

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

LLOYD CHASE ALLEN, GUILLERMO OCTAVIO ARBELAEZ, LANCELOT URILEY ARMSTRONG, MCARTHUR BREEDLOVE, MICHAEL GEORGE BRUNO, MILFORD WADE BYRD, ANA MARIA CARDONA, ANTONIO MICHAEL CARTER, JIMMY LEE CONEY, JIM ERIC CHANDLER, DAVID COOK, JERRY WILLIAM CORRELL, ANGEL NIEVES DIAZ, JAMES AREN DUCKETT, JAMES FLOYD, HENRY GARCIA, BURLEY GILLIAM, JERRY LEON HALIBURTON, PATRICK HANNON, ROBERT HENRY, BRANDY B. JENNINGS, TERRELL M. JOHNSON, VICTOR TONY JONES, CHARLES KIGHT, DEAN KILGORE, ANTON KRAWCZUK, CLEO DOUGLAS LECROY, LAWRENCE FRANCIS LEWIS, IAN DECO LIGHTBOURNE, EDUARDO LOPEZ, RODNEY TYRONE LOWE, MATTHEW MARSHALL, MARBEL MENDOZA, GREGORY MILLS, SONNY BOY OATS, MANUEL PARDO, DWAYNE PARKER, NORMAN PARKER, ROBERT PATTON, HARRY PHILLIPS, NORBERTO PIETRI, THOMAS DEWEY POPE, ROBERT BEELER POWER, WILLIAM REAVES, MICHAEL RIVERA, RICKEY BERNARD ROBERTS, JUAN DAVID RODRIGUEZ, RIGOBERTO SANCHEZ-VELASCO, FRANK LEE SMITH, DENNIS SOCHOR, ROY CLIFTON SWAFFORD, DAVID LEE THOMAS, WILLIAM THOMPSON, WAYNE L. TOMPKINS, GEORGE JAMES TREPAL, MANUEL VALLE, JASON DIRK WALTON, KENNETH WATSON, and JOEL DALE WRIGHT,

Petitioners,

v.

ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

and STATE OF FLORIDA,

Respondents.

_____ /

EMERGENCY PETITION FOR WRIT OF PROHIBITION, TO INVOKE THIS COURT'S ALL WRITS JURISDICTION, MOTION TO DECLARE UNCONSTITUTIONAL THE "DEATH PENALTY REFORM ACT OF 2000," WITH REQUEST FOR IMMEDIATE TEMPORARY INJUNCTIVE RELIEF, FURTHER BRIEFING, AND ORAL ARGUMENT

I. INTRODUCTION.

Petitioners are death-sentenced inmates represented by the office of the Capital Collateral Regional Counsel-South. During a hastily-called special session of the

Florida Legislature, the Legislature passed the "Death Penalty Reform Act of 2000" [hereinafter "Act"]. The Act has repealed the rules of criminal procedure which govern the procedures attendant to a capital defendant's ability to seek postconviction relief in the State of Florida, namely Fla. R. Crim. P. 3.851 (relating to collateral relief after death sentence has been imposed), and Fla. R. Crim. P. 3.852 (relating to capital postconviction public records production). Fla. R. Crim. P. 3.850 was also repealed to the extent that it is inconsistent with the Act. The Act is a stunning piece of legislative intrusion into judiciary, thereby violating the separation of powers doctrine, a suspension of the writ of habeas corpus, and an affront to numerous other significant constitutional and statutory rights afforded to death-sentenced inmates in the State of Florida both under the Florida and United States Constitutions.¹

Based on the foregoing, Petitioners request an immediate order from this Court enjoining the Respondents from invoking and/or applying the Act in any case, move for a briefing schedule and oral argument, and/or move at this time to declare the Act unconstitutional.² Petitioners further request that they be held harmless during the period of time under which the Act is being challenged, and that, under clear precedent

¹Due to the sweeping and unprecedented depth of the reforms set forth in the Act, and the urgent time frame made necessary by the immediate effective date of the Act, all of the Act's substantial constitutional problems cannot be addressed in such a short time. Thus Petitioners are requesting additional briefing on this subject.

²Petitioners are already aware that the Respondents are seeking to invoke the Act. In an Orange County case, the prosecutor filed a motion to require collateral counsel to file a "fully pled" postconviction motion in accordance with the Act (Attachment A). Attached to the motion is an email from Richard Martell, Chief of Capital Appeals, to all the Attorneys General in Florida, as well as several States Attorneys.

set forth by the Court in State ex rel. Boyd v. Green, 355 So. 2d 789 (Fla. 1978), the Court reinstate Fla. R. Crim. P. 3.850, 3.851, and 3.852.

