IN THE SUPREME COURT OF FLORIDA

NO. SC96646

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

COMMENTS OF THE TWENTY STATE ATTORNEYS ACTING TOGETHER THROUGH THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

COMES NOW, THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION [FPAA], representing the elected State Attorneys for the twenty judicial circuits of Florida, and files these comments[1] to the Florida Supreme Court's Amendments to Fla.R.Crim.P. 3.851, 3.852 and 3.993 as set forth in its opinion Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993, 25 Fla.L.Weekly S285 (Fla. April 14, 2000) [Amendments], stating as follows:

PRELIMINARY STATEMENT

There is a long held adage in the law that a final judgment is presumed to be correct and that it is the burden of the party which is challenging that judgment to prove that the judgment is defective. Paul v. State, 177 So.2d 537 (Fla. 3d DCA 1965). Even in capital cases, this Court recognized in Witt v. State, 387 So.2d 922, 925 (Fla. 1980), that there was a need for finality of judgments because the absence of such "casts a cloud of tentativeness over the criminal justice system benefitting neither the person convicted nor society as a whole." The State Attorneys respectfully submit that it is time for this Court to again recognize the importance of finality and to temper its procedural rules so that the finality of judgments is once again respected.

COMMENTS

RULE 3.851

1. **3.851(b)(3)&(4) - Appointment of Postconviction Counsel** (withdrawal collateral counsel).

The proposed Rule allows the Capital Collateral Regional Counsel [CCRC] to withdraw based on a conflict of interest or some other legal ground but does not require that the Chief Circuit Judge or the assigned Circuit Judge make any determination as to the appropriateness of the motion to withdraw. The State Attorneys submit that this Rule should be amended to include a provision similar to that contained in Sec. 27.53(3), Fla. Stat. (1999), which states that when a public defender files a motion to withdraw, then "[t]he court shall review and inquire or conduct a hearing into the adequacy of the public

[1] Included within this Comment will be a comment on the proposed new Rule of Judicial Administration, relating to real time court reporting.

defender's representations...without requiring the disclosure of confidential communications." The State Attorneys also submit that the Rule should be clarified so that pursuant to Sec. 27.703(1), Fla.Stat. (1999),[2] the Chief Circuit Judge or the assigned Circuit Judge should designate another CCRC office and, only if conflict exists with the other two CCRC offices, should appoint an attorney from the registry. Finally, the State Attorneys suggest that the time period for filing a motion to withdraw should be shortened to fifteen (15) days from the time that collateral counsel has learned of the grounds for withdrawal.

2. **Rule 3.851(c)(4) - Preliminary Procedures** (Duties of Defense Counsel and Prosecuting Attorney)

The proposed Rule would require, within fifteen (15) days of appointment of postconviction counsel, that defendant's trial counsel provide postconviction counsel with all information pertaining to the defendant's case. The State Attorneys submit that, although they endorse the idea of turning over trial counsel's files to postconviction counsel so that the latter can begin working on a postconviction motion, due to past problems the various State Attorney Offices have had with collateral counsel losing or misplacing items from trial counsel's files, the Rule should be amended to require that copies of the files be sent under seal to the appropriate Clerk of the Court or to the Records Repository. Collateral counsel would thereby have immediate access to those files. Only upon the conviction and sentence becoming final and a postconviction motion being filed which alleges that counsel was ineffective in their representation of the defendant, would those files then be available to the State. See Trepal v. State, 25 Fla.L.Weekly S190 (Fla. Mar. 9, 2000). Collateral counsel can designate if there is any material which is still privileged and the trial court can make an in camera determination of the validity of that privilege. Reed v. State, 640 So.2d 1094 (Fla. 1994).

The Rule also would require the State Attorney's Office , within fifteen (15) days after the appointment of postconviction counsel, to provide to postconviction counsel copies of all pretrial and trial discovery and all contents of the State's files except for information which the prosecutor has a legal right to withhold. The effect of the Rule would be to require the State Attorney Offices to provide **two copies** of its files - one within fifteen (15) days [or perhaps thirty (30)[3] if it takes the trial court the full 15 days to appoint collateral counsel] and another in sixty (60) days after the imposition of the death penalty. The second set of records would have to be sent to the Records Repository as required pursuant to Fla.R.Crim.P. 3.852. This is a not a wise use of public money. To avoid that waste of money and to try to get the material to collateral counsel as soon as possible, the State Attorneys suggest the

[2] This Court invalidated the amendment to Sec. 27.703 which was contained in Sec. 13 of the Death Penalty Reform Act of 2000. Allen v. Butterworth, 25 Fla.L.Weekly S277(Fla. April 14, 2000).

