IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-113

LLOYD CHASE ALLEN, et. al,

Petitioners,

v.

ROBERT A. BUTTERWORTH, et.al,

Respondents.
_____/

REPLY TO RESPONSE TO EMERGENCY PETITION

COME NOW THE PETITIONERS and herein submit this Reply to the Response filed by the Respondents in the above-captioned action.

A. Reply to Standing/Authorization Arguments.

Respondents maintain that "[t]he instant proceeding is not authorized under CCRC-South's enabling statute" and that "Petitioners' counsel lack statutory authority, and Petitioners themselves lack standing to maintain this action" (Response at 2). Respondents arguments are, in turn, inappropriately raised in a responsive pleading, and, more importantly, are erroneous as a matter of law and runs contrary to the principles of fairness and equal protection.

1. Alleged Lack of Statutory Authority.

Respondents argument that Petitioners' counsel lack "statutory authority" to challenge the Act is an argument that lies in an action for *quo warranto*, not as a response to the relief sought by the Petitioners. If Respondents believe that

Petitioners' counsel have acted outside the scope of their statutory authority, Respondents must petition for a writ of *quo warranto*. See e.g. State ex. rel. Smith v. Brummer, 443 So. 2d 957 (Fla. 1984); State ex. rel. Smith v. Brummer, 426 So. 2d 532 (Fla. 1983). "Quo warranto is the proper method to test the `exercise of some right or privilege, the peculiar powers of which are derived from the State.'" Martinez v. Martinez, 545 So. 2d 1338, 1339 (Fla. 1989) (citation omitted).

Respondents essentially rely on State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), as legal authority in support of their argument that because the petition "does not expressly challenge the legality of the judgment or death sentence imposed on any specific petitioner, CCRC-South is not authorized to file it, under the new law or precedent (Response at 2). The Kenny litigation involved a petition for *quo warranto*, and is thus not applicable under these circumstances. Moreover, as pointed out in the Petitioners' initial filing, the litigation addressed in Kenny was a federal §1983 action seeking to enjoin Florida from using the electric chair, which this Court found to exceed CCRC's statutory mandate. Kenny, 714 So. 2d at 410. Respondents do not address this distinction, and also do not address Petitioners' argument that this situation is akin to that addressed by the Court in State ex rel. Butterworth v. Minerva, et. al, No. 88-612, where this Court rejected a petition for *quo warranto* based on the State's assertion that CCR's filing of a federal declaratory action to determine whether Florida qualified under the "opt-in" provisions of the Antiterrorism and Effective Death Penalty Act [AEDPA]

exceeded its statutory mandate.[1] Although Minerva was decided in the context of a petition for *quo warranto*, which is the appropriate forum for Respondents to challenge whatever they wish to with respect to any allegations that the Petitioners' counsel have exceeded their statutory authority, it is equally relevant to the Respondents' arguments in this context.

Respondents also posit that this action "greatly resembles" the action in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A review of Brown establishes otherwise. At issue in Brown was a joinder of over one hundred death-sentenced inmates all seeking habeas corpus relief in the form of the vacation of all death sentences based on allegations that the Court had reviewed materials not provided to the defendants. Id. at 1328. Because the issue presented in Brown required a detailed factual analysis of each case, the Court determined, after conducting a balancing of the "relevant advantages and disadvantages" of the circumstances, id. at 1329, disposed of the petition in Brown's case which effectively addressed all the other petitioners in that case. Id. at 1330. Brown is therefore very distinguishable; here, the various petitioners are not addressing factual matters in their cases. Rather, they are challenging the

[1]The instant petition is also similar to the electric chair litigation of recent years brought by the CCR/CCRC offices, see Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997); Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999), as well as litigation involving whether a defendant is insane to be executed. See Medina v. State, 690 So. 2d 1241 (Fla. 1997); Provenzano v. State, 24 Fla. L. Weekly S434 (Fla. 1999). This litigation does not "expressly challenge the legality of the judgment or death sentence imposed upon any specific petitioner" (Response at 2), yet the litigation has proceeded without the statutory concerns the Respondents are asserting in the instant proceedings.

facial invalidity of a legislative act.[2]

Putting aside the legal argument, however, on a common sense basis the Respondents argument makes no sense. It violates any notion of due process, equal protection, and the constitutional right to access to courts, for the State to pass laws and then preclude the affected parties from challenging those same laws. If Respondents are correct in their argument, then there is an even more severe problem associated with the Act in terms of its unconstitutional restrictions on the right to counsel that is afforded to the Petitioners. See Section F, supra. Allowing Petitioners to have collateral counsel and then precluding that counsel from challenging the laws that apply makes the right to counsel completely illusory.