Petitioners' counsel are aware that there is language in the limiting their responsibilities to filing "only those postconviction or collateral actions authorized by law." § 27.702 (1) (as amended). Further, the Act provides in its legislative intent section that "[n]o state resources be expended in violation of this act." § 925.055 (2) (as amended). In light of the Legislature's repeal of rules 3.850, 3.851 and 3.852, however, there is no procedural mechanism governing Petitioners' cases. CCRC-South believes that it has the obligation to seek relief from this Court under these circumstances,³ particularly in light of the Act's express provisions that the statutory amendments are effective "unless and until such procedures are revised by rule of rules adopted by the Florida Supreme Court." See §§ 924.058; 924.059. Furthermore, the Act drastically affects all pending cases:

(3) All capital postconviction actions pending on the effective date of this act **shall be barred, and shall be dismissed with prejudice**, unless fully pled in substantial compliance with s. 924.058, **or with any superseding order or rule**, on or before:

(a) The time in which the action would be barred by this section if the action had not begun prior to the effective date of this act, or

³This situation is akin to the CCR's filing of a declaratory judgment suit in federal district court in order to clarify whether Florida qualified as an "opt-in" state for purposes of the expedited procedures included in the federal Anti-Terrorism and Effective Death Penalty Act of 1996. Respondents there filed a *quo warranto* petition against CCR, alleging that the federal "opt-in" litigation was outside the scope of CCR's statutory mandate. This Court rejected the Respondent's arguments. State ex rel. Butterworth v. Minerva, et. al, No. 88-612 (Order Denying Petition for *Quo Warranto*).

(b) Any earlier date provided by the rules or law, or court order, in effect immediately prior to the effective date of this act.

§ 924.057 (3) (emphasis added). Thus Petitioners, through their CCRC-South counsel, seek the relief requested herein in order to find out what the rules are going to be which govern their cases and request that they be held harmless throughout this challenge.⁴

II. JURISDICTION.

This Court has jurisdiction to issue writs of prohibition and all writs necessary to the complete exercise of its jurisdiction under Art. V § 3(b)(7) of the Florida Constitution. See, e.g. Jones v. Butterworth, 691 So. 2d 481 (Fla. 1997); Provenzano

⁴Petitioners are asking for immediate action at least with respect to the enforcement of the Act by the Respondents, as there now exists no procedural mechanism by which Petitioners can enforce their rights to seek collateral relief of their convictions and sentences of death. Respondents can hardly be heard to complain. See Linda Kleindienst, *Legislators May Give Death Row Inmates a Choice: Electric Chair or Injection*, FT.LAUDERDALE SUN-SENTINEL, January 5, 2000 (emphasis added) ("We've looked at all of these issues and we believe we are on solid ground," said Lt. Governor Frank Brogan, who serves as Bush's chief lobbyist. **But do we believe it will be challenged? Absolutely.**"); Transcript, *In Re: Public Meeting, Commission on Capital Cases*, Vol. 2 at 113 (statement of Brad Thomas) ("Now there will be litigation and discussion, and the court will make a decision whether they agree with the legislature's assertion here if they do pass the bill").

Petitioners would also note that the Act does not apply in the non-capital context, nor does it apply in the capital context for individuals represented by private or *pro bono* counsel. See § 27.702 (1) (as amended) ("the capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by statute"). Thus, it necessarily falls to either CCRC or other state-paid counsel to seek clarification of the rules governing these cases. It certainly would be an odd (and unfair) result for the Legislature to pass laws affecting a special class of persons, and at the same time restrict that class of persons from challenging the constitutionality of those same laws.

v. Moore, 737 So. 2d 551 (Fla. 1999); Britt v. Chiles, 704 So. 2d 1046 (Fla. 1997); Dickinson v. Stone, 251 So. 2d 268 (Fla. 1971). Although "[u]nder ordinary circumstances, this Court prefers that the constitutionality of a statute be considered first by a trial court," an entire class of cases in the judicial system is affected by the recently-enacted legislation, and so "the functions of government will be adversely affected unless an immediate determination is made by this Court." Dickinson, 251 So. 2d at 271.⁵

III. THE ACT VIOLATES EQUAL PROTECTION AND DUE PROCESS.

Perhaps the most blatant constitutional problem associated with the Act is that its provisions apply only to collateral counsel who are paid by the State, namely, CCRC counsel or counsel appointed under the Registry. Section 2 of the Act mandates that CCRC **shall** represent every person sentenced to death for the purpose of prosecuting collateral challenges, and that "[t]he capital collateral regional counsel and the attorneys appointed pursuant to s. 27.710 shall file only those postconviction or collateral actions authorized by law." Thus, under the Act, for a death-sentenced defendant who has 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).⁶

⁵Should the Court determine that the constitutionality of the Act be better addressed by the trial courts first, Petitioners would request that this cause be remanded.

