Supreme Court of Florida

No. SC96646

AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.851, 3.852, AND 3.993 AND FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.050[1]

[July 12, 2001]

CORRECTED OPINION

HARDING, J.

This Court has engaged in exhaustive efforts to balance the concerns of fairness and justice with the need for finality in postconviction proceedings in death penalty cases. During that process, we believe that a consensus has been reached as to the essential ingredients necessary to balance these competing concerns. Although we have not had the case management resources to provide information regarding the average length of capital postconviction proceedings, anecdotal evidence demonstrates and this Court has recognized that the time for

[1]Due to the amendment to Florida Rule of Judicial Administration 2.050, the style of this case has been changed accordingly.

resolving these matters has been excessive.[2]

After thoroughly considering the numerous concerns and issues raised in response to this Court's proposed amendments to rules 3.851 (Collateral Relief After Death Sentence Has Been Imposed and Affirmed on Direct Appeal), 3.852 (Capital Postconviction Public Records Production), and 3.993 (Forms Related to Capital Postconviction Records Production) of the Florida Rules of Criminal Procedure, we amend rule 3.851 as reflected in appendix A to this opinion.[3] We are hopeful that the new rule will allow future capital postconviction proceedings to be resolved within two years from the time the case becomes final, thereby eliminating the months and years of needless delay that we have seen in the past.

In recent years, we have found that cases are being resolved more expeditiously, due in large part to the implementation of this Court's requirements for quarterly reports from the chief judges to the Chief Justice on the status of capital postconviction cases, the Court's requirement of mandatory training for judges handling capital cases, the Court's adoption of rule 3.852 ("Capital

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[2] See, e.g., Peede v. State, 748 So. 2d 253, 255 n.4 (Fla. 1999); Jones v. State, 740 So. 2d 520, 524 (Fla. 1999). See also Cook v. State, No. SC94134 (Fla. June 28, 2001) (Wells, C.J., concurring); Rose v. State, 26 Fla. L. Weekly S210, S216 (Fla. April 5, 2001) (Wells, C.J., concurring); Nixon v. Singletary, 758 So. 2d 618, 627 (Fla. 2000) (Harding, C.J, concurring).

[3] We have jurisdiction. See Art. V, § 2(a), Fla. Const.

Postconviction Public Records Production”), and the development of registry counsel. These improvements notwithstanding, there is still more that needs to be done. Four components are essential to a balanced capital postconviction system. First, a capital defendant facing execution must be promptly provided competent[4] postconviction counsel charged with the responsibility of investigating the facts and circumstances of the case and researching the applicable law in order to present all postconviction claims in a timely manner. Second, in order for postconviction counsel to effectively carry out this responsibility, counsel must be given reasonable time and adequate resources. Third, postconviction counsel must have timely access to all information concerning the defendant’s case, especially public records from investigating and prosecuting agencies. Fourth, there must be active and reasonable judicial oversight of the postconviction process to ensure that the defendant’s claims are timely investigated and fairly and efficiently processed once presented. Pursuant to the changes we adopt today, in addition to the continued support of the above components, the Court is confident that we can obtain the goal of achieving a prompt, fair, and efficient resolution of capital

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[4] See § 27.710, Fla. Stat. (2000) (“Registry of attorneys applying to represent persons in postconviction capital collateral proceedings; certification of minimum requirements; appointment by trial court”).

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postconviction proceedings.

Although we have incorporated several of the features of our original proposals into current rule 3.851, we have determined that a procedure that would begin the capital postconviction process concurrently with the direct appeal process cannot be adopted at this time. This is because of the continued application of certain public records exemptions to capital postconviction defendants which would impede the efficacy of our original proposed procedure by precluding collateral counsel from investigating potential postconviction claims in a timely manner.

I. BACKGROUND

In developing our original proposals, we considered the proposed amendments to Florida Rule of Criminal Procedure 3.851 submitted by the Supreme Court Committee on Postconviction Relief in Capital Cases (the Morris Committee), which was charged with developing a case management plan for capital postconviction relief and recommending amendments to the existing capital postconviction procedures. See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 & 3.993, 772 So. 2d 488, 489 (Fla. 2000). We also were guided by the "dual-track" concept for capital postconviction proceedings

contained in the Death Penalty Reform Act of 2000 (DPRA).[5]

Our original proposals were designed to create a "dual-track" system similar to that contained in the DPRA. See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 & 3.993, 772 So. 2d 532 (Fla. 2000); see also Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 & 3.993, 772 So. 2d 488, 490 (Fla. 2000). They were intended to "eliminate those capital postconviction procedures that have historically created unreasonable delays in the process, while still maintaining quality and fairness." Id. at 489; see also 772 So. 2d at 533. The proposed rules were designed to promote the prompt and efficient processing of capital cases in a fair, just, and constitutionally sound manner while at the same time effectuating the Legislature's intent, as expressed in the DPRA, to reduce unnecessary delays in capital cases by beginning the capital postconviction process as early as possible after the imposition of a sentence of death and setting time limits for certain actions to be taken. See 772 So. 2d at 489.

Under our original proposed amendments, fifteen days after the death sentence is imposed collateral counsel would be appointed under rule 3.851 and the public records production process would begin under rule 3.852. An initial motion for postconviction relief must be filed with the trial court within 180 days

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[5] Ch. 2000-3, § 5, at 11, Laws of Fla.

after this Court issues its mandate on direct appeal. Under the original scheme, counsel would begin a meaningful investigation of potential postconviction claims and all public records issues would be resolved well before the motion for postconviction relief was due to be filed in the circuit court. We noted, however, that if public records exemptions that do not end until the conviction and sentence become final on direct appeal[6] remained in place, counsel could be precluded from effectively investigating potential postconviction claims in a timely manner. Thus, in order to ensure that the proposed scheme functioned as intended, we asked the Florida Legislature to address these exemptions. See 772 So. 2d at 491. When the regular legislative session ended with the exemptions as applied to capital cases intact, the Court proposed revised rules. See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 & 3.993, 772 So. 2d 512 (Fla. 2000) (published order).

