are included in the committee's proposed rule at 3.851(f)(1)(A)–(B).

Regarding the appointment, examination, and the report of experts and the hearing upon such reports, the committee, as did the court in *Carter*, looked to the rules regarding the determination of competency at trial. See Rules 3.210-3.212. Those rules served as a model for provisions in proposed subdivisions (f)(2)(D) and (f)(3)–(4). Some on the committee felt that language borrowed from Rules 3.210 and 3.212 was unclear and should not be incorporated into the new rule. However, the majority of the committee felt that, because this language had been the subject of significant judicial interpretation and application, greater clarity would be achieved by their retention in this postconviction rule.

The proposed rule provides in subdivision 3.851(f)(4)(B) that, when the court finds the defendant, after inquiry, to be competent to proceed or, if incompetent, finds that competency has been restored, the defendant shall have 60 days within which to amend the motion for postconviction relief as to only those issues that were deferred by the court determination that they required factual consultation with counsel. Considerable debate over this provision ensued before its adoption. Some felt that this gave advantage to attorneys who may file baseless motions for competency determinations in order to gain more time. Others felt that this provision might shorten a defendant's opportunity to file amendments because there may be cases in which, at the time of the determination of competency, more than 60 days may exist before the expiration of the limitation period. The committee rejected these concerns. Regarding the former, it relies on the fact that the motion suggesting reasonable grounds to believe the client is incompetent has to be made in "good faith." Regarding the latter concern, it is felt that the proposed language, in context, will be construed to permit more than 60 days to amend if the limitation period has not expired.

This proposed change will be included in our committee's four-year cycle report to the court. The committee feels that this proposed change could be adopted by the Court as a free-standing rule even if the Morris Committee proposed amendment is not adopted. This proposed change regarding competency determination, after considerable debate, passed in final form by a vote of the full committee of 24 in favor and 6 against. The Florida Bar Board of Governors approved this proposed amendment by unanimous vote of 32 in favor and 0 against.

### **3.851(f) Proposed rules committee change re-lettered 3.851(g).**

**3.851(g) Proposed rules committee change re-lettered 3.851(h).**

**3.851(h)(1) Proposed rules committee change re-lettered 3.851(i)(1).**

The Morris Committee's proposed amendment in this subdivision, regarding appeals from a final order on a postconviction motion, provides only a 15-day period for filing an appeal. Typically, the period of time for filing notices of appeal under rules of procedure is 30 days. Therefore, the rules committee recommends this consistent period of time for appeals of postconviction motions.

**3.851(h)(3) Proposed rules committee change deletes.**

The rules committee believes it is unnecessary to prescribe a period of time for the Florida Supreme Court to render a final decision.

**3.851(i) proposed amendment re-lettered 3.851(j).**

**III**

The rules committee's recommended changes to the Morris Committee's proposed amendment to Rule 3.851 are as follows:

The Criminal Procedure Rules Committee's proposed changes are *italicized and in bold type*. Deletions suggested by the rules committee to the Morris Committee proposal will be ~~both underlined and stricken~~.

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 ~~prisoners~~ defendants in state custody who have been sentenced to death and whose conviction and death sentence has been affirmed on appeal. A defendant in custody under sentence of death 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 constitutional error which were unavailable at the time of trial or direct appeal. This rule does not authorize relief based on grounds that could have

or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. No claim of ineffective assistance of collateral counsel may be raised pursuant to this rule.

**(b) Appointment of Counsel.**

(1) Postconviction counsel shall be appointed upon the issuance of a mandate affirming a judgment and sentence of death on direct appeal. On the day the mandate issues, the Supreme Court shall enter an order appointing the appropriate office of the Capital Collateral Regional Counsel.

*(2) The Supreme Court shall appoint the appropriate Capital Collateral Regional Counsel in cases in which certiorari review is pending before the United States Supreme Court on the effective date of this rule.*

(2) (3) Within 30 days of the mandate 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.