2. Alleged Lack of Standing of Petitioners.

Respondents also argue that the Petitioners themselves lack standing because "counsel have not identified any client who imminently will be, or has been, harmed by the DPRA" (Response at 2), and that "it has never been alleged that the Reform Act has been applied, or has even been invoked, as to any petitioner" (Response at 4). This argument lacks merit. Respondent's lack-of-harm defense was essentially addressed by the Court's February 7 Order expressly finding that because of the "confusion among lawyers and judges relative to which rules of criminal procedure are applicable," the previous rules were re-adopted by this Court as to all Petitioners.

[2]Moreover, the Court's allowing several defendants represented by registry counsel to join the instant petition further demonstrates that the Respondents' position regarding Brown is misplaced.

Furthermore, the Act attempts to define the "what, when, where, and how" of postconviction relief in pending cases, future cases currently on direct appeal,[3] and future successive cases. Petitioners and their counsel are entitled to know what the rules and legal standards are going to be. Due process requires no less. On a pragmatic level, resource allocation for attorneys, investigators, and other support functions, not to mention financial resource allocation, are all dependent on the procedures that have been in place for years. Uprooting that procedure -- for example, curtailing the time frames for procuring public records and for filing the postconviction motion, vastly altering the pleading requirements to satisfy the Act's definition of "fully

[3]Since the Act was signed into law, the CCRC-South office has been inundated with notices from various counties in the Southern Region that public records in numerous cases pending on direct appeal are being produced in accordance with the Act. As of the date of this pleading, CCRC-South has received pleadings in State v. Ricardo Gonzalez, Dade Case No. 92-2141D; State v. Noel Doorbal, Dade Case No. F95-17281B; State v. Manuel Antonio Rodriguez, Dade Case No. F93-25817B; State v. Daniel Lugo, Dade Case No. F95-17281C; State v. Leonardo Franqui, Dade Case No. F92-2141B; State v. Juan Carlos Chavez, Dade Case No. F95-37867; State v. Jesus Delgado, Dade Case No. 90-36048; State v. Seburt Nelson Connor, Dade No. F92-39548; State v. Lynford Blackwood, Broward Case No. 95-001473CF10A; State v. Julio Moro, Broward Case No. 94-8906CF10A; State v. Billy Leon Kearse, St. Lucie Case No. 91-136-CF; State v. Paul Evans, Indian River Case No. 97-754-CF. Even since the Act was suspended by the Court on February 7, 2000, confusion continues. For example, several Dade County agencies have acted after February 7 as if the Act applies. See e.g. Notices of Compliance in State v. Franqui and State v. Gonzalez dated February 10, 2000 (Attachment A). On the other hand, in Broward County, agencies were notified not to comply with the Act until a decision by this Court. See Letters in State v. Moro and State v. Blackwood (Attachment B). This problem is only the tip of the iceberg in terms of the logistical, not to mention legal, problems associated with a "dual track" process.

pled," vastly altering the legal standards attendant to successive motions, and vastly altering the time when collateral counsel is appointed -- causes a great deal of chaos not just in the judicial arena but in the area of resource allocation. Petitioners and their counsel are clearly entitled to know what the rules are going to be, and Respondents have offered no cogent legal authority establishing otherwise.

Respondents' assertion that Petitioners have not demonstrated that the Act is being invoked in every case is noteworty -- the Act's provisions were effective upon signing by the Governor, and remained so until February 7, 2000. If the Respondents are not invoking, or do not intend to invoke, the Act's provisions, then why was the Act passed in the first place? If the Act is such a "major substantive recognition and delineation of a death-sentenced inmate's statutory right to postconviction counsel at public expense" (Response at 28), why were Respondents, through all the Assistant States Attorneys and Assistant Attorneys General, not invoking its provisions as required by the Act itself?[4] All Petitioners clearly have standing to challenge the

[4]Respondents point to specific Petitioners such as Gregory Mills and Sonny Boy Oats, determining that they have "little stake in resolution of any matter concerning the `dual track' system" since they have had a round of state and federal litigation (Response at 5). Of course, Petitioners have challenged other sections of the Act aside from the `dual track' provisions, including the restrictions limiting the time frame for filing successive petitions, the preclusion of claims of actual innocence and sentencing claims in successive petitions, and the standard set forth in the Act under which relief can be granted. See Emergency Petition at 22-23. Petitioners and their counsel are simply seeking to clarify their rights and remedies and duties and responsibilities. Surely if Petitioners such as Mr. Mills and Mr. Oats were not included in the petition and were to later file a challenge in a successive posture, there is not a scintilla of doubt that Respondents would argue that any challenge would be

constitutionality of the Act.