⁶This blatant equal protection problem has been the subject of media editorials. Recently, an editorial in the St. Petersburg Times acknowledged this problem and

A law which applies to defendants who are indigent but not to those who are not is a blatant violation of equal protection. Griffin v. Illinois, 351 U.S. 12 (1955); Evitts v. Lucey, 469 U.S. 387 (1984). The House of Representatives Committee on Crime and Punishment legal staff analysis recognized that the legislation applied only to state-paid counsel, not private counsel, and recognized the equal protection problem:

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. The bill controls the duties of the capital collateral regional counsel and other state compensated postconviction counsel by amending s. 27.702 to require that these lawyers file only postconviction actions authorized by statute. **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.**

referred to the solution offered by Senator Locke Burte, the senate sponsor of the Death Penalty Reform Act:

The law also cuts off funds to state-paid lawyers who file more appeals than the law allows. Acknowledging that some inmates might have additional claims under such basic constitutional rights as habeas corpus--which not even the Florida Legislature can repeal--Burt rationalized that inmates could still get into court by paying their own lawyers or finding lawyers to work for free.

By his admission, Florida now officially boasts two brands of justice: one for the rich, one for the poor.

Editorial, THE LAW'S BURDEN,, The St. Petersburg Times, January 9, 2000.

The House analysis, however, believed that this Court had already rejected "a similar assertion" in State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), where the Court held that it was beyond CCC's statutory mandate to litigate a federal declaratory judgment suit and that no equal protection violation was established. Id. at 410.

However, the restrictions contained in the Act discussed herein are not in any way "similar" to the narrow issue decided in Kenny. In Kenny, the equal protection argument, in the Court's view, was untenable in light of the fact that the underlying action involved--a federal civil rights suit--was determined to be outside the scope of CCRC's mandate and that the legislature's restriction on state-funded counsel's duties was "a reasonable allocation of resources." Id. Here, of course, the Act on the one hand curtails the ability of Petitioners' counsel to pursue those actions **authorized** by statute, namely, collateral attacks on the conviction and sentence, yet at the same time provides that those restrictions do not apply to private or *pro bono* counsel.⁷ A completely different set of rules now applies by which state-paid collateral attorneys must follow as opposed to private or *pro bono* counsel. Different **rules and procedures** cannot be arbitrarily applied to different defendants based on their

⁷It could not be seriously argued that equal protection would not be violated if, for example, a rule required a public defender be brought to trial within 60 days, whereas a paying client would get six months. Or that a public defender client is not entitled to raise an insanity defense whereas a paying client could. Or that a public defender client must engage in reciprocal discovery whereas a paying client does not. Or that a public defender client may be tried while incompetent whereas a paying client may not. The list goes on. This simply illustrates the difference between the restrictions placed on state-paid counsel in the Act as opposed to the drastically different situation addressed in Kenny. A public defender client and a paying client must follow the same rules and procedures. The same law and legal standards must apply to both.

indigency status. This is not at all comparable to the issue addressed in Kenny. There are only so many restrictions that can be placed on counsel before the right to counsel is rendered illusory and the equal protection violation can no longer be shielded under the cloak of a "reasonable allocation of resources."

By providing state-paid counsel and providing a mechanism by which state-paid counsel can collaterally challenge a capital defendant's conviction and sentence, "the State [cannot] in effect make it available only to the wealthy." Evitts, 469 U.S. at 404. And while "[p]roviding equal justice for poor and rich, weak and powerful alike is an age-old problem," Griffin, 351 U.S. at 16, "our own constitutional guarantees of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons." Id. at 17. The sections of the Act which attempt to regulate the functions of state-paid counsel in death penalty cases must fall as they violate the equal protection clauses under the Florida and United States Constitutions.