[3] The fifteen (15) day time period is an almost impossible deadline for the State Attorney Offices to meet. Files in these cases are voluminous and very time consuming to copy.

following. First, under Fla.R.Crim.P. 3.852, State Attorney Offices will copy and index their nonexempt and unfiled public records and send them to the Records Repository within sixty (60) days after sentencing of the defendant.[4] However, material that is a nonpublic record at that time because the appeal is not final, such as a defendant's confession or interoffice memorandum, would be separated and sent to the Clerk of the Court under seal. Upon the conviction and sentence becoming final, those records would become public and would be made available to collateral counsel. A third category of records, to wit: those which remain exempt under Chapter 119 or which are by definition not public records, would also be sent to the Clerk's Office to be reviewed upon request in camera by the trial court. It must be stressed that the amount of material that would not be provided to collateral counsel until after the appeal is final is minimal. Under the proposed Rules, the defendant would have one hundred and eighty days (180) to file his or her final post conviction motion. That is more than sufficient time for collateral counsel to review this limited material and include whatever claims may result from that material within those six months. The State Attorneys submit that such a procedure will allow this Court to continue with its stated purpose "to strike a balance between the State's and the public's legitimate interest in the prompt and efficient processing of capital cases and this Court's duty to ensure that such cases are processed in a fair, just, and humane manner that conforms to constitutional requirements." Amendments, supra 25 Fla.L.Weekly at S287.

3. **Rule 3.851(d)(1)(C) - Time Limitations** (Extensions)

This is the proposal which the State Attorneys believe has the practical effect of nullifying any hope of this Court and the people of the State of Florida that the postconviction process will be started in a timely manner. The proposed Rule would allow extensions of time to file an initial postconviction motion on the grounds that counsel's inability to timely file the motion is not the result of lack of cooperation by the defendant or of due diligence on the part of counsel. The State Attorneys ask that this Court take judicial notice of any of the initial post conviction motions filed by any of the collateral counsels. There is usually a claim that they need more time to file the motion because they have not been adequately funded or some other reason relating to the operation of the various offices, such as loss of attorneys or investigators. If this Court adopts this provision, it is going to have to make a determination every year that the collateral counsels have been adequately funded [See, e.g., Arbelaez v. Butterworth, 738 So.2d 326 (Fla. 1999)] or else the system is back where it has always been with seemingly endless delays without any direction from the Court.

4. **Rule 3.851(e)(5) & (6) - Contents of the Motion**

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[4] It should be noted that the Court's proposed Rule, unlike the present Fla.R.Crim.P. 3.852, does not except material which is in the court file. The State Attorneys submit that the proposed Rule include this exception.

This provision has practical problems associated with it, especially when it is read in conjunction withthe proposed Rule 3.851(f)(5)(b). First, the proposed Rule does not define what "a detailed allegation of the factual basis" is for any claim for which the defendant wants an evidentiary hearing. The State Attorneys submit that this Court must further require the defendant to list with specificity the names of the witnesses and, in addition, provide a proffer of what each witness would testify to in support of the claim. In the proposed Rule 3.851(g) regarding successive motions, there is a requirement that the defendant's motion contain the names, addresses and telephone numbers of all witnesses supporting the claim along with any affidavits of the witnesses. There is no valid reason, given the legal presumption that counsel was competent and that the proceedings were regular, not to require in the first postconviction motion that the defendant at least list the names of the witnesses and provide a detailed proffer of their testimony with a statement that the witness was either available to testify (for claims of ineffective assistance of counsel) or unavailable to testify (for claims of newly discovered evidence) but is presently available to testify at an evidentiary hearing. The State Attorneys are aware of cases in which evidentiary hearings have been ordered by the courts based on blanket factual assertions contained in a motion but, as those cases developed through an evidentiary hearing, the witnesses were not willing or able to testify as previously asserted. This has resulted in a waste of judicial resources. Without that information, it has been difficult for the State to intelligently respond to the allegations in these motions. Such a requirement would also help to insure that the State is able to be prepared for any evidentiary hearing ordered to be held on the claim within the ninety (90) day time period as set forth in the proposed Rule 3.852(f)(5)(b).