B. Reply to Equal Protection Argument.

Respondent argues that "the Act's provisions apply to all death sentenced defendants, regardless of whether their counsel is state appointed or private" (Response at 7). Respondents overlook the plain language of the Act, which states that the CCRC **shall** represent every person sentenced to death for the purpose of postconviction litigation, and that CCRC attorneys and private counsel appointed under § 27.710 "shall file only those postconviction or collateral actions authorized by statute." See § 27.702 (1) (emphasis added). Respondents also overlook the legislature's own staff analysis, which explicitly recognized that a "major component of this bill is its approach to limiting postconviction actions **which may be filed on behalf of persons sentenced to death by state compensated attorneys. . . It could be argued that because non-state paid lawyers could file actions not authorized by statute, that the bill's attempt to regulate actions filed by state paid lawyers in this manner raises constitutional questions with respect to equal protection**."[5]

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defaulted because of the failure to join the rest of the petitioners in the instant action.

[5]There are other equal protection problems associated with the Act. For example, as noted by the petition filed by the Northern CCRC office:

> People in Florida who are convicted of crimes, including first degree murder, who are not sentenced to death, are entitled to habeas corpus relief if, in an untimely or successive rule 3.850 motion, they can demonstrate through newly discovered evidence that they would probably be acquitted on retrial.

It is apparent that Respondents do not understand the equal protection argument. For example, Respondents argue that the amendment to the CCRC's enabling statute places a "substantive limit on the authority of public-paid counsel" and on "the statutory right to postconviction representation" by "plac[ing[CCRC counsel, and private counsel **appointed under 27.710,** on the same footing" (Response at 15) (emphasis added). The Respondents then point out the "irony" of the Petitioners' complaint about "the Legislature's attempt to place CCRC and private appointed counsel on equal footing" (Response at 15). Petitioners complaint is not that CCRC counsel and counsel appointed under the registry are placed "on equal footing." Petitioners enunciated their equal protection argument quite clearly in their petition:

> [U]nder the Act, for a death-sentenced defendant who has
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> DPRA mandates the opposite result for people sentenced to death. A man or woman on death row, who, in a successive application for habeas corpus relief, can establish through newly discovered evidence that he or she would probably be acquitted or receive a life sentence on retrial . . . may not be granted habeas corpus relief. DPRA imposes on people sentenced to death the additional burden of establishing by clear and convincing evidence that "but for constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense.

Petition for Writs of Mandamus, Etc., Asay v. Butterworth, No. SC00-154, at 25. Thus, the Act ensures that convictions and sentences in non-death cases are more reliable than convictions and sentences in capital cases. Respondents concede that "the Act sets forth a careful process for capital postconviction relief, and has no bearing on non-capital postconviction proceedings" (Response at 27).

> resources to hire private counsel, or is fortunate enough to locate counsel willing to handle the case *pro bono*, none of the restrictions of the Act would apply and that defendant would be entitled to proceed under Rule 3.850, which was not repealed *in toto* (unlike Rules 3.851 and 3.852).

Emergency Petition at 5-6 (footnote omitted).

Respondents point to nothing to refute Petitioners' reading of the Act, except to simply state that no equal protection problem is presented, and even if it were, the Court's opinion in Kenny "in fact resolve[s] the fact that the Legislature may properly set parameters for state funded collateral litigation" (Response at 7-8). The Legislature is theoretically free to do what it wants; it is up to the Court to determine whether legislative actions, if challenged, violate the Constitution. The Court in Kenny determined that CCR's litigation of a federal civil rights suit exceeded the CCR's statutory authority. That is qualitatively a different situation than Petitioners have raised in this proceeding. Respondents' defense of the Act on equal protection grounds is unavailing.