**(c) Time Limitation.**

(1) Postconviction Motions

(A) ~~Any rule 3.850 fully-pled~~ motion to vacate judgment of conviction and sentence of death, in accordance with subdivision (d) below, shall be filed by the defendant within one year after the judgment and sentence become final *or within one year from the date of appointment pursuant to (b)(2) above.* 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 finality of the judgment is not affected by the availability of discretionary review in the United States Supreme Court or by the filing of a petition for discretionary review in the United States Supreme Court. The defendant must pursue federal discretionary remedies concurrently with state postconviction remedies. (a) upon the expiration of the time permitted to file a petition for writ of certiorari in the United States Supreme Court seeking review of the decision of the Supreme Court of Florida affirming a judgment and sentence of death (90 days after the opinion becomes final), or (b) upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

~~(3) These time limitations in subdivisions (b)(1) is are established with the understanding that each death penalty defendant will have counsel assigned and available to begin addressing the defendant's postconviction issues within 30 days after the judgment and sentence become final.~~

(B) Should the governor sign a death warrant before the expiration of these time limitations ~~in subdivision (b)(1)~~, this Court will, upon a defendant's request, grant a stay of execution to allow any postconviction relief motions or petitions to proceed in a timely and orderly manner. ~~Further, this time limitation shall not preclude the right to amend or to supplement pending pleadings pursuant to these rules.~~

(C) An extension of time may be granted by the ~~Supreme Court of Florida~~ trial court for the filing of postconviction pleadings if the defendant's counsel makes a showing of ~~good cause for counsel's inability to file the postconviction pleadings within the one year period established by this section~~ that a manifest injustice would result absent such relief. The pendency of public records requests or litigation, the pendency of other litigation, or the failure of collateral counsel to timely prosecute a case shall not constitute cause for extending or tolling the time for the filing of any postconviction pleading. *Where the grounds alleged to necessitate an extension of time resulted from the defendant's or collateral counsel's failure to exercise due diligence, such will not constitute cause for extending or tolling the time for filing of any postconviction pleading.* No appeal may be taken from the denial of a motion for extension of time for filing a postconviction motion.

## (2) Extraordinary Remedies

All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus *not claiming ineffective assistance of appellate counsel*, shall be filed ~~simultaneously with the initial brief filed on behalf of the death-sentenced defendant in the appeal of the circuit court's order on the rule 3.850 motion.~~ within 120 days of appointment of collateral counsel. *Petitions for habeas corpus claiming ineffective assistance of appellate counsel shall be filed pursuant to subsection (j) below.*

~~(5) The provisions of rule 3.850, to the extent they are not inconsistent with this rule, remain applicable to postconviction or collateral relief.~~

~~(6) The Court will review the operation and effectiveness of this rule on or before July 1, 1995. This rule will govern the cases of all death-sentenced individuals whose convictions and sentences become final after January 1, 1994.~~

## (d) Contents of Motion.

A motion filed under this rule shall not exceed 50 pages exclusive of attachments and exhibits. The motion shall be under oath and include:

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

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



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

(4) the nature of the relief sought;

(5) a fully detailed allegation of the factual basis for any claim of legal or constitutional error asserted, including the attachment of any document supporting the claim, the name and address of any witness, the attachment of affidavits of the witnesses or a proffer of their testimony; and

(6) a concise memorandum of applicable case law as to each claim asserted.

The court on its own motion or on the motion of the state may strike the postconviction motion if it fails to comply with the requirements of subdivision (c) or (d). The defendant shall have thirty days in which to comply with the rule or the motion for postconviction relief shall be denied with prejudice.

**(e) Procedure; Evidentiary Hearing; Disposition.**

(1) *Judicial Assignment.* Upon service of the original postconviction relief motion, the chief judge shall assign the case to a trial judge qualified to conduct capital proceedings under the Rules of Judicial Administration.

(2) *Assignment of Counsel.* If the Capital Collateral Counsel files a motion to withdraw in the trial court, pursuant to (b)(2), a copy shall be provided to the chief judge of the circuit or assigned trial judge, who shall immediately appoint new postconviction counsel

(3) *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 finally denied without a hearing. The attorneys may appear by telephone at such status conferences, with leave of the trial court. Pending motions, except those requiring the presence of the defendant, shall be heard at the status conference unless otherwise ordered by the court.

(4) *Filing and Service.* The motion for postconviction relief, the answer, and any other court paper filed 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.

(5) Duties of Clerk. Upon the filing of a motion for postconviction relief, the clerk shall immediately forward the motion and file to the appropriate judge.

(6) Answer. Within 60 days of the filing of the motion, the state shall file its answer. ***The answer filed under this rule shall not exceed 50 pages exclusive of attachments and exhibits.*** The answer may address the legal sufficiency of the motion. Additionally, the answer shall respond to the allegations of the motion, provide a concise memorandum of applicable case law, and specifically address whether an evidentiary hearing should be accorded on any of the movant's claims. If the state disputes any issue of fact in the motion, the answer shall include a fully detailed allegation of the facts supporting the state's position, including the attachment of sworn affidavits in support thereof, and appropriate portions, if any, of the record of trial proceedings, the name and address of any potential witnesses, a proffer of their testimony and the basis thereof. If the state asserts that no evidentiary hearing is required, the state shall provide the legal and factual bases for such conclusion.