After reviewing the numerous comments filed and hearing oral argument on both our original and revised proposals, we postponed amending the rules until we

[6] See § 119.07(3)(b), Fla. Stat. (1999) (exempting "active criminal investigative information"); § 119.07(3)(l), Fla. Stat. (1999) (exempting records prepared by an agency attorney exclusively for civil or criminal litigation until the conclusion of litigation); § 119.011(3)(d)(2), Fla. Stat. (1999) (providing that criminal investigative information is considered "active" while such information is directly related to pending prosecutions or appeals) (emphasis added).

could thoroughly consider a number of critical issues and concerns, a number of which we address below. See 772 So. 2d at 533-34.

II. FILING OF RULE 3.851 MOTION IN THIS COURT

First, as requested by the Legislature,[7] we have considered the feasibility of requiring capital postconviction motions to be filed directly in this Court and have determined that such a change in procedure at this time would only serve to further delay the postconviction process. We have reviewed the Oklahoma procedures which require that capital postconviction actions be brought in the appellate, rather than in the trial, court ninety days from the date the last brief is filed on direct appeal. 22 Okla. Stat. §1089 (2000). However, after reviewing the Oklahoma procedures, we believe that the large number of inmates on Florida's death row militates against adopting such a system in this state.

Oklahoma currently has approximately 126 death-row inmates, while Florida currently has 373. Requiring that rule 3.851 motions be filed in this Court would present the Court with a large increase in original proceedings. The filing of

original postconviction pleadings with this Court would require considerable

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[7] See ch. 2000-3, § 20, at 23, Laws of Fla. (requesting that the Court study the issue).

time and additional resources. We do not determine that this procedure would enhance the disposition of these cases in a fair, just, and constitutionally sound manner.

Moreover, the new rules at issue here are the logical refinement of well-established, long-standing rules of procedure providing for the filing of capital postconviction motions in the trial court.[8] In contrast, the significantly different procedures that would be necessary if we were to require rule 3.851 motions to be filed in this Court most certainly would meet with new challenges and uncertainties that could take years to resolve. Finally, not only would this complete change in procedure result in new delays in the postconviction process, it necessarily would further delay the adoption of new rules because we would essentially have to begin the rule-amendment process anew and seek further committee input and public comment.

III. RULE OF DISCOVERY TO OVERRIDE EXEMPTIONS

Next, we decline to adopt a rule of discovery that, despite the continued existence of the public records exemptions at issue here,[9] would require production of records prior to a conviction and death sentence becoming final on

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[8] See Fla. R. Crim. P. 3.850, 3.851.

[9] See §§ 119.07(3)(b), 119.07(3)(l), Fla. Stat. (2000).

direct appeal. We have given much consideration to the Solicitor General's suggestion that this Court has "inherent" authority to adopt such a rule. However, since its inception in 1996, see In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production, 683 So. 2d 475 (Fla. 1996), Florida's capital postconviction discovery rule--rule 3.852--has been based on the broad public records production authorized under chapter 119. See Amendments to Florida Rules of Criminal Procedure 3.852 (Capital Postconviction Public Records Production) & Rule 3.993 (Related Forms), 754 So. 2d 640, 643 (Fla. 1999) (adopting rule 3.852 as a discovery rule for public records production ancillary to capital postconviction proceedings); see also In re Amendment to Florida Rules of Criminal Procedure–Capital Postconviction Public Records Production, 683 So. 2d 475 (Fla. 1996) (adopting first version of rule based on public records production).

The public records exemptions at issue here have been interpreted to end upon the conviction and sentence becoming final on direct appeal, see State v. Kokal, 562 So. 2d 324 (Fla. 1990), and have functioned in harmony with our current capital postconviction rules, and, as rule 3.852 has progressed, in most cases have allowed for timely records production under the current one-year time period. Therefore, we decline to adopt a rule of discovery that could be seen as an

attempt to override these legislatively created exemptions. Rather, we defer to the Legislature to make the policy decision as to whether to retain the exemptions as they apply to capital defendants or remove them in order to allow for the adoption of a dual-track system as originally proposed. See art. I, § 24(c), Fla. Const. (authorizing the Legislature to provide by general law for the exemption of records otherwise accessible by the public, provided that the law states with specificity the public necessity justifying the exemption and the exemption is no broader than necessary to accomplish the stated purpose); see also Kight v. Dugger, 574 So. 2d 1066, 1068 (Fla.1990) (explaining that the Legislature has the constitutional power to regulate disclosure of public records); State v. Kokal, 562 So. 2d at 326 (recognizing that only the Legislature can create exemptions to chapter 119).

IV. AMENDMENTS

Rather than adopting an entirely new rule, we have decided to amend current rule 3.851 to incorporate several of the proposals that have been suggested to the Court. The most significant changes are addressed below.

Appointment of Counsel

In order to ensure the prompt appointment of postconviction counsel, we have added subdivision (b). This provision requires the appointment of counsel upon the issuance of mandate from this Court on direct appeal.

Preliminary Procedures

We have added subdivision (c)(1), entitled Judicial Assignment, which provides for the assignment of a qualified judge within thirty days after the mandate issues on direct appeal. Consistent with this change, we also amend Florida Rule of Judicial Administration 2.050(b)(4) to reflect the same. Additionally, in order to provide constant oversight into the postconviction process, we have also added subdivision (c)(2), entitled Status Conferences. This provision requires the assigned judge to conduct a status hearing not later than ninety days after the assignment of the case, and at least every ninety days thereafter until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. These status conferences will permit the timely resolution of public records issues and other preliminary matters and will provide better case management to ensure the appropriate disposition of these cases. We recognize that the requirements for status conferences may be onerous for trial judges that already have overburdened calenders. Yet, we emphasize that there is a need for placing capital postconviction cases in a priority status to effectuate the prompt, fair, and efficient resolution of these matters.

Contents of An Initial Motion

After considering all the comments filed addressing an adequately pled

initial motion, we believe that the requirements contained in subdivision (e), Contents of Motion, are sufficient to put the parties and trial court on notice as to what constitutes a sufficiently pled initial motion. We also believe that the information that must be included in an initial motion under subdivision (e), together with the information that must be disclosed at the case management conference under subdivision (f)(5), is sufficient to allow the State to prepare for an evidentiary hearing.