5. 3.851(f) - Procedure; Evidentiary Hearing; Disposition

The State Attorneys submit that, although they recognize this Court is frustrated by what it perceives to be time wasted when it must reverse summary denials of initial postconviction motions, the answer to that frustration should not be as provided in the proposed Rule 3.851(f)(5)(B) which is to give the defendant carte blanche to determine which issues there must be an evidentiaryhearing on, no matter how frivolous. It must be stressed that there has rarely been a case in which this Court has reversed a summary denial of a capital post conviction case and sent it back to the trial court for an evidentiary hearing on every claim raised by the defendant. In fact, this Court, on the day before it issued these proposed Rules, upheld the summary denial of an initial capital postconviction motion. See Thompson v. State, 25 Fla.L.Weekly S346b (Fla. April 13, 2000). It is the position of the State Attorneys that the concept of allowing evidentiary hearings on all non-legal issues unnecessarily departs from the original concept of the purpose of the postconviction motion. These motions, even in capital cases, were originally "an avenue to challenge a once final judgment andsentence in limited instances for limited reasons." Witt v. State, supra, 387 So.2d at 925 (Fla. 1980). Allowing unbridled evidentiary hearings would allow challenges to presumptively valid judgments in unlimited instances for unlimited reasons.

The State Attorneys submit that this Court must continue the provisions of Fla.R.Crim.P. 3.850(c) & (d) which allow the trial court to summarily deny a claim if it is procedurally barred, insufficiently pled, or where the files and records of the case conclusively demonstrate that the defendant is not entitled to relief. If this Court adopts the Rule as now proposed, then it will be in effect receding from a long line of cases which recognize procedural bars. The State Attorneys again ask that this Court take judicial notice of any of the initial postconviction motions filed by the collateral counsels, and the Court will see that almost every claim which is procedurally barred is raised in the motion alternatively, i.e., that counsel was ineffective for failing to object to the alleged error. Thus, defendants will continue that practice and request and obtain evidentiary hearings not only on the general claim of ineffective assistance of counsel for failing to present various types of evidence, be it in the guilt or penalty phase, but for counsel's failure to object to various occurrences in court. It would allow the defendant to avoid most procedural bars. See, e.g., Cherry v. State, 659 So.2d 1069 (Fla. 1995); Kight v. State, 574 So.2d 1066 (Fla. 1990).

Furthermore, to allow the defendants to be the final arbitrators of which claims there should be an evidentiary hearing on would, in effect, render the provision in 3.851(f)(3) which requires the State to file an answer to the motion and to "address the legal insufficiency of any claim in the motion, respond to the allegations in the motion and address any procedural bars" a nullity. There would be no purpose for the State addressing the legal insufficiency of the claims or the procedural bars if the defendant has the final say on what claims he or she receives an evidentiary hearing.

On an additional note, the State Attorneys submit that forty five (45) day time period for the filing of the State's response, as well as the fifty (50) page limit on the response, is not reasonable. Under the proposed Rule 3.851, the defendant is given six months after the direct appeal is final to file his or her motion. That time period does not include the average of two or three years that collateral counsel has had after appointment to begin reviewing the defendant's case while the case was on direct appeal. Many times a new prosecutor, who was not involved in the initial trial, is assigned to the case after the postconviction process has begun. Forty-five (45) days is insufficient time to allow the State to adequately investigate and respond to the allegations set forth in the motion. The State Attorneys therefore request this Court to amend the proposed Rule 3.851(f)(3) to allow the State sixty (60) days in which to file its answer. As to the page limitation, the defendant is given a total of seventy-five (75) pages for his motion and memorandum of law under 3.851(e). As this Court is well aware, the State very often cannot accept a statement of facts as set forth by the defendant and must rewrite the facts in an unbiased manner including all the evidence against or for a defendant. Thus, the State Attorneys submit that the proposed Rule should be amended so that the total page limits are the same for both the defendant and the State.

The State Attorneys submit that it would be a waste of judicial resources to allow hearings for claims that were clearly legally insufficient or conclusively refuted by the record. For example, on direct appeal the defendant might have raised a claim which was procedurally barred by counsel's failure

to object. This Court in its opinion would hold, as it often does, that the claim is procedurally barred, but even if not, it is without merit or non prejudicial. Under the proposed Rule, defendants would be able to obtain an evidentiary hearing on the claim of ineffective assistance of counsel despite the fact that the claim would be legally insufficient under the standards of Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984), because the defendant's allegation of prejudice would be insufficient in light of this Court's prior ruling. Compare State v. Salmon, 636 So.2d 16 (Fla. 1994). This Court must retain the mechanism for the trial court to weed out the clearly frivolous claims from those which at least have some well pled legitimacy.