(7) Amendments. No amendment of the motion, including amendments arising from unresolved public records requests, shall be allowed after the state files its answer.

(8) Evidentiary Hearing. ~~Prior to ruling on any rule 3.850 motion filed by a prisoner who has been sentenced to death,~~ Within 30 days following receipt of the state's answer, the trial court shall conduct a hearing to determine whether an evidentiary hearing is required. ~~This rule shall apply only to rule 3.850 motions that have not been ruled on as of January 1, 1997.~~ Within 30 days thereafter, the court shall rule whether an evidentiary hearing is required and, if so, shall schedule an evidentiary hearing to be held within 90 days. If the court determines that the motion is legally insufficient or that the motion, files and records in the case show that the defendant is entitled to no relief, the court shall, within 45 days thereafter, deny the motion, setting forth a detailed rationale therefor, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review.

(9) Disclosure. Within 10 days of the order scheduling an evidentiary hearing, the defendant shall disclose the names and addresses of any potential witnesses not previously disclosed, with their affidavit or a proffer of their testimony. Upon receipt of the defendant's disclosures, the State shall have 10 days within which to provide reciprocal disclosure. The disclosure required of the state shall be the same as required of the defendant. If the defense intends to offer expert testimony of his/her mental status, the state shall be entitled to have the defendant examined by an expert of its choosing. All of the defendant's mental status claims in the motion shall be stricken if the defendant fails to cooperate with the state's expert. Reports provided by any expert witness shall be disclosed to opposing counsel upon receipt.

(10) Transcript and final order. Following the evidentiary hearing, the court shall order the transcription of the proceedings which shall be filed within 30 days. The court shall render its order, determining the issues and making detailed findings of fact and conclusions of law with

respect to each allegation asserted, within 30 days of receipt of the transcript.

***(f) Incompetence to Proceed in Capital Collateral Proceedings.***

***(1) Postconviction Proceedings Barred During Incompetency***

***(A) A death-sentenced prisoner pursuing collateral relief who is found by the court to be mentally incompetent shall not be proceeded against, subject to the limitations in subdivision (2). All collateral relief issues that involve only matters of record and claims that do not require the prisoner's input shall proceed notwithstanding the prisoner's incompetency.***

***(B) Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced prisoner is incompetent to proceed. The motion and certificate shall replace the signed oath by the prisoner that otherwise must accompany a post-conviction motion.***

***(2) Motion for Examination***

***(A) If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the prisoner's input, a judicial determination of incompetency is required.***

***(B) The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue and the reason that competent consultation with the prisoner is necessary with respect to each factual matter specified. To the extent that it does not invade the lawyer-client privilege, the motion shall contain a recital of the specific observations of, and conversations with, the death-sentenced prisoner that have formed the basis of the motion.***

***(C) If the court finds that there are reasonable grounds to believe that a death-sentenced prisoner is incompetent to proceed in a postconviction proceeding in which factual matters are at issue, the development or resolution of which requires the prisoner's input, the court shall order the prisoner examined by no more than 3, nor fewer than 2, experts before setting the matter for a hearing. The court may seek input from the death-sentenced prisoner's counsel and the state attorney before appointment of the experts.***

***(D) The order appointing experts shall: (i) identify the purpose of the evaluation and specify the area of inquiry should be addressed;***

*(ii) specify the legal criteria to be applied; and*

*(iii) specify the date by which the report shall be submitted and to whom it shall be submitted.*

*(E) Counsel for both the death-sentenced prisoner and the state may be present at the examination, which shall be conducted at a date and time convenient for all parties and the Department of Corrections.*

*(3) Scope of Examination and Report*

*(A) On appointment by the court, the experts shall examine the death-sentenced prisoner with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the prisoner, and shall evaluate the prisoner as ordered.*

*(i) The experts first shall consider factors related to the issue of whether the death-sentenced prisoner meets the criteria for competence to proceed, that is, whether the prisoner has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the prisoner has a rational as well as factual understanding of the pending collateral proceedings.*

*(ii) In considering the issue of competence to proceed, the experts shall consider and include in their report:*

*(aa) the prisoner's capacity to understand the adversary nature of the legal process and the collateral proceedings;*

*(bb) the prisoner's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue; and*