Under subdivision (e)(1)(D), the motion must include "a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought." Significantly, subdivision (e) contains all the requirements that were contained in section 8(2) of the DPRA[10] and the Morris Committee's proposal for a "fully pled" motion, except for the requirement that the motion include any documents supporting the claim, a list of witnesses and their affidavits or a proffer of their testimony. Under subdivision (f)(5), a case management conference must be held within ninety days after the state files its answer. At that conference, both parties must disclose all documentary exhibits that will be offered at the evidentiary hearing; provide an exhibit list that includes all exhibits; and exchange a witness list with the names and addresses of any potential witnesses. Expert witnesses

[10] Ch. 2000-3, § 8(2), at 15, Laws of Fla.

also must be designated and copies of any expert reports must be provided. Thus, prior to the case management conference, the detailed allegations in the motion will provide the state with notice of the facts underlying claims for which an evidentiary hearing is sought; and, at the case management conference, the state will receive all documents or exhibits supporting the claims as well as a witness list. We believe these two provisions will allow both parties to adequately prepare for the evidentiary hearing.

Evidentiary Hearings

Amended rule 3.851, as did our proposals, requires that an evidentiary hearing be held on claims identified in an initial motion as requiring a factual determination. We have considered the comments in opposition to this requirement but continue to believe that "[i]n light of the large number of summary denials of initial motions which the Court has been compelled to reverse under the current rules . . . this change will reduce unwarranted delay in many cases." 772 So. 2d at 489.

In contrast to the evidentiary hearing requirement for initial motions, under subdivision (f)(5)(B) we have left it up to the trial court to determine whether an evidentiary hearing should be held on a successive motion. Consistent with rule

3.850(d),[11] under new subdivision (f)(5)(B), "if the [successive] motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing." Although evidentiary hearings on factually based claims contained in successive motions are not automatically required under the new rule, we encourage trial courts to liberally allow them on timely raised newly discovered evidence claims, and Brady[12] or Giglio[13] claims. This will avoid possible delays caused by the need to remand successive motions for factual development of such claims.[14]

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[11] Florida Rule of Criminal Procedure 3.850(d) provides that if the motion, files, and records conclusively show that the movant is entitled to no relief, the postconviction motion shall be denied without a hearing. See also Valle v. State, 705 So. 2d 1331, 1333 (Fla. 1997) (recognizing that a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief); Roberts v. State, 568 So.2d 1255, 1256 (Fla. 1990) (stating that where the trial court denies a motion for postconviction relief without conducting an evidentiary hearing, the motion and the record must conclusively demonstrate that the defendant is entitled to no relief).

[12] Brady v. Maryland, 373 U.S. 83 (1963).

[13] Giglio v. United States, 405 U.S. 150 (1972).

[14] See, e.g., Roberts v. State, 678 So. 2d 1232 (Fla. 1996) (reversing summary denial of second motion for postconviction relief and remanding for evidentiary hearing on newly discovered evidence involving recanted testimony); Swafford v. State, 679 So. 2d 736 (Fla. 1996) (reversing summary denial of third motion for postconviction relief and remanding for evidentiary hearing on Brady claim); Scott v. State, 657 So. 2d 1129 (Fla. 1995) (reversing summary denial of third motion for postconviction relief and remanding for evidentiary hearing on newly discovered Brady claims); Johnson v. Singletary, 647 So. 2d 106, 111 (Fla.

V. PROCEDURES AFTER DEATH WARRANT SIGNED

Neither our original nor our revised proposals contained procedures to be followed after a death warrant is signed. In our July 14, 2000, opinion, we asked the Morris Committee to further study the need for such procedures. See 772 So. 2d at 534. In its September 29, 2000, report, the Committee concluded that a provision addressing the procedure to be followed after a death warrant is signed would provide needed guidance to trial judges and therefore recommended that such a provision be added to proposed rule 3.851. The Committee pointed out that, since the courts do not schedule executions and do not regulate the time from the date the warrant issues until the prisoner is scheduled to be executed, the new provision must be flexible enough to accommodate these variables. With those realities in mind, the Committee recommends the following general concepts to be included in the new subdivision:

> (1) Proceedings after a death warrant has been issued shall take priority over all other cases.
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> (2) The time limits of rule 3.851 and any other rule shall not apply to restrict the trial court.
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> (3) Proceedings in the trial court shall be scheduled expeditiously considering the time limitations imposed by

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1994) (reversing summary denial of second motion for postconviction relief and remanding for evidentiary hearing on newly discovered evidence consisting of affidavits stating that deceased inmate had confessed to killings).

the date of execution and the time required for appellate review and that a stay of execution be granted only as a last resort.

(4) Provisions for venue shall be suspended on motion after a death warrant has been issued. Venue shall be determined by the trial court considering the availability of witnesses or evidence, time limitations imposed by the date of execution, the security issues involved in the individual case, and any other factor determined by the trial court.

(5) The trial court shall electronically transmit a copy of any final order to the Supreme Court of Florida.

(6) The record on appeal shall be immediately delivered to the Clerk of the Supreme Court of Florida.

(7) The defendant's presence should not be required except for the evidentiary hearing.

However, since the Morris Committee did not offer proposed language implementing its recommendations, we have not included them in the amended rule. We now ask the Morris Committee to work with the Criminal Procedure Rules Committee to draft a new subdivision incorporating these recommendations. The committees should file a joint report with proposed rules with the Clerk of this Court by January 1, 2002. Until such time as we adopt the new procedures, new subdivision (h) of rule 3.851, entitled "After Death Warrant Signed," makes clear that the time periods provided for under the new rule must be expedited after a death warrant is signed. See also rule 3.851(f)(5)(B) as amended herein, providing

that if warrant is signed the trial court shall expedite time periods in accordance with subdivision (h).