C. Reply to Due Process Argument.

Respondents assert that Petitioners' due process challenges to the Act "simply represent value judgments on opposing counsels' part" (Response at 8). Because of Respondents' skewed understanding of the concept of due process, their arguments are difficult to respond to. For example, Petitioners are at a loss to explain how the total removal of judicial discretion by a trial court to extend a time period regardless of

circumstance is a reflection of counsels' "value judgments."[6] Even the AEDPA provides for equitable tolling of the federal limitations period "when a movant untimely files because of extraordinary circumstances that are beyond his control and unavoidable even with diligence." Sandvik v. United States, 177 F. 3d 1269, 1271 (11th Cir. 1991). The Legislature's "legitimate[] concern[] with the delay endemic in

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[6]Counsel for Respondents appears to share the same "value judgments" as Petitioners' counsel when it comes to emergency situations that affect the State. For example, the undersigned counsel has had an oral argument in Michael Bruno's case reset three (3) times due to counsel problems with the State. The first argument was cancelled due to illness of the Assistant Attorney General; naturally Mr. Bruno's counsel did not object based on those unique circumstances. The second oral argument was cancelled after Mr. Martell filed an emergency motion stating that the Assistant Attorney General familiar with the case had left the office, and requested that the case be moved from the December docket to the January docket (Emergency Motion to Continue Oral Argument, Bruno v. State, No. 92,223, filed November 23, 1999). The Court then reset the argument to February of this year. **One week** before the February argument date (and over two months after the last argument was canceled), a new Assistant Attorney General from a different office than the office previously responsible for the case entered his appearance; that same Assistant Attorney General was involved in the ongoing warrant litigation in Terry Sims' case. The February setting was again canceled, and the case is now set for argument in March.

Petitioners' counsel discusses the Bruno situation because it exemplifies perfectly the due process problems associated with Act's draconian prohibition on any judicial act of discretion notwithstanding the circumstances. Of course, emergencies such as illness and staffing problems often arise; the lawyers that litigate these cases on both sides are human beings. Human beings get sick, have relatives die suddenly, or just up and leave employment without notice. A death warrant is suddenly signed and attorneys on both sides need to seek extensions and continuances. The State expects to be treated fairly, which of course is the underlying basis of the concept of due process, yet argues that Petitioners' same concerns are mere "value judgments." Respondents' position highlights the unfairness of the Act.

capital collateral proceedings" because of the "unfettered amendment of pleadings and the proliferation of successive pleadings" (Response at 8),[7] does not mean that the Act's draconian provisions automatically pass constitutional muster. See Nixon v. Singletary, 25 Fla. L. Weekly S59 (Fla. Jan. 27, 2000) (Harding, C.J., concurring) ("No defendant should be denied the relief requested simply because of delay").

Respondents do not discuss most of the specific due process concerns detailed by the Petitioners. Respondents ignore the glaring problem with the Act as pertaining to incompetent clients. See Carter v. State, 706 So. 2d 873 (Fla. 1997). Respondents ignore the fact that no investigative files from state agencies can be disclosed during the collateral process because the direct appeal is pending. See State v. Kokal, 562 So. 2d 324 (Fla. 1990).[8] See also State v. Riechmann, __ Fla. L. Weekly S__ (Fla. Feb. 24, 2000) (resentencing granted after discovery through Chapter 119 disclosure of the State's role in having *ex parte* communication with the trial judge where judge improperly delegated responsibility of drafting the sentencing order). Under the Act, the type of document discovered in Riechmann -- a rough draft of the sentencing order -- would not have been disclosed; the documents were discovered in the prosecution files, which are not public record until the direct appeal is affirmed. Kokal. Due

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[7] But see Jones v. State, 740 So. 2d 520, 524 (Fla. 1999) ("For twelve years and without explanation, the defendant sat on Death Row awaiting the competency hearing ordered by this Court. Thus, this delay, which was undisputably not due to appellant, deprived him of a timely hearing").

[8] See Dyckman, *Death Penalty Law is a Diabolical Trap*, ST. PETERSBURG TIMES, Feb. 24, 2000 (Attachment C).

process is going to be repeatedly thwarted under the Act.

Aside from repeating the legislature's concerns about delay, the Respondents in no way address the overruling of a wealth of this Court's cases which have interpreted the due process clause as it applies to capital postconviction proceedings. The Legislature cannot by statute overrule this Court's cases interpreting the Constitution. See, e.g. Chiles v. Phelps, 714 So. 2d 453, 456 (Fla. 1998).

