June 1, 2000

Via Hand Delivery

The Honorable Thomas D. Hall
Clerk of the Court
Florida Supreme Court
500 South Duval Street
Tallahassee, Florida 32399-1926

Re: Comments of Governor Jeb Bush Regarding Proposed Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993

Dear Mr. Hall:

Governor Jeb Bush, by and through the undersigned counsel, files these comments to the Florida Supreme Court's Proposed Amendments to Rules 3.851, 3.852, and 3.993, Florida Rules of Criminal Procedure, as set forth in the Court's opinion titled "Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993," 25 Fla. L. Weekly S285 (Fla. April 14, 2000), as revised on May 17, 2000.

Preliminary Statement

In striking down Florida's Death Penalty Reform Act of 2000 as unconstitutional, this Court has made clear its intent to arrogate to itself exclusive and independent power over the administration of Florida's capital cases through our justice system. The judiciary's power and independence, however, like the powers and independence of the executive and legislative branches, are granted by Florida's citizens, and require concomitant leadership, responsibility and accountability to the people we all must serve. Having declared that it has exclusive jurisdiction over the administration of justice in capital cases, this Court must now accept far greater responsibility for adopting and strictly enforcing rules to fix a system tragically characterized by unnecessary delay and legal gamesmanship. The families of murder victims and defendants who may justly be entitled to relief – and the citizens of Florida – deserve nothing less.

The Proposed Amendments to the existing Rules fall well short of achieving the reasonable public policy goal of resolving Florida's capital cases, on average, within five years of the death sentence. They should therefore be rejected as having no definitive time limits, no accountability and no enforcement mechanism. In place of the Proposed Amendments, the Court is encouraged to promulgate new proposed rules that are more consistent with the Death Penalty Reform Act of 2000 and the reform recommendations proposed by the Supreme Court Committee on Post-Conviction Relief in Capital Cases (hereinafter, the "Morris Commission").

Background

According to the Florida Attorney General's Office, the number of death row cases in the state and federal court system on April 15, 2000, was as follows:

- On direct appeal: 94
- Post-conviction at the trial court: 170
- Post-conviction at the Florida Supreme Court: 57
- Federal habeas corpus: 35

The first execution during Governor Bush's administration was of Allen Lee Davis, who in 1982 murdered John Weiler's pregnant wife, Nancy, and his two daughters in their home during a bloody rampage. Davis killed Nancy Weiler, who was three months pregnant, by beating her to death with a pistol. Davis tied 10-year old Kristina's hands, lay her on the bed, shot her in the chest and in the face at point blank range. Allen Davis then shot 5-year old Katherine in the back as she tried to escape the horror, and then crushed Katherine's skull.

Allen Davis murdered John Weiler's family in minutes, but it took Florida courts over 16 years to render justice in the case. As outrageous as this sounds, Davis' lengthy stay on death row is unfortunately not the exception in Florida.

Fifteen years ago the average delay in capital cases resulting in execution was eight years. Ten years ago, the average delay was 10 years. Today, the victims' families and the people of Florida are forced to wait an average of 14 years to see justice, an increase in delays of more than 80%. Today, over 150 convicted murderers on death row have delayed the imposition of their sentences over 10 years. That is simply wrong. Justice delayed in these cases is justice denied.

A majority of this Court has claimed that many delays in capital cases were caused by repeated challenges in state and federal courts regarding Florida's electric chair, and recommended that the state's method of execution be changed to lethal injection. The Florida Legislature has now adopted an alternative method of execution,

yet there are no signs that this will lead to a significant decrease in the delay in capital cases. In addition, the Florida Legislature has increased the Supreme Court's funding by 82% between fiscal years 1990-91 and 1999-2000, including funding for six additional staff attorneys at the Florida Supreme Court, and has increased overall judicial funding by 71%. Funding for post-conviction legal representation has also dramatically increased from $2 million to over $8 million, an increase of more than 300%, providing the most comprehensive capital post-conviction legal services in the entire nation. All of these actions have also been taken in an attempt to reduce delays in the administration of capital appeals. Remarkably, delays have worsened.