The State Attorneys submit that this proposed Rule would protract litigation. It seems that today, in many counties, it takes a capital case over a hundred thousand dollars and approximately two, three or four years to get to trial from the date of arraignment. To allow the defendant to then relitigate everything, regardless of how frivolous the claim, would also prove unnecessarily costly. One could only guess how long it will take the CCRC Offices to again run out of money as well as have the Comptroller run out of funds to pay for the appointed capital collateral attorneys and their costs.

The State Attorneys do believe that once an evidentiary hearing is deemed to be required, the case management conference proposed by Rule 3.851(f)(5) would be an important tool to insure that capital postconviction motions are handled in a more diligent manner. Since proposed Rule 3.851(f)(5)(C) requires that there be argument at the case management conference, then it should make clear that this conference is in lieu of a "Huff hearing."[5] In addition, the State Attorneys suggest that after the initial case management conference, there should be periodic status conferences which are necessary to keep these postconviction cases on track.

The State Attorneys agree that both parties should be required to exchange witness lists and relied upon documents. However, because the defendant is the moving party, he or she should be required to provide his or her list first.[6] The State often does not know who it will be calling in rebuttal of the defendant's claims until it knows who the defense is calling. This is especially so when the defense lists a mental health expert. The State Attorneys also submit that the proposed Rules 3.851(f)(5) & 3.851(f)(7) which require the parties to provide copies of all experts' reports, must be clarified to require that the party have the expert provide a report and a curriculum vitae. If the expert is one that was not previously used in the case, or if the expert was one

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[5] As stated supra, the State Attorneys maintain that they must have the right to argue the insufficiency of the allegations and the procedural bars. However, if this Court adopts the proposed Rule giving collateral counsel the right to make the determination of evidentiary hearing issues, then the State Attorneys submit that Huff hearings should still be held for cases in which a final motion for postconviction relief has been filed at the time these Rules go into effect. See page 15 infra.

[6] If this Court agrees with the suggestion of the State Attorneys that the initial motion for postconviction relief contain the names and proffers of witnesses, then this provision would apply to the defendant if there are additional witnesses that he or she plans to call at an evidentiary hearing and were not already provided to the State in the motion.

who was previously used and is adding to or changing his or her prior testimony, then a new report should be required. In addition to the report, the parties must turn over what information was considered by the expert including the tests that were conducted and their results. It has been the experience of the State Attorneys that very often collateral counsel will specifically request that the experts not make a report in an effort to "surprise" the State at the hearing. Without those basic requirements, the parties, in particular the State, will be forced to take costly depositions of the expert witnesses in order to determine what they will testify to and the basis for their testimony. See State v. Lewis, 656 So.2d 1248 (Fla. 1994).[7] This is especially true with mental health experts because, under the proposed Rule 3.851(f)(7), the State would only have ninety (90) days to obtain their own experts and have the defendant examined.

As to the issue of amendments to the motion or answer under proposed Rule 3.851(f)(4), the State Attorneys submit that any amendment should be initially within the time period provided for in 3.851(d)(1)(A). However, if the amendment is not filed within that time period, it is the position of the State Attorneys that the term "good cause" for the amendment should be defined in a manner consistent with the requirements for filing a successive motion, to wit: the information that the amendment is based upon was not, and could not have been, timely discovered through due diligence or the fundamental constitutional right asserted was not established within the time period.

6. Rule 3.851(g) - Successive Motions

The State Attorneys believe that successive motions should be treated vastly differently than initial motions. They should be held to a higher standard and the proposed Rule should state that the time for filing the motions be shortened to 60 days[8] after the discovery of the alleged newly discovered evidence or the announcement of the new law. In addition, there should be a provision, as there is in Fla.R.Crim.P. 3.850(f), which allows the trial court, after receiving the State's response, to summarily dismiss a successive motion 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 that the failure of the defendant to assert those grounds in a prior motion constituted an abuse of the proceedings governed by these Rules.

RULE 3.852

7. Rule 3.852(d)(1) - Action Upon Issuance of Imposition of Death Sentence

The proposed Rule 3.852(d)(1) requires that the State Attorney who prosecuted the case send written notice of the imposition of the death penalty

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[7] The requirement of reports and curriculum vitae would equate these witnesses to Category B witnesses under Fla.R.Crim.P. 3.220(b)(1)(A)(i) & (ii).