Respondents argue that the Act's successor provisions do not violate due process because the Act sets forth the "same" standard as the federal standard upheld in Felker v. Turpin, 518 U.S. 651 (1996) (Response at 8-9). Respondents do not understand the argument made by the Petitioners and misstate federal law. Respondents' assertion that federal law permits "claims of actual innocence" in a successor petition for habeas corpus (Response at 8), is a flat misrepresentation of law. Under federal law, to reach the merits of a constitutional claim raised in a successive petition for habeas corpus, a defendant must allege actual innocence **as a gateway in order to reach the merits of a procedurally barred constitutional violation**. See Herrera v. Collins, 506 U.S. 390, 404 (1993) ("a claim of `actual innocence' is not itself a constitutional claim, but instead a gateway though which a habeas petitioner must pass to have his otherwise barred constitutional claims considered on the merits"). What Respondents also fail to acknowledge is that Congress, in enacting the AEDPA, did not make its successor provisions applicable to a certain class of cases; they apply to all cases irrespective of the sentence involved. Florida's Act, on the other hand, provides a more restrictive successor standard only for

capital cases;[9] individuals not sentenced to death remain entitled to seek relief in a successive posture under the previous legal regime. See Jones v. State, 591 So. 2d 911 (Fla. 1991). This is violative of due process and equal protection.

Moreover, the outcome of Felker is grounded on circumstances not present in the Florida regime due to the recent Act. For example, the Felker Court found that the AEDPA was not an unconstitutional suspension of the writ of habeas corpus because the AEDPA "does not deprive this Court of jurisdiction to entertain original habeas petitions." Felker, 518 U.S. at 658. Under the Act, however, a collateral attack by state-paid counsel can only consist of one postconviction motion, one appeal therefrom, and one petition for habeas corpus alleging ineffective assistance of appellate counsel. See § 924.058 (1) ("The defendant or the defendant's capital postconviction counsel **shall not file** more than one postconviction motion in the sentencing court, one appeal therefrom in the Florida Supreme Court, and one original capital postconviction action alleging the ineffectiveness of direct appeal counsel in the Florida Supreme Court").[10] No forum would be available for a successive claim that

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[9]To add insult to injury from Petitioners' perspective, while the Act applies only to capital cases, it prohibits **any** successive challenge based on ineligibility for the death sentence. But see Porter v. State, 723 So. 2d 191 (Fla. 1998); Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). See also Lightbourne v. State, 742 So. 2d 238 (Fla. 1999) (remanding for evidentiary hearing to determine effects of alleged Brady/newly discovered evidence claim on defendant's sentence raised in successor Rule 3.850 motion).

[10]This provision provides an exception under § 924.056 (5), which is the unduly restrictive successor provision discussed above.

does not fit the narrow exception set forth in 924.056 (5), as the Act's express language deprives this Court of entertaining an original successive action under its all writs jurisdiction.[11] Thus, analogy to Felker is inapposite.

Reliance on Felker and other federal constitutional jurisprudence also is misplaced since Florida, unlike federal law, did allow, prior to the Act, a free-standing claim of innocence of either the underlying offense, Jones v. State, 591 So. 2d 911 (Fla. 1991), or of the death penalty, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), to be raised in a successive posture. Neither Jones nor Scott rely on a defendant's assertion of innocence as a gateway to reaching an otherwise barred constitutional claim; rather, a claim of innocence was allowed to stand on its own notwithstanding the lack of any "constitutional error" in the trial. Under the Act, however, such free-standing claims of innocence are barred in a successive motion for postconviction relief for individuals sentenced to death; they remain a viable claim, however, in the non-capital context. This result too is violative of due process and equal protection.

Respondent's rely on Booker v. State, 514 So. 2d 1079 (Fla. 1987), for the proposition that the Legislature can "properly prescribe the means and method by

[11]Such restrictions do not apply to capital defendants who are not represented by state paid counsel, see supra Section B, nor do they apply in the non-capital context. Equal protection and due process violations abound in this Act. See Swafford v. State, 679 So. 2d 736, 740 (Fla. 1996) (Harding, J., concurring) (citation omitted) ("[I]n recognition of the `qualitative difference of death from all other punishments,' our jurisprudence also embraces the concept that `death is different' and affords a correspondingly greater degree of scrutiny to capital proceedings").

which appellate review may be obtained" (Response at 9). By its own words, not discussed by Respondents, Booker is inapposite. At issue in Booker was a challenge, on certification from a district court of appeal, to legislation prohibiting appellate review of an issue relating to the extent of departure from a guideline sentence. Booker, 514 So. 2d at 1080. The Brown Court explicitly stated its holding "is limited to the narrow issue of the extent of departure from a guidelines sentence within the statutory maximum, and **does not involve appellate review of claims based on other grounds**." Id. at 1082 n.2. (emphasis added). Further, the Court explicitly stated that "appellate scrutiny of the process by which a defendant is convicted and sentenced is not implicated by our holding herein." Id. Respondents fail to acknowledge that the case itself states its holding is limited strictly to the facts of the case.