It is thus the considered view of Governor Bush that the most significant cause of delay in death-penalty cases in this state is not funding inadequacy or the method of execution, but the "stacking" of death-penalty appeals and its related consequences. By allowing death-row inmates to file their post-conviction appeals years after their direct appeal, the current system enables inmates to engage in legal gamesmanship, stacking appeals on top of one another and causing unconscionable and unnecessary delays. For example, Allen Davis' death sentence was first upheld by the Florida Supreme Court in 1984, but under the current rules he was allowed to file "post-conviction" appeal after appeal until 1999. This kind of delay is simply unjustified and unwarranted.

The current time span of fourteen years between sentencing and execution in capital cases is simply unacceptable, and has understandably generated calls for reform from the families of crime victims. Even members of this Court have acknowledged the need for meaningful reform. Thus in a recent Florida Supreme Court opinion reviewing the death penalty of an inmate convicted in 1974, Justice Wells strongly expressed his position that the capital appeals process needs to be changed, stating:

> While I agree that the length of time Knight has spent on death row does not create a constitutional impediment to his execution, I do again state my view that such an extended time period to finally adjudicate these cases is totally unacceptable and is this Court's and the State's primary responsibility to correct. . . . The murders in this case were committed in July 1974; Knight was convicted of the murders in April 1975. The courts and the State must be able to do better, and any explanation of why we are unable to do so is insufficient. Knight v. State, 746 So. 2d 423, 439-40 (Fla. 1998).

Despite the cogent comments of Justice Wells, Thomas Knight's case is still pending in the circuit court with his post-conviction pleading due to be filed by November 8, 2000 – twenty-five years and seven months after his murder convictions.

Similarly, in Witt v. State, 387 So. 2d 922, 925 (Fla.), cert. denied, 449 U.S. 1067, (1980), this Court recognized the need for finality in criminal cases, and the limits of post-conviction judicial review:

> It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. *There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just.* Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole. Id. at 925. (emphasis supplied)

Under the Current System There Are Unnecessary and Unwarranted Delays During the Post-Conviction Process

Justice has been lost in the maze of delays that now characterize the Florida capital appeals process. Convicted murderers sentenced to death in Florida and executed have filed an average of 10 appeals in state and federal courts challenging their convictions and sentences. The vast majority of these appeals are "collateral" or "post-conviction" appeals. Some of the litigation involving multiple post-conviction motions by the same inmate has lasted over a decade. See Groover v. State, 703 So. 2d 1035 (Fla. 1997) (first post-conviction motion filed in 1986; *eighth* post-conviction action resolved in 1998); Mills v. State, 684 So. 2d 801 (Fla. 1996) (seven post-conviction actions filed in state court in addition to similar actions in federal court); Lambrix v. State, 698 So. 2d 247 (Fla. 1996) (extensive post-conviction review recited). Clearly, the post-conviction appeal process is causing delay in the proper administration of justice.

As of April 15, 2000, according to the Attorney General's Office, there were 57 cases still pending before this Court on post-conviction matters, at least 42 of which have now been pending for over 200 days. Section 924.055(4), Florida Statutes, mandates time limitations for post-conviction proceedings in capital cases as follows:

1. All petitions must be filed within one year of the conviction becoming final;

2. Within 90 day of the State's response, the circuit court shall render its opinion; and

3. Within 200 days of the notice of appeal, the Supreme Court shall render its opinion.

Again, the Court has too often ignored these time limits, without explanation. Some long pending post-conviction appeals include:

- Roger Cherry was sentenced to death on September 26, 1987 for the brutal double murder of Leonard and Esther Wayne. Briefs were filed, and oral argument was held on January 6, 1999, just one day after this Governor took office. Today, nearly 16 months later, the Court has still issued no opinion in this case.

- George Porter was sentenced to death on March 4, 1988, for the double murder of Evelyn Williams and Walter Burrows. Briefs were filed, and oral argument was held on May 12, 1999. Today, over one year later, this Court has still not issued its opinion.

- Robert Patten was sentenced to death on March 4, 1982, for the murder of a uniformed Miami police officer. Briefs were filed, and oral argument was held on June 10, 1999. Today, nearly one year later, this Court has still not issued its opinion.