In addition to the invidious equal protection violations, the Act belies any notion that due process applies in capital postconviction litigation. The Act totally removes the notion of judicial discretion in any aspect of the process.⁸ A judge has no discretion to extend a time period regardless of the circumstances. See § 924.056 (3)(d) ("The time for commencement of the postconviction action may not be tolled for any reason or cause"). A judge has no discretion to permit an amendment regardless

⁸The only discretion remaining with a court is to grant one thirty (30) day extension to the court reporter to transcribe a capital trial . See § 924.056 (2).

of circumstances. See id. ("All claims raised by amendment of a defendant's capital postconviction action are barred if the claims are raised outside the time limitations provided by statute for the filing of capital postconviction actions"). A judge has no discretion to continue a hearing under any circumstances. See § 924.059 (2);(3).⁹ The Act proscribes a judge's discretion to enter a stay of execution. See § 924.095 ("No claim filed after the time required by law shall be grounds for a judicial stay of any warrant"). In fact, the Act's provisions overturn every case in which this Court has held that due process applies to capital collateral litigation and every case in which the Court has set the parameters by which these cases are governed.

For example, by its draconian prohibition on amendments regardless of circumstance, the Act overrules all cases in which this Court has held that an amendment is authorized when a state agency has improperly withheld public records. See, e.g. Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994) ("Reed should be allowed a reasonable time to obtain any records to which he is entitled and allowed a reasonable

⁹The Act's proponents clearly believe that any "delay" in capital postconviction cases is due entirely to the defense. This of course is not the case. See, e.g. Jones v. State, 740 So. 2d 520 (Fla. 1999); Peede v. State, 24 Fla. L. Weekly S391 (Fla. 1999). By removing any discretion whatsoever, the Act is unduly harsh. What if there is a hurricane and a pleading cannot be filed on the due date? What if a hurricane causes a shutdown and an evidentiary hearing must be continued. This year alone the courts of south Florida were closed on several days due to various storms. Such acts of God, particularly in South Florida, are not a rarity, yet the Act makes no provision whatsoever for unforeseen circumstances. Other unforeseen circumstances on occasion arise as well, for example, an illness. Petitioner Michael Bruno, for example, has had two oral argument dates cancelled on request of the State, the first for illness of the Assistant Attorney General, the second because the Assistant Attorney General left the office and no one was available to do the argument. A judge should always maintain the ability to exercise discretion based on the circumstances.

time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents"); Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1993) ("Hoffman may seek the relevant public records . . . and within a reasonable time shall be permitted to amend his petition under rule 3.850, raising any new ground brought to light by the disclosure of the public records"); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993) ("Should the trial court determine that Walton is entitled to disclosure of the records at issue, we direct that Walton be granted an additional thirty days from the rendition of that ruling in which to amend his rule 3.850 motion to permit additional claims or facts discovered as a result of the disclosure to be raised before the trial court"); Anderson v. State, 627 So. 2d 1170, 1172 (Fla. 1993) ("The various state agencies must either comply with Anderson's requests or object pursuant to the procedures set forth by this Court and under chapter 119. We direct that Anderson be granted thirty days to amend his motion, computed from the date the various state agencies deliver to Anderson the records to which he is entitled"); Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1994) ("Therefore, we direct the state attorney's office to tender to the trial court the portions of its records that it sealed for an in camera inspection of those documents. . . . If those documents reveal any new claims, i.e., claims other than those raised in the instant motion and petition, Lopez will have thirty days from the date of access to file an amended postconviction motion raising those new claims"); Provenzano v. Dugger, 561 So. 2d 541, 547 (Fla. 1990) ("[W]here a defendant's prior request for the state attorney's file has been denied, we believe that it is appropriate for such a request to be made as part of a motion for postconviction

relief. . . In the event that a disclosure is ordered, the defendant will then have an opportunity to amend his motion to allege any Brady claims which might be exposed"); Mendyk v. State, 592 So. 2d 1076,1082 (Fla. 1991) ("Having found merit to Mendyk's claim under chapter 119, Florida Statutes (1989), we extend the two-year time limitation of Florida Rule of Criminal Procedure 3.850 for sixty days from the date of disclosure solely for the purpose of providing Mendyk the opportunity to file a new motion for post-conviction relief predicated upon any new claims arising from the disclosure"); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) ("[T]he state attorney shall disclose to Engle's attorney those portions of his file covered by chapter 119, Florida Statutes (1987), as interpreted in State v. Kokal, 562 So. 2d 324 (Fla. 1990). The two-year time limitation of Florida Rule of Criminal Procedure 3.850 shall be extended for sixty days from the date of such disclosure solely for the purpose of providing Engle with the opportunity to file a new postconviction motion relief predicated upon any claims under Brady v. Maryland, 373 U.S. 83 (1963), arising from the disclosure of such files. In this manner, Engle will be placed in the same position as he would have been if such files had been disclosed when they were first requested"); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993) ("Muehleman has sixty days from the date he receives the records to which he is entitled or from the date of this opinion, whichever is later, to amend his 3.850 petition to include any facts or claims contained in the sheriff's records").