[8] Under Mills v. State, 684 So.2d 806 (Fla. 1996), capital defendants have one year from the discovery of the new evidence or the change in law to file a successive motion. See also Fla.R.Crim.P. 3.850(b).

to each law enforcement agency involved in the investigation of the capital case. The State Attorneys submit that this Court should amend this provision to make clear that the provision does not apply to law enforcement agencies who are not State of Florida agencies subject to

Chapter 119, to-wit: out-of-state law enforcement agencies or federal agencies. The State Attorneys recognize that Rule 3.852(b)(5) defines "agency" as an entity defined in Section 119.011(2) which is subject to the requirement of producing public records under Chapter 119. However, this issue has arisen in postconviction cases and the State Attorneys believe that this clarification is needed. In addition the term "state attorney who prosecuted the case" should be amended to read the "state attorney or his or her designee" because the State Attorney or the Assistant State Attorney who prosecuted the case may no longer be in that office at the time these notices are required to be sent. This change is also needed in 3.852(d)(2).

Another change to proposed Rule 3.852 is an addition to 3.852(d)(2)(A) and 3.852(e)(2) that would not require the State Attorney or the law enforcement agencies to copy and send to the Records Repository public records which have been filed in the trial court. This is in accord with Sec. 119.19(3)(b), Fla. Stat. (1999). The State Attorneys believe that this omission from the Rules was merely an oversight as apparent from the forms promulgated by this Court. Fla.R.Crim.P. 3.993(a) & (c) which set forth the forms contain the following language: "you and each law enforcement agency involved in this case should copy, index, and deliver to the records repository of the Secretary of State all public records, except those filed in the trial court, which were produced in the investigation, arrest, prosecution, or incarceration of this case." In fact, the revised forms for proposed Rule 3.851 contain the same language. See Proposed Rule 3.3993(b), Notice of Imposition of Death Penalty and to Produce Public Records.

APPLICATION OF THE AMENDED RULES TO PENDING CASES

8. In its opinion setting forth the amendments to the various Rules, this Court asked for comments concerning which of the proposed provisions can be applied to defendants who were sentenced prior to the effective date of the Rule including, but not limited to, the following: (1) those for whom counsel has not been appointed as of the effective date; (2) those who have had collateral counsel appointed but who have not yet filed a postconviction motion; and (3) those who have had counsel appointed and have postconviction motions pending. The comments of the State Attorneys to each of those situations are as follows:

a. Those Who Do Not Have Counsel

The State Attorneys submit that for those defendants who do not have counsel appointed at the time of the effective date of the new Rules, the new Rules should be in effect and that counsel should be appointed within fifteen (15) days. Due to the fact that it is unknown where in the appellate process a particular defendant is at the time the Rules go into effect, the State Attorneys suggest that the defendant in this situation be given no more than one year to file a completed motion for postconviction relief. The new Rules concerning the substance of the motion and the procedure, Rules 3.851 (e) & (f), should be in effect.

b. Defendants Who Have Collateral Counsel, But Have Not Yet Filed

The State Attorneys suggest that defendants who fall in this category should have one (1) year from the date of their appointment to file a final motion for postconviction relief. This gives the collateral counsel a full year (and in most cases, more than a year) to investigate, obtain public records and to file the postconviction motions. Again, the new Rules governing the substance and procedure should apply.

c. Defendants Who Have Had Counsel Appointed and Have Postconviction Motions Pending

In this scenario, the trial courts are faced with "shell" motions that have been filed in order to protect the defendant's federal habeas corpus rights. In most of these cases, the trial courts have entered orders extending the time periods for the filing of an amended motion. The State Attorneys suggest that in these cases, the new Rules as to the time for filing the motions should not apply but the trial court's order extending the time period should be considered definitive. The State Attorneys also suggest that such extension orders be limited to no more than six (6) months. If there are cases in which the trial court has not entered an order extending the time period, then the defendants should be ordered to file a completed amended motion within six (6) months. In addition, the State Attorneys suggest that the form and procedure Rules apply to any amended motions but that for any final motions, the old Rules, i.e., Huff

hearings, etc. should apply.