Delays also occur in the setting of oral argument in post-conviction cases. The Court has called for oral argument to be scheduled within 6 months of the filing of the briefs. Yet,

- In the case of Dominick Occhicone, convicted for the premeditated double murder of his girlfriend's parents, the State's last brief was filed on June 14, 1999, yet today, one year later, the parties are still waiting for oral argument.

- Similarly, in the case of Duane Owen, convicted for bludgeoning Georgianna Worden to death, the State's last brief was filed on June 4, 1999, yet today, one year later, the State is still waiting for oral argument in this case.

Under the Current System There Are Also Unnecessary and Unwarranted Delays During The Direct Appeal Process

There are also delays in the handling of direct appeals that exacerbate the issue currently before the Court. Section 921.141(4), Florida Statutes, requires this Court to render opinions in the <u>direct</u> appeal of capital cases within two years of the filing of the notice of appeal. The Court's own rule, Rule 2.085(d)(2), Fla. R. Jud. Admin., states that opinions should be rendered within 180 days of oral argument. Yet, the Court frequently ignores these time requirements. In fact, as of April 15, 2000, according to the Attorney General's Office, 94 cases were still pending before this Court on the first direct appeal. At least 20 of these case have now been pending for over two years, in violation of Section 921.141(4), Florida Statutes. Many of these cases are fully briefed and oral arguments have already been held. Thus, these cases are simply sitting in the Court, awaiting resolution, some in violation of Rule 2.085(d)(2), Fla. R. Jud. Admin. For example:

- In the case of Robert Trease, who was sentenced to death on January 22, 1997, for murdering Paul Edenson during a burglary, the direct appeal has been fully briefed with oral argument held on November 2, 1998. Today,

nineteen months after the oral argument, the Court has still not issued an opinion.

- In the case of Michael Keen, who was sentenced to death for the third time on July 15, 1996, for murdering his pregnant wife Anita Keen, the direct appeal has been fully briefed with oral argument held on January 8, 1999. Today, seventeen months after the oral argument, the Court has still not issued an opinion.

- In the case of John Hess, who was sentenced to death on January 29, 1997, for murdering a security guard at a seniors' nursing home, the direct appeal has been fully briefed with oral argument held on March 4, 1999. Today, fifteen months after the oral argument, the Court has still not issued an opinion.

- In the case of Richard Rinaldo, who was sentenced to death on January 24, 1997, for murdering Jimmy Lee Swanson, the direct appeal has been fully briefed with oral argument held on April 5, 1999. Today, fourteen months after the oral argument, the Court has still not issued an opinion.

The failure to set oral arguments in a timely fashion is an additional source of unwarranted delay in the direct appeal of capital cases. Supreme Court Spokesman Craig Waters was quoted by the Ft. Lauderdale Sun-Sentinel on December 23, 1999, as stating that: "Usually [the] court waits until briefs are in, and then holds a hearing four to six months after that." Mr. Waters made similar statements to the St. Petersburg Times on December 9, 1999. Yet, the Court has not followed this self-imposed standard in managing its capital cases. For example:

- In the case of Albert Holland, who was convicted for the shooting death of a uniformed police officer, the State's final brief was filed on March 10, 1999. Fifteen months have elapsed since that time, and no oral argument has yet been held.

- In the case of Lynford Blackwood, who was convicted for the telephone cord strangulation of Carolyn Tynes, the State's final brief was filed on March 22, 1999. Fourteen months have elapsed since that time, and no oral argument has yet been held.

- In the case of Joaquin Martinez, who was convicted for a premeditated double murder, the State's final brief was filed on May 14, 1999. Over a year has elapsed since that time, and no oral argument has yet been held.

These cases, and the reasons for the delay, also warrant far more public scrutiny. Florida citizens, and Florida's victims in particular, are entitled to know why the Court

cannot comply with its own time limits or those set by the Legislature. More importantly, citizens and victims are entitled to prompt action to remedy the current situation.