VI. OTHER STEPS TO IMPROVE CAPITAL POSTCONVICTION PROCESS

As we explained in our prior opinion, there are a number of other steps we have taken or are considering that will greatly improve the capital postconviction process. See 772 So. 2d at 534. This Court already has mandated a training course on capital cases for circuit judges who preside over those cases[15] as well as minimum standards for conflict counsel in capital cases.[16] In our last opinion in this case, we asked the Morris Committee to consider the need for a statewide roster of judges qualified to preside over capital cases and are now considering the Committee's recommendation that such a roster should be developed. See id. We also are considering proposed amendments to new rule 3.112 which would extend the standards to include public defenders, collateral counsel, and private counsel who handle capital cases. See In re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases,

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[15] See In re Amendment to the Florida Rules of Judicial Administration, Rule 2.050(b)(10), 688 So. 2d 320 (Fla. 1997).

[16] See In re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases, 759 So. 2d 610 (Fla. 1999) (adopting minimum standards for conflict counsel).

SC90635 (oral argument held December 1, 2000). In connection with these proceedings, we recently adopted new Rule of Judicial Administration 2.070(i) which requires the chief judge of each circuit to enter an administrative order developing and implementing a circuit-wide plan to expedite the preparation of transcripts in all capital trials and capital postconviction proceedings. See 772 So. 2d at 534-35. We believe these changes together with the amendments we adopt today will eliminate much of the delay in our capital postconviction process while at the same time promoting quality and fairness in the system.

CONCLUSION

Accordingly, we amend Florida Rule of Criminal Procedure 3.851 as reflected in appendix A to this opinion.[17] We also amend Florida Rule of Judicial Administration 2.050 as reflected in appendix B to this opinion. Additions to the rules are indicated by underlining; deletions are indicated by strike-through type. The amendments shall become effective October 1, 2001, at 12:01 a.m., and shall apply to all motions filed on or after that date. Motions pending on that date are governed by the version of rule 3.851 in effect immediately prior to that date.

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[17] Since the current version of rule 3.851 will continue to apply to motions pending on the effective date of these amendments, both versions of the rule should be published by The Florida Bar and in West Group's Florida Rules of Court with a notation that unless otherwise indicated in the rules, the current rule applies to motions pending on the effective date of the amendments.

Interested parties shall have thirty days from the date of this opinion in which to file comments. We do not adopt the previously proposed amendments to Florida Rules of Criminal Procedure 3.852 and 3.993. The current versions of those rules shall remain in effect.

We would like to thank Governor Bush, former Speaker Thrasher, the Morris Committee, the Criminal Procedure Rules Committee, and the many other interested persons and organizations who filed comments and participated in oral argument. We have considered each of the comments and suggestions. The Criminal Procedure Rules Committee will continually evaluate the rules governing capital postconviction proceedings and may propose changes as it sees fit in accordance with Florida Rule of Judicial Administration 2.130(c).

It is so ordered.

SHAW, LEWIS, and QUINCE, JJ., concur.
WELLS, C.J., concurs with an opinion.
ANSTEAD, J., concurs specially with an opinion, in which SHAW and PARIENTE, JJ., concur.
PARIENTE, J., concurs specially with an opinion, in which ANSTEAD, J., concurs.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THESE AMENDMENTS.

WELLS, C.J., concurring.

I concur with the majority because I believe that these rules will advance the goal of the fair, effective, and efficient processing of capital postconviction cases. I write separately to underscore my suggestion that the Legislature squarely confront the public records issue.

Public records production continues to be a significant problem in the processing of these capital postconviction cases. Substantial time continues to be consumed in the circuit courts while decisions are made regarding what records must be produced and the boundaries of that production. I conclude that in order to effectively reduce the time associated with public records production, there must be changes to chapter 119, Florida Statutes, which would facilitate and delineate public records production. I would respectfully suggest that the Legislature study this problem area and consider changes to chapter 119, taking into consideration this Court's decisions in Memorial Hospital-West Volusia, Inc. v. News-Journal Corp, 26 Fla. L. Weekly S268 (Fla. April 26, 2001); Halifax Hosp. Medical Center v. News-Journal Corp., 724 So. 2d 567 (Fla. 1999); State v. Kokal, 562 So. 2d 324 (Fla. 1990); and Shevin v. Byron, Harless, Schaffer, Reid & Associates, 379 So. 2d 633 (Fla. 1980), and article 1, section 24(c), Florida Constitution.

Defendants, the State, and the courts would benefit from a statute

specifically designating what records are to be produced and what records are exempt from production under the provisions of the Florida Constitution. Obviously, documents covered by Brady v. Maryland, 373 U.S. 83 (1963), must be produced in accord with the requirements of the United States Constitution as determined by the United States Supreme Court.

ANSTEAD, J., specially concurring.

I write separately to express both a caution and an optimism about our exhaustive efforts to reform the postconviction process in death penalty jurisprudence. First, the caution to note that with today's revisions we appear to have reached the outer limits of our authority to restrict the constitutional process under habeas corpus for catching serious mistakes in capital cases. In other words, we must be mindful that there are limits to how far we can go in restricting a capital defendant's access to the courts to present a claim that a serious mistake was made in his conviction or capital sentence.

Indeed, in Allen v. Butterworth, 756 So. 2d 52, 59 (Fla. 2000), in dealing with our continuing efforts at postconviction reform, we then cautioned:

> While this Court will continue such efforts, we are also mindful that our primary responsibility is to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitution.

That caution bears repeating here. The reality is that few, if any, of the numerous postconviction decisions finding major errors in capital convictions and sentences in Florida would have occurred if a strict one-year limitation had been rigidly enforced. Those decisions demonstrate that the discovery of major flaws based upon new evidence, Brady claims, or the recantations of witnesses, does not always conveniently occur in that brief time span. If fewer errors are to be found in the future let us hope that it will be because the thoroughness of the process allowed fewer errors, and not because of the expiration of an arbitrary deadline.

HABEAS CORPUS

In our response to demands to speed up the process while seemingly never being able to satisfy the competing interests, we must be constantly mindful that we are dealing with a Constitution, and an express right to the writ of habeas corpus set out therein. We must also be mindful of the fact that we are acting at a time when access to the federal courts on postconviction claims has been severely curtailed so that a proceeding in the state courts is essentially "the only game in town." We are it.