Finally, Respondents rely on Vaught v. State, 410 So. 2d 147 (Fla. 1982), to argue that this Court has "consistently upheld §921.141 itself from challenges that it improperly attempts to regulate practice and procedure" (Response at 9).[12] The issue in Vaught was the constitutionality of the capital sentencing law. Id. at 149. The Court rejected the challenge because the statutory provisions were substantive as they "define[d] those capital felonies which the legislature finds deserving of the death penalty." Id. As explained in more detail in Section D, infra, the Act is in most respects procedural and thus violative of the separation of powers doctrine. The Act does not define crimes or punishments; it regulates the process for seeking postconviction relief

[12]Respondents make this argument in their due process section, not the separation of powers section.

in capital cases where state-paid counsel is involved. Vaught is therefore inapplicable to this situation.

D. Reply to Separation of Powers Argument.

While Respondents argue that "the entire area of substance and procedure has been describes as a `twilight zone'" (Response at 10), there are well-settled definitions of what constitutes substance as opposed to procedure which establish that the Act, in intent and effect, is procedural. "Substantive law is that which declares what acts are crimes and prescribes the punishment therefore, while procedural law is that which provides or regulates the steps by which one who violates a criminal statute is punished." State v. Garcia, 229 So. 2d 336 (Fla. 1969). Respondents attempt to classify the entire Act as an attempt by the Legislature to enact a "statute of limitations" (Response at 10), is not persuasive,[13] given that even the legislature recognized in its initial "whereas" clause that its intention was to regulate "the

[13]As relied on by Respondents, the Court's opinion in Kalway v. Singletary, 708 So. 2d 267 (Fla. 1998), is not especially on point (Response at 10). In upholding the legislation at issue in Kalway, the Court defined the subject matter therein as a "technical matter not outside the purview of the legislature." Id. at 269. The legislation at issue in this action is not merely a "technical matter," as even conceded by Respondents own view of the Act's scope: "The DPRA is a major substantive recognition and delineation of a death-sentenced inmate's statutory right to postconviction counsel at public expense" (Response at 28).

Moreover, that the Eleventh Circuit may have construed the deadlines under Fla. R. Crim. P. 3.850 as "statutes of limitations" (Response at 10), is irrelevant to the separation of powers argument presented by the Petitioners. It is this Court's view of state law that is dispositive. See Stringer v. Black, 503 U.S. 222 (1992).

processes by which an offender sentenced to death may pursue postconviction and collateral review of the judgment and sentence of death."

Essentially conceding that the Act contains many procedural aspects,[14] Respondents next argue that "such provisions were necessary to implement the substantive provisions" and that "such provision can be severed, so that the constitutional provisions of the Act may be given full force" (Response at 11) (citing Leapai v. Milton, 595 So. 2d 12 (Fla. 1992)). This Court has already recognized the pervasive nature of the Act's procedural provisions on the capital postconviction process:

> For example, procedural questions have arisen concerning the appointment of counsel for death-sentenced defendants whose appeals were pending prior to the effective date of the Act, as well as the procedures that apply to such defendants. Similarly, questions have arisen as to what procedures apply to defendants who had postconviction actions pending on the effective date. Procedural questions concerning the disclosure of public records also have been raised. In sum, there is confusion among lawyers and judges relative to which rules of criminal procedure are applicable.

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[14]Respondents state that "[t]he Legislature unquestionably had the authority to repeal those rules of criminal procedure cited in the Reform Act" (Response at 12-13). Petitioners agree that the legislature has the authority to repeal a rule of procedure assuming the required votes. See Article V, § 2(a), Florida Constitution. However, the legislature **does not** and **did not** have the authority to repeal Rule 3.850 "to the extent it is inconsistent with this act". See In Re: Clarification of Florida Rules of Practice and Procedure, 281 So. 2d 204 (Fla. 1973) ("The fact that this Court may adopt a statute as a rule does not vest the Legislature with any authority to amend the rule indirectly by amending the statute. In other words, an attempt by the Legislature to amend a statute which has become a part of the rules of practice and procedure would be a nullity").