The Death Penalty Reform Act of 2000 Was Designed to Reduce Unnecessary and Unwarranted Delays

The Death Penalty Reform Act of 2000 was designed to address concerns about unwarranted and unnecessary delay in the justice system. It provided that the direct appeal and the post-conviction appeals work concurrently, and prohibited the current years of delay between each appeal. The Act was designed to meet the reasonable goal of the Florida Legislature and the Governor to have capital cases resolved, on average, within 5 years. The reforms contained in the Act would have significantly reduced the delays that cause so much trauma to victims and cost Florida's taxpayers millions of dollars. The Act was thoughtfully drafted to ensure that legitimate claims of innocence and other legal grounds would be resolved in a timely manner. The reforms contemplated by the Act, which were overwhelmingly approved by the Florida Legislature during the January 2000 Special Session, would have ensured constitutionally sound procedures that include appropriate enforcement mechanisms to ensure timely resolution of capital post-conviction actions and real accountability. The Proposed Amendments contain none of these reforms, and for the specific reasons that follow should be rejected.

Specific Comments on the Proposed Amendments

The Proposed Amendments should be rejected, and new rules promulgated that are consistent with Florida's Death Penalty Reform Act of 2000 and recommendations of the Morris Commission. The Death Penalty Reform Act of 2000 was based upon the reasonable public policy goal of resolving capital cases within five years of the death sentence, and made significant strides in attempting to reduce unnecessary delay. The Morris Commission report also proposed reforms to reduce some of the delay in these cases. Inexplicably, this Court has essentially rejected both the recommendations made by the Legislature and the Morris Commission. For the specific reasons given below, however, the Court's Proposed Amendments create loopholes and processes that will lead inevitably to even more delay in a system that is already unacceptably prolonged.

The Death Penalty Reform Act of 2000 and the recommendations to this Court of the Morris Commission all consistently include procedural safeguards that are instrumental in eliminating unnecessary delay in capital post-conviction litigation. Those procedural safeguards include a rule mandating that all initial post-conviction motions be fully pled, a rule mandating that all post-conviction motions be filed within a specific time frame or procedurally denied, and a rule imposing reasonable limitations on successive motions. The Proposed Amendments do not contain any of these essential safeguards against delay and legal gamesmanship.

The Proposed Amendments should also be rejected because they: inappropriately expand the time in which to file post-conviction appeals; fail to ensure that post-conviction appeals will be timely resolved; mandate evidentiary hearings and other procedures that will transform capital post-conviction actions into a "second, full-blown trial;" and fail to establish judicial accountability.

The Proposed Amendments Fail To Ensure That Initial Post-Conviction Actions Are Timely Filed

In contrast with the Death Penalty Appeals Reform Act of 2000 and the Morris Commission Recommendations, Proposed Rule 3.851 fails to adequately require the timely prosecution of capital post-conviction actions and actually creates a new ground for allowing delay in post-conviction actions. The Act specifically provided that "the failure of the defendant or the defendant's post-conviction counsel to timely prosecute a case shall *not constitute cause for the court to grant any request for an extension of time or other delay* . . .. The time for commencement, or the post-conviction action, may not be tolled for any reason or cause." Chapter 2000-3, Section Six, Laws of Florida. In addition, the Act provided that: "Any claim not pursued within the . . . time limits is barred. No claim filed after the time required by law shall be grounds for a judicial stay of any warrant." Id. at Section Four.

The Proposed Amendment allows a convicted murderer to file an untimely post-conviction action any time "the defendant retained counsel to timely file a 3.851 motion, and counsel, through neglect, failed to file the motion." This new language, not stated in current Rule 3.850 and 3.851, will likely result in further delay, as it will not stop defendant's counsel from simply stating that the counsel's own "neglect" prevented a timely filing. Given that the Proposed Amendments allow convicted murderers up to one year after the mandate's issuance in which to file an initial post-conviction action, this additional ground for delay is unjustified and will exacerbate the current delays in the system. The proposed Amendments also provide no sanctions for neglect on the part of post-conviction counsel, nor do they require the circuit court to report such misfeasance to the Florida Bar for disciplinary proceedings. Defendant's counsel could simply miss the rule's deadlines without fear of affecting the defendant's ability to further delay proceedings.