Traditionally, postconviction rights have been asserted through use of the constitutionally guaranteed writ of habeas corpus, the Great Writ. The Great Writ has been placed in Florida's Constitution as an ultimate safeguard against human

error. Of course, there is no time limitation on the invocation of this writ, and its suspension is forbidden. However, in order to insure the orderly and efficient processing of postconviction claims under the writ of habeas corpus, we have enacted a procedural rule to guide the process. In such rule, we originally imposed a time limitation of two years for the filing of such claims, with a proper exception for certain claims that could not reasonably be discovered and advanced within the two-year period.

We have also held that counsel will be provided for indigent defendants in postconviction proceedings only in limited instances. See Graham v. State, 372 So. 2d 1363 (Fla. 1979). Because of our especial concern in capital cases, however, we have consistently refused to allow a capital defendant to be executed unless that defendant was provided access to counsel-assisted postconviction proceedings. See Arbelaez v. Butterworth, 738 So. 2d 326, 326 (Fla. 1999) ("We acknowledge we have a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner. . . ."). Similarly, the Legislature has provided resources to see that all capital defendants have reasonable access to counsel-assisted postconviction proceedings. As a consequence, this Court has consistently refused to delay executions where reasonable access to counsel has been provided and all reasonable claims have

been considered and properly denied.

REDUCED TIME FOR CAPITAL CLAIMS

When the Legislature acted to provide counsel and resources in capital postconviction proceedings, this Court took the dramatic step of cutting in half the two-year time allowed for postconviction claims in capital cases. While it would not ordinarily make sense to provide less time for the most serious of cases, while providing twice the time in less serious misdemeanor and felony cases, we acted in specific reliance on the Legislature's providing counsel in capital postconviction proceedings. At the same time, however, we openly cautioned that because our reduction of the time for filing claims was expressly premised on the provision of competent counsel with adequate resources, we would have to reconsider this decision if adequate resources were not provided. See Fla. R. Crim. P. 3.851 Court Commentary (1993) ("In the event the capital collateral representative is not fully funded and available to provide proper representation for all death penalty defendants, the reduction in the time period [for seeking relief under this rule] would not be justified and would necessarily have to be repealed, and this Court will forthwith entertain a petition for the repeal of the rule."). Since that time we have worked constantly and diligently, with the assistance of the Legislature, to see that a fair and efficient, and adequately resourced, system for capital

postconviction proceedings is put in place. Today's revisions are the culmination of those efforts.

ESSENTIAL INGREDIENTS AND VIGILANCE

Despite concerns about our limitations on habeas corpus, there is also considerable cause for optimism in considering how far we have come with the help of the Legislature in providing a fair process and adequate resources for capital postconviction proceedings. For example, it appears that a consensus has now been reached among all those involved as to certain essential ingredients without which a fair and efficient system for capital postconviction proceedings cannot survive. It is critically important that all now are vigilant in seeing that these essential prerequisites are assured in every capital postconviction proceeding:

First, as this Court has recognized for many years, it is essential that a capital defendant facing execution be promptly provided with competent postconviction counsel who shall be charged with the responsibility of investigating the facts and circumstances of the case, and researching the law, in order to determine the existence of any legal reasons why the defendant's conviction or sentence should be set aside.

Second, postconviction counsel must be provided with reasonable time and

adequate resources to carry out her responsibilities.

Third, postconviction counsel must have timely access to all information, including especially public records from investigating and prosecuting agencies, concerning the case.

Fourth, there must be active and reasonable judicial oversight of the proceedings to see that the claims are fairly and efficiently processed in a postconviction proceeding.

By our vigilance in paying strict attention to these four essential prerequisites, confidence in the outcome of postconviction proceedings should be assured. On the other hand, neglect of any of the four will surely place the proceedings at risk.

We must never lose sight of the important values being balanced in death penalty proceedings. On the one hand society has invoked the ultimate sanction of death because an innocent life has been taken by the defendant under especially egregious circumstances. On the other hand that same society cautions that "death is different" and extraordinary safeguards must be taken to insure that only those whose guilt is certain and that are truly deserving of the forfeiture of life are ultimately put to death. We in the courts have the major responsibility for insuring that these values are properly reflected and balanced in our procedures and

oversight of the death penalty process.

As noted above, there is much reason for optimism. Counsel and resources are now available institutionally and through court-appointment, and public records discovery has been organized in a coherent and efficient manner. In addition, the Legislature, in enacting legislation for DNA testing, has sent out a strong signal that all available safeguards should be utilized to insure that no one who may be innocent of the crime or not deserving of the punishment be executed. All involved must now pull together to insure the system works and strikes the proper balance.

SHAW and PARIENTE, JJ., concur.

PARIENTE, J., specially concurring.

I concur in the adoption of this rule because I believe that the requirement of an evidentiary hearing and case management monitoring are two significant steps that will enhance the post-conviction process by literally cutting years off of the litigation of these claims without compromising the fairness of the process. We have also placed requirements on specificity in pleading. However, the ability of post-conviction counsel to file a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought and the ability of post-conviction

counsel to be prepared for an evidentiary hearing to be held in a timely manner after the filing of the post-conviction motion will depend, in large part, on the timely disclosure of public records and the resolution of public records issues before the post-conviction motion is filed.

My major concern is whether we have provided realistic time limits for the trial court to hold an evidentiary hearing after the post-conviction motion has been filed. In this proposed rule an evidentiary hearing must be held no later than nine months after the State files its answer and as soon as seven months. When we had initially proposed this rule last April, we had envisioned a modified dual-track system where public records discovery would be ongoing during the time the case was on direct appeal. See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993, 772 So. 2d 488, 491 (Fla. 2000). As we stated at that time:

> Our proposal will allow collateral counsel adequate time to evaluate all potential postconviction claims, including ineffective assistance of trial counsel, which oftentimes only become apparent after this Court's decision on direct appeal. In addition, according to the statements of several attorneys and judges who appeared at oral argument, the requests for public records and the litigation that follows is the single biggest cause for delay in the current system. Under our proposed rules, the issue of public records should be resolved well before the postconviction motion is due to be filed in the circuit court.