Order, In Re: Rules Governing Capital Postconviction Actions, No. SC00-242, at 2-3. Petitioners respectfully submit that in light of the nature of the Act and its overrarching goal of promulgating procedures to govern judicial proceedings,[15] it is impossible to sever procedural and substantive provisions, and thus the entire Act must fall. State ex rel. Boyd v.Green, 335 So. 2d 789, 795 (Fla. 1978). Even were some aspect of the Act to survive a separation of powers challenge, those aspects still are vulnerable under the other constitutional arguments advanced by the Petitioners.

E. Reply to Suspension of Writ Argument.

Respondents assert that the Act does not result in a suspension of the writ of habeas corpus because a death-sentenced inmate "may also file an original postconviction action in this Court" (Response at 13). Respondents miss the point. Rule 3.850 is the procedural mechanism for asserting collateral attacks otherwise available under habeas corpus. State v. Bolyea, 520 So. 2d 563 (Fla. 1988); Haag v. State, 591 So. 2d 614 (Fla. 1992). The Act deprives this or any court from entertaining a successive action for relief in a postconviction case unless the narrow exception in 924.056 (5) is met. See 924.058 (1).[16] For example, as Petitioners argued in their

[15]Petitioners would note that, in response to the filing of their petition and other challenges, a proposed constitutional amendment has been drafted which would permit the legislature to enact procedural rules "for expediting particular classes of cases" (Attachment D).

[16]Petitioners' counsel have certainly "kept abreast of this Court's precedent" regarding this Court's previous limitations on those claims which can be entertained in a writ of habeas corpus (Response at 13). However, this too misses the point. The Act prevents collateral counsel from filing and deprives the Court from entertaining any petition not

original filing, Petitioners' counsel are precluded under the Act from invoking this or any court's jurisdiction to remedy a wrong not correctable under Rule 3.850 or in which no forum exists due to the Act's restrictions on successive postconviction motions. This result is a suspension of the writ and a due process violation. See e.g. James v. State, 615 So. 2d 668 (Fla. 1993) (allowing successive claim to be raised in Rule 3.850 motion regarding heinous, atrocious, or cruel jury instruction if objection was made and issue raised on appeal because it would not be "fair" to deprive defendant of benefit of new law); Witt v. State, 465 So. 2d 510 (Fla. 1985) (allowing successive Rule 3.850 motion upon a showing that "there has been a change in the law since the first petition or that there are facts relevant to issues in the cause that could not have been discovered at the time the first petition was filed. These two examples are not intended to set forth the exclusive means to justify a second petition"); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1988) (allowing retroactive application of Lockett claims); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (allowing retroactive application of Hitchcock claims); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992) (allowing successive Rule 3.850 motion alleging ineffective assistance of counsel because prior collateral counsel had conflict of interest preventing him from raising the issue); Fotopolous v. State, No. 91,227 (Order, August 25, 1999) (allowing amendment to Rule 3.850 motion "in an attempt to properly administer justice" despite the fact that appeal brief "set forth positions and arguments that had not been properly presented to the trial court in either

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authorized by statute, notwithstanding the nature of the claims asserted therein.

the original or amended Rule 3.850 motion"). Because the Act would clearly prohibit such petitions, it effectively operates to suspend the writ of habeas corpus under the Florida Constitution.[17]

[17]But the Act would not prevent a non-capital defendant from raising a second postconviction action, thus also violating equal protection. See Section B, supra.

F. Response to Regulation of State-Funded Counsel Argument.

Respondents assert that Petitioners "have failed to demonstrate that any of the new legislation has adversely affected their advocacy" (Response at 14), yet at the same time have asserted that Petitioners' counsel are "not authorized to file" the instant action (Response at 2). Petitioners' counsel can hardly imagine a more severe restriction on their ability to represent their clients than to have a law passed that affects their clients which they are statutorily prohibited from challenging in court. Respondents own arguments establish that the Act "adversely affects" the representation of Petitioners' counsel. See Response at 21 (discussing the Act's "reasonable condition on a defendant's right to counsel--cooperation by that defendant"); 23 (requirement of "fully plead" motions as a "requirement placed on an inmate's exercise of this right to postconviction counsel"); 25 (discussing the "conditions on successive postconviction actions"). All of these "conditions" are undue restrictions on the right to effective collateral counsel.

