IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.851 AND FLORIDA RULE OF APPELLATE PROCEDURE 9.142

CASE NO. SC21-537

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Comment of Katherine Fernandez Rundle, State Attorney for the Eleventh Judicial Circuit, on proposed changes to Fla. R. Crim. P. 3.851 and Fla. R. App. P. 9.142

The Court invited comments on proposed amendments to Florida Rule of Criminal Procedure 3.851 eliminating the present prohibition against defendants representing themselves in capital postconviction proceedings in the trial court. The Court also invited comment on provisions in both Florida Rule of Appellate Procedure 9.142 and Florida Rule of Criminal Procedure 3.851 providing for automatic appeals of an order granting a motion to dismiss the motion for postconviction relief or to discharge counsel. The State Attorney for the Eleventh Judicial Circuit in Miami-Dade County, respectfully submits the following comments.

After careful consideration, I oppose the current proposed amendment to Rule 3.851 eliminating the present prohibition against defendants representing themselves in capital postconviction proceedings in the trial court. I also oppose the provisions in Florida Rule of Appellate Procedure 9.142 and Florida Rule of Criminal Procedure 3.851 providing for automatic appeals of an order granting a motion to dismiss the motion for postconviction relief or to discharge counsel. There are a myriad of practical, procedural, administrative and other considerations, many of which were cited by other agencies[1] in their comments in opposition to the proposed change, why I believe the interests of justice would best be served by retaining the current rule prohibiting defendants from representing themselves in a capital postconviction. First, pro se capital defendants would be challenged in identifying and complying with complex and time sensitive procedural and pleading requirements in capital post-conviction proceedings. Moreover, the Department of Corrections, and the court system, would be faced with numerous practical and logistical hurdles associated with inmate records requests, including public records requests pursuant to Fla. R. Crim. P. 3.852; and

[1] The following agencies or organizations have provided comments opposing the proposed amendment to Fla. R. Crim. P. 3.851 or identifying procedural and logistical challenges: Criminal Procedure Rules Committee, Florida Department of Corrections, Florida Mental Health Advocacy Coalition, Office of the Federal Public Defender for the Northern District of Florida-Capital Habeas Unit, Capital Collateral Regional Counsel-South, and Florida Association of Criminal Defense Lawyers.

redaction, storage and inmate access to the voluminous records, including recordings and photographs, that would be necessary to effectively litigate issues in a pro se capital post-conviction proceeding. These problems would be exacerbated by issues associated with prosecutors communicating with a pro se inmate in a timely and effective manner. Pro se defendants would have little or no experience, or practical ability to identify, communicate with, or comply with procedural requirements to pay for potential experts, nevertheless make travel arrangements for experts, or any other witness, if necessary. Finally, there are issues related to the potential for capital defendants requesting and being granted the ability to personally depose witnesses including, potentially, counsel or judges.[2]

In addition to the practical complexities of a pro se defendant litigating a capital post-conviction in the trial court, there are other considerations that transcend a request by defendants who have been convicted and sentenced to death, to represent themselves in post-conviction. The specific amendment concerning the requirement that postconviction defendants be represented by counsel was designed to fulfill the obligation that the death penalty be administered in a fair, consistent, and reliable manner. See In re Amends. to Fla. Rules of Jud. Admin.; Florida Rules of Crim. Procedure; and Fla. Rules of App. Proc.--Cap. Postconviction Rules, 148 So. 3d 1171, (Mem)–1172 (Fla. 2014). The necessity that the death penalty be applied in a fair, consistent, and reliable manner is mandated by the United States Supreme Court and this Court. See Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Arbalaez v. Butterworth, 738 So. 2d 326, 326-327 (Fla. 1999); Gordon v. State, 75 So. 3d 200, 202 (Fla. 2011) (“Any right of self-determination and self-representation during postconviction proceedings, however, does not outweigh this Court's solemn duty to ensure that the death penalty is imposed in a fair, consistent, and reliable manner, and to guarantee this Court's administrative responsibility to minimize delays in the postconviction process.”).

It is unlikely that pro se defendants could competently represent themselves in a capital post-conviction setting, which is inconsistent with the goals stated above. There are minimum requirements for experienced attorneys to be appointed as counsel in a capital case. See Fla. R. Crim. P. 3.112. It also seems incongruous that capital defendants who are not permitted to represent themselves on direct appeal, or on appeal of the post-conviction, could nevertheless represent themselves in a capital postconviction in which they must adequately protect the record for an appeal. In fact, this Court has held that a defendant sentenced to death does not have a right to self-representation on direct appeal under either the United States or Florida Constitutions, and death-sentenced appellants do not have a federal or state constitutional right to

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[2] See State v. Lewis, 656 So. 2d 1248, 1249 (Fla. 1994); Rodriguez v. State, 919 So. 2d 1252, 1279-1280 (Fla. 2006)(motion to depose trial judge properly denied).

proceed pro se in any postconviction appeals. See Gordon v. State, supra at 202. Davis v. State, 789 So. 2d 978, 980–81 (Fla. 2001); see also Martinez v. Court of Appeal of Cal., 528 U.S. 152, 120 S. Ct. 684, 145 L.Ed.2d 597 (2000). The stated reason is that the Court recognizes that it has "a constitutional responsibility to ensure the death penalty is administered in a fair, consistent and reliable manner, as well as having an administrative responsibility to work to minimize the delays inherent in the postconviction process." "These principals are best served in the capital postconviction appellate context when death sentenced appellants are represented by counsel." Gordon, supra at 202.

To counter the above problems, this Court has proposed the appointment of standby counsel. However, appointment of standby counsel can lead to litigation regarding the extent of standby counsel's involvement. See McCaskle v. Wiggins, 465 U.S. 168 (1984) (allegations of too much involvement); State v. Knight, 866 So. 2d 1195 (Fla. 2003) (allegations of too little involvement). Further, there are bound to be conflicts between standby counsel and capital defendants which will also lead to more litigation and even more delay.

Accordingly, in the absence of a knowing, intelligent and voluntary waiver or dismissal of the post-conviction proceeding itself[3], I oppose a change to the current rule prohibiting pro se capital post-conviction litigation in state court.

Lastly, I also oppose retaining the provisions in Florida Rule of Appellate Procedure 9.142 and Florida Rule of Criminal Procedure 3.851(i)(8) providing for automatic appeals of an order granting a motion to dismiss the motion for postconviction relief or to discharge counsel. This, too, will lead to unnecessary delay where a capital defendant chooses not to appeal the trial court's ruling. Normally, the right to appeal or NOT appeal is personal to the defendant under United States Supreme Court precedent. McCoy v. Louisiana, 138 S.Ct. 1500, 1508 (2018) (noting some decisions, including the right to forgo an appeal, are reserved for the client citing Jones v. Barnes, 463 U.S. 745, 751 (1983)); Garza v. Idaho, 139 S.Ct. 738, 746 (2019) (stating that the accused has the ultimate authority to decide whether to take an appeal and that the filing a notice of appeal is . . . within the defendant's prerogative). Thus, these appeals should be discretionary and not mandatory.

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[3] See Davis v. State, 257 So. 3d 100, 107 (Fla. 2008) (affirming voluntary dismissal of a capital post-conviction by a competent defendant).

Respectfully submitted on September 28, 2021.

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CERTIFICATE OF COMPLIANCE

I certify that this comment was prepared in compliance with the font requirements of Florida Rule of Appellate Procedure 9.045(b).

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