Judge Stanley Morris, Chair of the Morris Commission, stated his views that accountability and enforcement are essential in this Court's procedures in capital post-conviction actions. In his transmittal letter to Chief Justice Harding, Judge Morris stated that under the Morris Commission proposal, if a post-conviction action is not timely filed, or timely filed in a proper manner, "the motion is denied with prejudice." See Letter of Sept. 30, 1999 at Page Four. In fact, the Morris Commission's proposed rule states that: "The pendency of public records requests . . . other litigation, or the failure of collateral counsel to timely prosecute a case shall not constitute cause for extending or tolling the time for filing any post-conviction pleading." See Morris Commission Proposed Rule 3.851(c).

This Court's Proposed Amendment does not provide sufficient prohibitions to ensure that dilatory, untimely post-conviction actions will not be entertained. The Court's proposal does attempt to limit a circuit court's discretion to grant an extension of time, by specifically excluding the lack of a defendant's cooperation or counsel's lack of diligence. But this provision lacks the specificity of the Morris Commission's recommendation listing those other grounds which shall not constitute sufficient cause to allow delay. Furthermore, the Court's Proposed Amendments seem to contradict themselves regarding whether or not counsel's "neglect" compared to counsel's "lack of due diligence" may constitute grounds for delay.

Recommendation: The Court should reject the Proposed Amendments, and adopt a new rule with a firm prohibition on untimely-filed post-conviction motions, as set forth in the Act and the Morris Commission Report.

The Proposed Amendments Fail to Limit Improper Pleading Amendments that Cause Unnecessary Delay in Capital Post-Conviction Actions

The Court's Proposed Amendments, by allowing pleading amendments after the deadline for filing the post-conviction motion, fail to address a major current abuse of capital post-conviction procedures. This abuse occurs when a convicted murderer files a "shell" pleading, without any intent to be bound by that pleading. Rather, the post-conviction claimant's counsel continually reserves the right to amend his or her pleading, knowing that this strategy will ensure the pleading is not final for years, ensuring that the case cannot be resolved for years. Thus, average delays continue to increase because state capital post-conviction actions are never final. In fact, the greatest cause of delay often appears to occur in the state circuit courts where these abuses occur.

This Court's Proposed Rule 3.851(f)(4) Amendments state: "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 . . .. Granting a motion [to amend] . . . 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 . . . ." (emphasis supplied.)

Both the Florida Legislature and the Morris Commission recognized the abuses in the capital post-conviction process caused by amendments. Both the Legislature and the Morris Commission provided an effective prohibition of dilatory amendments, recognizing that allowing amendments in capital post-conviction cases had caused great delays. Judge Morris stated in his transmittal letter to Chief Justice Harding that: "The provisions for amendments to the motion are strict; they are not allowed after an answer is filed. The Committee is of the opinion that a thoroughly researched and prepared motion and answer eliminates the need to amend. Part of the problem creating the need for the committee is the current practice of pleading unsubstantiated claims, commonly called 'shell pleadings', which are later abandoned or bolstered . . .. [This practice] is confusing, burdensome, wasteful of precious resources and ultimately impedes, rather than facilitates, a thorough review and thoughtful order resolving the issues . . ."

The Death Penalty Appeals Reform Act of 2000 provided an even more effective limitation of untimely amendments by stating that the "time for commencement, of the post-conviction action, may not be tolled for any reason or cause. *All claims raised by amendment* of a defendant's post-conviction action *are barred* if the claims are raised outside the time limitations provided by statute for the filing of capital post-conviction actions." <u>See</u> Chapter 2000-3, Section Six, Laws of Florida. Clearly, this policy approved by the Legislature is far more likely to prevent abuse and reduce unnecessary delay caused by amendments than is this Court's proposed rule provisions regarding amendments.

Under sections (e)(5) and (f)(5)(b) of this Court's proposed Rule, the defendants determine which matters require an evidentiary hearing. If the defendant's lawyer delays filing claims until the maximum period allowed under this Rule, it will be 500 days after the issuance of the mandate that new issues are raised.[1] In response to an amendment, the state is given twenty days to reply. Under this rule, it would be advantageous for defendants to hold back their most meritorious claims in the hopes of either causing the state to seek a continuance, or reducing the state's authorized response time by more than half, or both.