This Court has exclusive authority, derived from the Florida Constitution, to determine matters relating to the regulation of the practice of law in Florida. See Article V, § 2(a), 15, Fla. Const.; Fla. R. App. P. 9.030 (a)(3). Aside from imposing restrictions on state-paid postconviction lawyers that do not apply to privately-retained counsel, see Section B, supra, the Act expressly limits state-paid lawyers to filing actions authorized by statute, see § 27.702; § 924.055 (2), encourages the imposition of sanctions on any attorney who violates these restrictions, and requires violations by state-paid counsel to be reported to the legislature, impliedly threatening that person's

future employment. See § 27.702; § 924.055 (2); § 924.305. This cannot be squared with the principle that "[t]he state is **constitutionally obliged** to respect the professional independence of the public defenders whom it engages." State ex rel. Smith v. Brummer, 426 So. 2d 532, 533 (Fla. 1982). The Act also expressly conflicts with numerous ethical canons that counsel, whether postconviction or otherwise, have a duty to follow. See, e.g. R. Regulating Fla. Bar 4-5.4 (d) (attorney has ethical obligation not to "permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services"); 4-1.7 (b) ("A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest").

Attorneys have an ethical obligation to zealously represent the client. R. Regulating Fla. Bar 4-1.3, Comment. The Act, however, has a chilling effect on the zealous representation that Petitioners' counsel owe to their clients. For example, a function of a lawyer is to make "good faith argument for an extension, modification, or reversal of existing law." See R. Regulating Fla. Bar 4-3.1. The Act, however, threatens collateral counsel with sanctions for raising an issue which might be deemed to "abuse" a petition, or which a court might find "frivolous or procedurally barred or that should have been raised on direct appeal," or which is determined to "adversely affect[] the orderly administration of justice." See § 924.395 (1)(a); (1)(b); (1)(d). These overt threats are contrary to counsels' ethical obligations. This Court has at times modified

and/or reversed prior precedent based on arguments raised by CCR/CCRC counsel, see, e.g. Jones v. State, 591 So. 2d 911 (Fla. 1991) (overruling prior case law regarding standard for newly discovered evidence); Carter v. State, 706 So. 2d 873 (Fla. 1997) (overruling prior case law regarding right for postconviction defendant to be competent), by non-CCR/CCRC counsel, see, e.g. Stephens v. State, 24 Fla. L. Weekly S554 (Fla. Nov. 24, 1999) (receding from prior case law regarding appropriate standard of review in ineffective assistance of counsel claims), or by direct appeal counsel. See, e.g. Delgado v. State, 2000 WL 124382 (Fla. Feb. 3, 2000) (receding from prior case law on issue of burglary statute). The Court has likewise agreed with arguments raised by collateral counsel that new law should be applied to previously-decided issues. See, e.g. James v. State, 615 So. 2d 668 (Fla. 1993) (allowing successive claim to be raised in Rule 3.850 motion regarding heinous, atrocious, or cruel jury instruction if objection was made and issue raised on appeal because it would not be "fair" to deprive defendant of benefit of new law); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1988) (allowing retroactive application of Lockett claims); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (allowing retroactive application of Hitchcock claims). By chilling state-paid collateral counsel's ability to seek modification and/or reversal of precedent, the Act takes one of the most important legal tools away from Petitioners' counsel and makes collateral counsel subservient to the whim of the legislature.

G. Conclusion.

The Respondents have not demonstrated that the Act is constitutional. In fact many of Respondents arguments highlight the constitutional problems associated with the Act. Petitioners are entitled to the relief sought in their petition.

I HEREBY CERTIFY that a true copy of the foregoing petition has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 24, 2000.

NEAL A. DUPREE
Capital Collateral Regional Counsel
Southern Region
Florida Bar. No. 311545
101 NE Third Avenue, Suite 400
Ft. Lauderdale, FL 33301
(954) 713-1284

TODD G. SCHER
Litigation Director
Florida Bar. No. 0899641

By:_____
TODD G. SCHER

Copies Furnished to:

Fariba Komeily & Sandra Jaggard
Department of Legal Affairs
Rivergate Plaza, Suite 950
444 Brickell Avenue
Miami, FL 33131

Richard Martell
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050

Kenneth Nunnelley & Judy Taylor Rush
Department of Legal Affairs
444 Seabreeze Boulevard, 5th Floor
Daytona Beach, FL 32118

Leslie Campbell
Department of Legal Affairs
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299

Carol Dittmar
Department of Legal Affairs
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, FL 33607