Id. (emphasis supplied).

I acknowledge that in this proposed rule, we have slightly increased the time in which an evidentiary hearing must be held from our previous proposed 3.851 rule on which we have sought comment. However, because there will not be a period of years during which public records issues can be resolved, it is essential for our proposed system to work properly that the status conferences in the year between appointment of counsel and the filing of the post-conviction motion be productively used to resolve public records requests and that the State cooperates in making sure that all requests are timely complied with.

I lastly concur fully in Justice Anstead's observations as to the essential ingredients for our post-conviction process to be expeditious without sacrificing fairness: 1) competent counsel; 2) reasonable time and adequate resources; 3) timely access to all information, especially public records, and 4) active and reasonable judicial oversight.

ANSTEAD, J., concurs.

Original Proceeding - Florida Rules of Criminal Procedure

Honorable Stan R. Morris, Chairperson, Supreme Court Committee on Postconviction Relief in Capital Cases (The Morris Committee), Gainesville, Florida; Honorable Philip J. Padovano, Judge, First District Court of Appeal,

Tallahassee, Florida; Honorable O. H. Eaton, Jr., Chair, The Florida Bar Criminal Procedure Rules Committee, Sanford, Florida; John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida; Honorable Scott J. Silverman, Chair, Rules of Judicial Administration Committee, Miami, Florida; Robert R. Wills, Immediate Past Chair of the Criminal Procedure Rules Committee, Fort Lauderdale, Florida; and Honorable Robert A. Butterworth, Attorney General, and Richard B. Martell, Chief, Capital Appeals, and Carolyn M. Snurkowski, Division Director, Office of the Attorney General, Tallahassee, Florida,

for Petitioners

Charles Canady, General Counsel, Reginald J. Brown, Deputy General Counsel, and Martin P. McDonnell, Assistant General Counsel, Tallahassee, Florida, for Honorable Jeb Bush, Governor of the State of Florida; Arthur I. Jacobs, General Counsel, Florida Prosecuting Attorneys Association, Fernandina Beach, Florida; Neal A. Dupree, Capital Collateral Regional Counsel, Southern Region, and Todd G. Scher, Litigation Director, Southern Region, Fort Lauderdale, Florida; Gregory C. Smith, Capital Collateral Counsel, Northern Region, Andrew Thomas, Chief Assistant CCRC, Northern Region, and Timothy P. Schardl, Special Assistant CCRC, Northern Region, of the Law Offices of Mark E. Olive, P.A., Tallahassee, Florida; John P. Moser and Michael P. Reiter, Capital Collateral Regional Counsel, Middle Region, Tampa, Florida; Roger R. Mass, Executive Director, Commission on Capital Cases, Tallahassee, Florida; Nancy A. Daniels, Public Defender, and W. C. McLain, Michael J. Minerva and Chet Kaufman, Assistant Public Defenders, Second Judicial Circuit, Tallahassee, Florida, and Bennett H. Brummer, Public Defender, and Christina A. Spaulding, Assistant Public Defender, Eleventh Judicial Circuit, Miami, Florida, for the Florida Public Defender Association, Inc.; Cary Haughwout, Public Defender, and Gary Caldwell, Assistant Public Defender, Chief, Capital Crimes Division, Fifteenth Judicial Circuit, West Palm Beach, Florida; Gerard T. York, Assistant General Counsel for the Department of State, Tallahassee, Florida; Helene E. Marks, Legal Counsel to Richard Ake, Clerk of the Circuit Court for Hillsborough County, Tampa, Florida; Harvey Ruvin, Clerk, Eleventh Judicial Circuit, Miami, Florida; Michael R. Ramage, General Counsel to the Florida Department of Law Enforcement, Tallahassee, Florida; Thomas E. Warner, Solicitor General, and T. Kent Wetherell, II, Deputy Solicitor General, Office of the Solicitor General, Tallahassee, Florida; Lawrence J. Fox, Chair, Judy A. Gallant, Staff Attorney, and Elisabeth Semel, Director of the American Bar Association, Washington, D.C.;

Robert Augustus Harper and Steven Brian Whittington, Robert Augustus Harper Law Firm, P.A., of the Florida Association of Criminal Defense Lawyers, Tallahassee, Florida; and Stephen Krosschell of Goodman & Nekvasil, P.A., , Clearwater, Florida,

Responding

Tom Feeney, Johnnie B. Byrd, Jr., and John Dudley Goodlette, Tallahassee, Florida for John E. Thrasher, former Speaker, House of Representatives,

Amicus Curiae

APPENDIX A

Rule 3.851. Collateral Relief After Death Sentence Has Been Imposed And Affirmed on Direct Appeal

(a) Scope. This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by a prisoner in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.

(b) Appointment of Postconviction Counsel.

(1) Upon the issuance of mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida shall at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel.

(2) Within 30 days of the issuance of mandate, 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.

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

(c) Preliminary Procedures.

(1) Judicial Assignment. Within 30 days of the issuance of mandate affirming a judgment and sentence of death on direct appeal, the chief judge shall assign the case to a judge qualified under the Rules of Judicial Administration to conduct capital proceedings.

(2) Status Conferences. The assigned judge shall conduct a status hearing not later than 90 days after the judicial assignment, and shall hold status conferences at least every 90 days thereafter until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. The attorneys, with leave of the trial

court, may appear by telephone at such status conferences. Such requests shall be liberally granted. Pending motions, disputes involving public records, or any other matters ordered by the court shall be heard at the status conferences.

(3) Prisoner's Presence Not Required. The prisoner's presence shall not be required at any hearing or conference held under this rule, except at the evidentiary hearing on the merits of any claim and at any hearing involving conflict with or removal of collateral counsel.