This Court's proposed rule ineffectively attempts to limit amendments and will likely not prevent the abuses recognized by the Morris Commission and the Legislature. It is highly likely that post-conviction claimants will continue to file dilatory amendments under this Court's proposed rule. In addition, such claimants will predictably demand a continuance of the mandatory evidentiary hearing, claiming a "manifest injustice." The claimants will litigate the limits of the meaning of "manifest injustice," forcing this Court to repeatedly decide whether or not the trial court should have granted a continuance. Unfortunately, prior practice and history demonstrate that the claimants are likely to succeed with this strategy, as this Court has been reluctant to impose effective limitations and timely resolution of post-conviction proceedings, resulting in the crisis of delay now occurring in capital cases.

Recommendation: The Court should reject the Proposed Amendments and promulgate a new proposed rule consistent with the Act that prohibits the consideration of any post-conviction amendment that is filed after the time limit allowed for the original filing of the action.

The Proposed Amendments Fail to Properly Ensure that Procedurally Defaulted Claims Are Denied Consideration

In the "Scope and Purpose" section of the Proposed Amendments, the Court provides: "The purpose of this rule is to provide the means by which a defendant under

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[1] Calculated from 365 days from the mandate, plus 45 days for the state's reply, plus 30 days for a case management conference, plus 90 days for a scheduled evidentiary hearing, minus 30 days.

sentence of death can raise claims of error which were **unavailable** at the time of trial or direct appeal." The question arises as to what makes a claim "unavailable." The Proposed Amendments can be contrasted with the language of the Morris Committee proposal, which clearly restricted the scope of permitted claims by stating "This rule does not authorize relief based on grounds that **could have or should have** been raised at trial and . . . on direct appeal . . .." See Morris Commission, Proposed Rule 3.851, Section (a), Page One]. Either through oversight or defect, the Proposed Amendments even neglect to ensure that the current limitations of cognizable issues of Fla. R. Crim. P. 3.850 , remain in effect. It is inappropriate to create a new class of claims described as "unavailable" when such claims will be defined in potentially expanded terms that depend entirely on how the Court subsequently defines "unavailable."

In addition, the Proposed Amendments state with respect to section 3.851 (e), "Contents of Motions," that: "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 post-conviction relief." (emphasis supplied) This section apparently authorizes re-litigation of issues raised on direct appeal and new direct appeal matters which should be procedurally barred in a post-conviction proceeding, as it implies that with sufficient justification, the courts should consider defaulted claims. Significantly, the Proposed Amendments do not prohibit the raising of such direct appeal issues in this manner. Further, the Proposed Amendments do not direct trial courts to deny such motions. Instead, the Proposed Amendment leaves the issue of litigation and court consideration of appeal issues in a post-conviction forum to be an open question.

In contrast with this Court's Proposed Amendments, the Legislature clearly defined the rules of procedural default in the Death Penalty Appeals Reform Act of 2000, which states: "No claim may be considered in such [post-conviction] action which could have or should have been raised before trial, at trial, or if preserved [,] [sic] on direct appeal." Chapter 2000-3, Section Six, Laws of Florida. The Act clearly imposed a requirement that state courts must enforce the doctrine of procedural default. The Court's Proposed Amendments fail to do so, and should be rejected.

Recommendation: The Proposed Amendments should be rejected, and a new rule should be promulgated consistent with the Death Penalty Reform Act, stating that no claims that could have or should have been raised before trial, at trial, or if preserved, on direct appeal, may be raised in a post-conviction action. The new rule should specifically require trial courts to deny any defaulted claims as a matter of law.

The Court's Proposed Amendments Fail To Properly Limit Repetitive and Successive Post-Conviction Actions

Since 1994, convicted murderers executed in Florida have filed an average of ten appeals in state and federal court, including direct appeal in state court and all post-conviction actions in state and federal courts. Many of these appeals were, in fact,

successive or repetitive post-conviction actions challenging the same judgment and sentence in state courts.