RULES OF JUDICIAL ADMINISTRATION

9. Rule 2.___ - Real Time Transcription in Capital Cases

In this proposed Rule, this Court intends to require that in all trials in which the State seeks the death penalty, as well as in Rule 3.851 proceedings, the State Attorney will be responsible for arranging and paying for real-time transcription of the proceedings. Although the State Attorneys are supportive of any way to fairly expedite the capital process, they must strenuously object to a judicial rule of procedure which is a violation of the separation of powers by requiring a state agency to expend money out of its budget in this manner. As so clearly set forth in this Court's opinion in Allen v. Butterworth, supra, which accompanied these proposed Rules, this Court held that Article II, Section 3, of the Florida Constitution prohibits members of one branch of government from exercising "any powers appertaining to either of the other branches unless expressly provided herein." 25 Fla.L.Weekly at S279. Article VII, Section 1(c), states that "[n]o money shall be drawn from the treasury except in pursuance of appropriation made by law." "This Court has long held that the power to appropriate state funds is legislative and is to be exercised only through duly enacted statutes." Chiles v. Children, A, B, C, D, E and F, 589 So.2d 260, 265 (Fla. 1991). As there have been no appropriations to the State Attorney Offices by the Legislature for the purpose of paying for real-time transcription, this Court has no authority to require that the State Attorney Offices expend any part of their budgets for those costs.[9] See, e.g., Petition of Florida Bar, 61 So.2d 646 (Fla. 1952); Department of Juvenile Justice v. C.M., 704 So.2d 1123 (Fla. 4th DCA 1998). There is certainly no showing that the failure to have the State Attorney Offices pay for real-time transcription would violate any defendant's constitutional rights that could justify this judicial intrusion into the powers and responsibilities of the Legislature. See Coalition for Adequacy and Fairness in School Funding, Inc. v. Chiles, 680 So.2d 400 (Fla. 1996). Thus, the State Attorneys submit that this Court cannot constitutionally adopt this rule of judicial administration. Thus, the State Attorneys would suggest that this Court include as a suggestion to the Legislature for enactment during the next legislative session, a request that the courts be funded to provide for real time transcription of these proceeding or, if the defendant is indigent, that this be included as a proper cost of prosecution to be paid by the counties (and eventually the State).

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[9] There is no doubt that this expenditure would be very costly to the State Attorney Offices as such a cost is at least twice the cost of normal court reporting transcription and in capital cases the records of these cases can be anywhere from 5,000 pages to over 20,000 pages. More problematic is the fact that there are many cases in which the State seeks the death penalty in good faith, but where the defendant is not sentenced to death. In those cases, the cost of real time reporting would be a waste of scarce monetary resources. In addition, in some counties it may be more costly and difficult to obtain this technology.

Wherefore, the State Attorneys of the Twenty Judicial Circuits of Florida, by and through the Florida Prosecuting Attorneys Association, respectfully request that this Court consider and adopt the Comments set forth herein.

Respectfully submitted,

By:_____
ARTHUR I. JACOBS
General Counsel
Florida Prosecuting Attorneys Association
Florida Bar No. 108249
401 Centre Street 2d Floor
P.O. Box 1110
Fernandina Beach, Fl 32035-1110

_____ _____
Curtis A. Golden, State Attorney William N. Meggs, State Attorney
First Judicial Circuit Second Judicial Circuit

_____ _____
Jerry M. Blair, State Attorney Harry Shorstein, State Attorney
Third Judicial Circuit Fourth Judicial Circuit

_____ _____
Brad King, State Attorney Bernie McCabe, State Attorney
Fifth Judicial Circuit Sixth Judicial Circuit

_____ _____
John Tanner, State Attorney Rod Smith, State Attorney
Seventh Judicial Circuit Eighth Judicial Circuit

_____ _____
Lawson L. Lamar, State Attorney Jerry Hill, State Attorney
Ninth Judicial Circuit Tenth Judicial Circuit

_____ _____
Katherine Furnandez-Rundle, Earl Moreland, State Attorney
State Attorney Eleventh Judicial Circuit Twelfth Judicial Circuit

_____ _____
Harry Lee Coe, III, State Attorney Jim Appleman, State Attorney
Thirteenth Judicial Circuit Fourteenth Judicial Circuit

_____ _____

Barry E. Krischer, State Attorney
Fifteenth Judicial Circuit

Kirk Zuelch, State Attorney
Sixteenth Judicial Circuit

_____

Michael J. Satz, State Attorney
Seventeenth Judicial Circuit

_____

Norman R. Wolfinger, State Attorney
Eighteenth Judicial Circuit

_____

Bruce H. Colton, State Attorney
Nineteenth Judicial Circuit

_____

Joseph P. D'Alessandro, State Attorney
Twentieth Judicial Circuit