*(cc) any other factors considered relevant by the experts and the court as specified in the order appointing the experts.*

*(B) If the experts find that the death-sentenced prisoner is incompetent to proceed, the experts shall report on any recommended treatment for the prisoner to attain competence to proceed. In considering the issues relating to treatment, the experts shall report on:*

*(i) the mental illness or mental retardation causing the incompetence;*

*(ii) the treatment or treatments appropriate for the mental illness or*

*mental retardation of the prisoner and an explanation of each of the possible treatment alternatives in order of choices; and*

*(iii) the likelihood of the prisoner attaining competence under the treatment recommended, an assessment of the probable duration of the treatment required to restore competence, and the probability that the prisoner will attain competence to proceed in the foreseeable future.*

**(4) Proceedings Following Competency Examination.**

*(A) Within 30 days after the experts have completed their examinations of the death-sentenced prisoner, the court shall schedule a hearing on the issue of the prisoner's competence to proceed.*

*(B) If, after a hearing, the court finds the prisoner competent to proceed, or, after having found the prisoner incompetent, finds that competency has been restored, the court shall enter its order so finding and shall proceed with a postconviction motion. The prisoner shall have 60 days to amend his or her postconviction motion only as to those issues that the court found required factual consultation with counsel.*

*(C) If the court does not find the prisoner incompetent, the order shall contain:*

*(i) findings of fact relating to the issues of competency;*

*(ii) copies of the reports of the examining experts; and*

*(iii) copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the death-sentenced prisoner.*

*(D) If the court finds the prisoner incompetent or finds the prisoner competent subject to the continuation of appropriate treatment, the court shall follow the procedures set forth in rule 3.212(c), except that, to the extent practicable, any treatment shall take place at a custodial facility under the direct supervision of the Department of Corrections.*

**~~(f)~~ (g) 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.

**~~(g)~~ (h) Successive Motions.**

A second or successive motion shall be denied if the court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits, or, if new and

different grounds are alleged, the court finds the failure of the defendant or his or her attorney to assert those grounds in a prior motion constituted an abuse of procedure governed by these rules. No successive motion shall be entertained unless the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable fact finder would have found the defendant guilty of the underlying offense or recommended or imposed the death penalty. Additionally, the facts underlying this claim must have been unknown to the defendant or his or her attorney and must not have been ascertainable through the exercise of due diligence at the time of the prior postconviction motion. The time provisions set forth in (c)(1)(A) are inapplicable to successive motions, and a defendant under sentence of death must file any successive motion within 30 days of the availability, through due diligence, of the basis for any claim therefor. The trial court shall expedite disposition of successive collateral motions and may shorten any time provisions set forth in this rule.

**(h) (i) Appeals.**

(1) An appeal may be taken to the Supreme Court of Florida within ~~15 days~~ 30 days from the entry of a final order on the motion for postconviction relief. Interlocutory appeals shall not be permitted. No motion for rehearing shall be permitted. The clerk of the court shall promptly serve upon all parties a copy of the final order, with a certificate of service.

(2) If the trial court has denied the original motion or a successor motion without an evidentiary hearing either on the ground that it is facially insufficient or on the ground that the attached files and records conclusively refute the defendant's claim, the appeal to the Florida Supreme Court will be governed by the summary procedures in rule 9.140(I). On appeal the case shall be initially reviewed for a determination whether the trial court correctly resolved the claims without an evidentiary hearing. If the Supreme Court determines an evidentiary hearing should have been held on one or more claims, the decision to remand for an evidentiary hearing may be made by an order without opinion. Jurisdiction shall be relinquished to the trial court for a specified period for the purpose of conducting an evidentiary hearing on the issue or issues identified in the Supreme Court's order. Thereafter, the record shall be supplemented with the hearing transcript.

(3) ~~A final decision by the Supreme Court of Florida shall be rendered within 180 days from receipt of the record on appeal.~~

**(i) (j) Habeas Corpus.**

Claims of ineffective assistance of appellate counsel shall be asserted by filing a Petition for Writ of Habeas Corpus in the Supreme Court of Florida. *A habeas corpus petition claiming ineffective assistance of counsel shall be filed within 120 days after expiration of the time permitted to file a petition for writ of certiorari in the United States Supreme Court seeking*

*review of the decision of the Supreme Court of Florida affirming a judgement and sentence of death(90 days after the opinion becomes final), or upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed. All other collateral claims formerly cognizable by Writ of Habeas Corpus shall be asserted by filing a motion for postconviction relief pursuant to this rule.*