The Court's Proposed Amendments provide a definition of a "successive" post-conviction action as one where a court "has previously ruled on a post-conviction motion challenging the same judgment and sentence." See Proposed Rule 3.851, section (g), Successive Motions. This provision authorizes much broader avenues for defendants to file successive post-conviction actions than what was contained in the Morris Commission proposal, the Death Penalty Reform Act of 2000 and federal law. The Proposed Amendments authorize successive motions anytime they satisfy "initial" motion requirements. In addition, successive claims based on newly discovered evidence can be brought by complying with a few additional requirements. With respect to successive motions, aside from some technical requirements, as long as the movant can state a reason why a witness or a document was not previously available, these motions are authorized. Notably absent from this Proposed Amendment is a provision currently found in Rule 3.850(f) with respect to successive claims which authorizes a judge to dismiss a second or successive motion if the judge 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 judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedures governed by these rules." Most significantly, the trial courts *are not expressly authorized to dismiss successive post-conviction motions that a judge determines to constitute an abuse of process.*

The Proposed Amendments fail to effectively limit the filing and consideration of successive motions, which greatly contribute to delay. By contrast, the Morris Commission and the Death Penalty Appeals Reform Act of 2000 prohibited the consideration of such claims unless based on actual innocence and constitutional error. The Act provided that convicted murderers sentenced to death "shall not file more than one capital post-conviction action in the sentencing court, one appeal therefrom in the Florida Supreme Court, and one original capital post-conviction action alleging the ineffectiveness of direct appeal counsel in the Florida Supreme Court, except as [otherwise provided.]" Chapter 2000-3, Section Eight, Laws of Florida.

The only exception provided in the Act for consideration of a successive capital post-conviction action was to permit claims raised within 90 days of discovering new evidence demonstrating that "but for constitutional error, no reasonable fact finder would have found the defendant guilty [.]" Id. at Section Six. In addition, the Act provided further safeguard against delay by prohibiting the use of the 90-day period for filing such a claim as a basis for a judicial stay of a death warrant. Id.

The Morris Commission Report, like the Act, provided a standard of review of successive motions that Judge Morris described as "strict and necessary. It provides for both closure and fairness." See Letter of September 30, 1999 at Page Five. The Morris Commission recommended a provision that required the denial of a successive motion "if the court finds that it fails to allege new or different grounds, or if new and different

grounds are alleged, the court finds the failure of the defendant or his attorney . . . constituted an abuse of the process [.]" Morris Commission Proposed Rule, Section (g) "Successive Motions." The Morris Commission proposal further states that: "*No successive motion shall be entertained* unless the facts . . . would be sufficient to establish *by clear and convincing evidence* that no reasonable fact finder would have found the defendant guilty [."] Id. The Morris proposal also requires that the successive motion be based on newly-discovered evidence "not . . .[previously] ascertainable through the exercise of due diligence" within "30 days of the availability, through due diligence, of the basis for any claim therefore." Id. As noted, both the Morris Commission and the Act provided firm prohibitions of successive motions with a very narrow exception based on newly discovered, convincing evidence of the defendant's actual innocence.

In addition to the fundamental flaws in the Court's proposed provisions on successive petitions, the Proposed Amendments give the state only ten days to respond to successive motions. This time limit also works to the advantage of a defendant who retains more meritorious claims for successive motions by substantially reducing the time in which the state may respond to the successive motion. Again, the Proposed Amendments will not reduce delays caused by successive motions, but will likely increase delays.

Recommendation: This Court should adopt the reasonable limitations of successive motions in capital cases provided in the Death Penalty Appeals Reform Act of 2000, allowing meritorious claims of actual innocence based on newly discovered evidence and constitutional error. Time limits should be imposed on the filing of such newly discovered claims of innocence that require such filings to occur no later than 30-90 days after the evidence could have or should have been discovered through due diligence.

The Proposed Amendments Fail To Provide Dual-Track Resolution of Direct and Post-Conviction Appeals

This Court's Proposed Amendments require convicted murderers to file their post-conviction motion within twelve months after this Court's mandate is issued on direct appeal. This does not meaningfully alter the existing rules, and effectively means that there will be no initial post-conviction motion filed in the trial court until approximately three years after the defendant is sentenced to death. The Proposed Amendments also mandate evidentiary hearings in every case. By allowing three years to pass between the sentencing and the filing of the initial post-conviction motion, this Court is effectively precluding a resolution of the case within five years.

Recommendation: This Court should reject the Proposed Amendments and adopt the dual-track time limitations contained in the Death Penalty Appeals Reform Act of 2000.

Sincerely,

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