(4) Duties of Defense Counsel and Prosecuting Attorney. Within 45 days of appointment of postconviction counsel, the defendant's trial counsel shall provide to postconviction counsel all information pertaining to the defendant's capital case which was obtained during the representation of the defendant. Postconviction counsel shall maintain the confidentiality of all confidential information received. Within 45 days of appointment of postconviction counsel, the state attorney's office that prosecuted the defendant shall provide to the postconviction counsel copies of all pretrial and trial discovery and all contents of the state's file, except for information that the prosecuting attorney has a legal right under state or federal law to withhold from disclosure.

(~~b~~d) Time Limitation.

(1) Any ~~rule 3.850~~ motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that

(A) the facts on which the claim is predicated were unknown to the

movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

(~~2~~3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the ~~rule 3.850~~initial motion for postconviction relief filed under this rule.

(~~3~~4) The time limitation in subdivision (~~b~~d)(1) is established with the understanding that each death-sentenced prisoner will have counsel assigned and available to begin addressing the prisoner's postconviction issues within 30 days after the judgment and sentence become final. Should the governor sign a death warrant before the expiration of the time limitation in subdivision (~~b~~d)(1), the Supreme Court of Florida, on a defendant's request, will grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner. Furthermore, this time limitation shall not preclude the right to amend or to supplement pending pleadings under these rules.

(~~4~~5) An extension of time may be granted by the Supreme Court of Florida for the filing of postconviction pleadings if the prisoner's counsel makes a showing of good cause for counsel's inability to file the postconviction pleadings within the 1-year period established by this rule.

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

~~(6) This rule will govern the cases of all death-sentenced prisoners whose convictions and sentences become final after January 1, 1994.~~

(e) **Contents of Motion**.

(1) Initial Motion. A motion filed under this rule is an initial postconviction motion if no state court has previously ruled on a postconviction motion challenging the same judgment and sentence. An initial motion and memorandum of law filed under this rule shall not exceed 75 pages exclusive of the attachments. Attachments shall include but are not limited to the judgment and sentence. The motion shall be under oath and shall include:

(A) a statement specifying the judgment and sentence under attack and the name of the court that rendered the same;

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

(C) the nature of the relief sought;

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

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

The memorandum of law shall set forth the applicable case law supporting the granting of relief as to each separately pled claim. As to claims that were raised on appeal or should have or could have been raised on appeal, the memorandum shall contain a brief statement as to why these claims are being raised on postconviction relief.

(2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include:

(A) all of the pleading requirements of an initial motion under subdivision (e)(1);

(B) the disposition of all previous claims raised in postconviction proceedings and the reason or reasons the claim or claims raised in the present motion

were not raised in the former motion or motions;

(C) if based upon newly discovered evidence, Brady v. Maryland, 373 U.S. 83 (1963), or Giglio v. United States, 405 U.S. 150 (1972), the following:

(i) the names, addresses, and telephone numbers of all witnesses supporting the claim;

(ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;

(iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and

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

(~~c~~f) ~~Hearing Requirement.~~ ~~Before ruling on any rule 3.850 motion filed by a death-sentenced prisoner, the trial court shall conduct a hearing to determine whether an evidentiary hearing is required.~~**Procedure; Evidentiary Hearing; Disposition.**

(1) Filing and Service. All pleadings in the postconviction proceeding shall be filed with the clerk of the trial 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 trial court shall determine that the assigned judge has received a copy. All motions other than the postconviction motion itself shall be accompanied by a notice of hearing.

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

(3) Answer.

(A) To Initial Motion. Within 60 days of the filing of an initial motion, the state shall file its answer. The answer and accompanying memorandum of

law shall not exceed 75 pages, exclusive of attachments and exhibits. The answer shall address the legal insufficiency of any claim in the motion, respond to the allegations of the motion, and address any procedural bars. As to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.

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

(4) Amendments. A motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not raised earlier and attaches a copy of the claim sought to be added. Granting a motion under this subdivision shall not be a basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

(5) Case Management Conference; Evidentiary Hearing.

(A) Initial Postconviction Motion. No later than 90 days after the state files its answer to an initial motion, the trial court shall hold a case management conference. At the case management conference, both parties shall disclose all documentary exhibits they intend to offer at the evidentiary hearing, provide an exhibit list that includes all such exhibits, and exchange a witness list with the names and addresses of any potential witnesses. All expert witnesses shall be so designated with copies of all expert reports attached. At the case management conference, the trial court shall:

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

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

(B) Successive Postconviction Motion. Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held within 60 days. If a death warrant has been signed, the trial court shall expedite these time periods in accordance with subdivision (h) of this rule.

(C) Extension of Time to Hold Evidentiary Hearing. The trial court also may for good cause extend the time for holding an evidentiary hearing for up to 90 days.

(D) Procedures After Evidentiary Hearing. Immediately following an evidentiary hearing, the trial court shall order a transcript of the hearing which shall be filed within 30 days. Within 30 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review. The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal. The clerk of the trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service.

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

(6) Rehearing. Motions for rehearing shall be filed within 15 days of the rendition of the trial court's order and a response thereto filed within 10 days thereafter. The trial court's order disposing of the motion for rehearing shall be

rendered not later than 15 days thereafter.

(~~d~~g) Incompetence to Proceed in Capital Collateral Proceedings.

(1) A death-sentenced prisoner pursuing collateral relief under this rule ~~3.850 or rule 3.851~~ who is found by the court to be mentally incompetent shall not be proceeded against~~, subject to the limitations in subdivision (d)(3).~~if there are factual matters at issue, the development or resolution of which require the prisoner's input. However, ~~A~~all collateral relief issues that involve only matters of record and claims that do not require the prisoner's input shall proceed in collateral proceedings notwithstanding the prisoner's incompetency.

(2) 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 ~~rule 3.850~~ motion filed under this rule.

(3) 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.

(4) 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 with collateral counsel, 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.

(5) 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 require 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.

(6) The order appointing experts shall:

(A) identify the purpose of the evaluation and specify the area of inquiry that should be addressed;

(B) specify the legal criteria to be applied; and

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

(7) 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.

(8) 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.

(A) 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.

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

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

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

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

(C) Any written report submitted by an expert shall:

(i) identify the specific matters referred for evaluation;

(ii) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each;

(iii) state the expert's clinical observations, findings, and opinions on each issue referred by the court for evaluation, and indicate specifically those issues, if any, on which the expert could not give an opinion; and

(iv) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

(9) 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:

(A) the mental illness or mental retardation causing the incompetence;

(B) 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

(C) 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.

(10) 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.

(11) 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 rule ~~3.850~~3.850 motion only as to those issues that the court found required factual consultation with counsel.

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

(A) findings of fact relating to the issues of competency;

(B) copies of the reports of the examining experts; and

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

(13) 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.

(~~e~~h) After Death Warrant Signed.

The time periods provided for under this rule shall be expedited after a death warrant has been signed.

Court Commentary

1993 Adoption. This rule is consistent with the recommendation of the Supreme Court Committee on Postconviction Relief in Capital Cases, which was created because of the substantial delays in the death penalty postconviction relief process. The committee was created because of the inability of the capital collateral representative to properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delays in those cases. That committee recognized that, to make the process work properly, each death row prisoner should have counsel available to represent him or her in postconviction relief proceedings. The committee found that one of the major problems with the process was that the triggering mechanism to start or assure movement of the postconviction relief proceedings was the signing of a death warrant. In a number of instances, the courts were not aware of the problems concerning representation of a defendant until a death

warrant was signed. In other instances, the committee found that, when postconviction relief motions had been filed, they clearly had not moved at an orderly pace and the signing of a death warrant was being used as a means to expedite the process. The committee recommended that specific named counsel should be designated to represent each prisoner not later than 30 days after the defendant's judgment and sentence of death becomes final. To assure that representation, the committee's report noted that it was essential that there be adequate funding of the capital collateral representative and sought temporary assistance from The Florida Bar in providing pro bono representation for some inmates.

There is a justification for the reduction of the time period for a capital prisoner as distinguished from a noncapital prisoner, who has two years to file a postconviction relief proceeding. A capital prisoner will have counsel immediately available to represent him or her in a postconviction relief proceeding, while counsel is not provided or constitutionally required for noncapital defendants to whom the two-year period applies.

In the event the capital collateral representative is not fully funded and available to provide proper representation for all death penalty defendants, the reduction in the time period would not be justified and would necessarily have to be repealed, and this Court will forthwith entertain a petition for the repeal of the rule. In this context, it is important to emphasize that the governor agrees that absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, provided that counsel for death penalty defendants is proceeding in a timely and diligent manner. This Court agrees that the initial round of postconviction proceedings should proceed in a deliberate but timely manner without the pressure of a pending death warrant. Subdivision 3.851(b)(4) above addresses concerns of The Florida Bar and The Florida Bar Foundation.

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

1996 Amendment. Subdivision (c) is added to make the Court's decision in Huff v. State, 622 So. 2d 982 (Fla. 1993), applicable to all rule 3.850 motions filed by a prisoner who has been sentenced to death. Florida Rule of Judicial Administration

2.071(b) allows for telephonic and teleconferencing communication equipment to be utilized "for a motion hearing, pretrial conference, or a status conference." Teleconferencing sites have been established by the Department of Management Services, Division of Communications at various metropolitan locations in the state. The "Shevin Study" examined, at this Court's request, the issue of delays in capital postconviction relief proceedings and noted that travel problems of counsel cause part of those delays. The Court strongly encourages the use of the new telephonic and teleconferencing technology for postconviction relief proceedings that do not require evidentiary hearings, such as the hearing required under subdivision (c) of this rule. Only the attorneys need be involved in a hearing held under subdivision (c) of this rule; attendance of the postconviction defendant is not required.

2001 Amendment. Several new procedures are added to rule 3.851. New subdivision (b), Appointment of Postconviction Counsel, is added to ensure appointment of postconviction counsel upon the Supreme Court of Florida's issuance of mandate on direct appeal. New subdivision (c), Preliminary Procedures, provides for, among other things, the assignment of a qualified judge within 30 days after mandate issues on direct appeal and status conferences every 90 days after the assignment until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. These status conferences are intended to provide a forum for the timely resolution of public records issues and other preliminary matters. New subdivision (f), Procedure; Evidentiary Hearing; Disposition, sets forth general procedures. Most significantly, that subdivision requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay. See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993, 772 So. 2d 488, 491 (Fla. 2000).

APPENDIX B

Rule 2.050. Trial Court Administration

(a) (No Change)

(b) Chief Judge.

(1) (No Change)

(2) (No Change)

(3) (No Change)

(4) The chief judge shall assign judges to the courts and divisions, and shall determine the length of each assignment. All judges shall inform the chief judge of any contemplated absences that will affect the progress of the court's business. If a judge is temporarily absent, is disqualified in an action, or is unable to perform the duties of the office, the chief judge or the chief judge's designee may assign a proceeding pending before the judge to any other judge or any additional assigned judge of the same court. The chief judge may assign any judge to temporary service for which the judge is qualified in any court in the same circuit. If it appears to the chief judge that the speedy, efficient, and proper administration of justice so requires, the chief judge shall request the chief justice of the supreme court to assign temporarily an additional judge or judges from outside the circuit to duty in the court requiring assistance, and shall advise the chief justice whether or not the approval of the chief judge of the circuit from which the assignment is to be made has been obtained. The assigned judges shall be subject to administrative supervision of the chief judge for all purposes of this rule. When assigning a judge to hear any type of postconviction or collateral relief proceeding brought by a defendant who has been sentenced to death, the chief judge shall assign to such cases ~~the judge who presided over the original proceeding if that judge is active or otherwise available to serve unless otherwise directed by the supreme court~~<u>a judge qualified to conduct such proceedings under subdivision (b)(10) of this rule</u>. Nothing in this rule shall restrict the constitutional powers of the chief justice of the supreme court to make such assignments as the chief justice shall deem appropriate.

(5) (No Change)

(6) (No Change)

(7) (No Change)

(8) (No Change)

(9) (No Change)

(10) (No Change)

(c) (No Change)

(d) (No Change)

(e) (No Change)

(f) (No Change)

(g) (No Change)

(h) (No Change)