The Act's prohibition on any amended motions, in conjunction with setting up a "dual tracking" procedure for capital cases, has created a further glaring due process

problem by assuring that no claims for relief based on records in the possession of a state agency can ever be brought. According to the Act, the investigation of collateral claims is going on at the same time as the direct appeal is pending. However, under Florida law, a state agency is precluded from disclosing any records on cases in which there is "pending prosecution or appeals." As this Court has held, this section "means ongoing prosecutions or appeals from convictions and sentences which have not become final." State v. Koka, 562 So. 2d 324, 326 (Fla. 1990). Even under the provisions of the Act which provide for state agencies to disclose records, no state agency would be obligated, and in fact may be prohibited, from disclosing any record in a pending capital case because the direct appeal is not yet final.¹⁰ Thus the entire public records process would be a sham and no records would be provided; at best, limited records might be disclosed, but certainly not records which an agency would not want to disclose in the event a retrial might be necessary as a result of a reversal on direct appeal.¹¹ Those, of course, are the records which often provide the source of a collateral challenge. See, e.g. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Young v. State, 739 So. 2d 553 (Fla. 1999).

The Act also precludes any due process considerations for a capital defendant who may be incompetent to assist counsel in preparing a postconviction motion. In Carter v. State, 706 So. 2d 873 (Fla. 1997), this Court held that "a judicial

¹⁰Presumably, state agencies are loathe to disclose such records in the event that a defendant is afforded a new trial on direct appeal.

¹¹Section 2 of the Act permits a state agency to withhold information it is entitled to withhold under law.

determination of competency is required when there are reasonable grounds to believe that a capital defendant is incompetent to proceed in postconviction proceedings in which factual matters are at issue, the development or resolution of which require the defendant's input." Id. at 875. Due to the draconian prohibition on amendments, however, a defendant adjudged to be incompetent would be precluded from amending a postconviction motion if he or she is restored to competency after the statutory time deadline. This of course violates due process as well as the right to counsel. Id. at 875 ("Unless a death-row inmate is able to assist counsel by relaying such information, the right to collateral counsel, as well as the postconviction proceedings themselves, would be practically meaningless").

The foregoing discussion is meant to simply highlight the serious equal protection and due process problems with the Act recently passed by the Legislature. Because the Act is a blatant constitutional violation, it is void and must be stricken.

IV. THE ACT VIOLATES THE SEPARATION OF POWERS DOCTRINE.

By its own stated purpose, the Act's initial "whereas" clause explicitly acknowledges that the legislation is intended to regulate "the processes by which an offender sentenced to death may pursue postconviction and collateral review of the judgment and sentence of death." The Act also explicitly recognizes that its provisions are effective "unless and until such procedures are revised by rule of rules adopted by the Florida Supreme Court." See §§ 924.058; 924.059.

Under Art. V § 2(a) of the Florida Constitution, this Court has the exclusive authority to "adopt rules for the practice and procedure in all courts, including the time

for seeking appellate review." Markert v. Johnson 367 So. 2d 1003 (Fla. 1978); Gator Freightways v. Mayo, 328 So. 2d 444 (Fla. 1976); State ex rel. Times Pub. Co. v. Patterson, 451 So. 2d 888 (Fla. 2d DCA 1984); SerNester, Inc. v. General Finance Loan Co. of Miami Northwest, 167 So. 2d 230 (Fla. 3d DCA 1964), *appeal dismissed*, 174 S0. 2d 35 (Fla. 1965). Any attempt to create rules of practice and procedure on the part of the Legislative branch is a violation of the separation of powers doctrine. Johnson v. State, 328 So. 2d 842 (Fla. 1st DCA 1975), *aff'd.*, 346 So. 2d 66 (Fla. 1976), In re Adoption of a Minor Child, 570 So. 2d 340 (1990), *approved in part*, 593 So. 2d 185 (Fla. 1990). While judicial rules of practice and procedure may be repealed by a general law enacted by a two-thirds vote of the legislature, the power to initiate them rests in this Court. Johnson v. State, 336 So. 2d 93 (Fla. 1976); Swan v. State, 322 So. 2d 485 (Fla. 1975).

There can be no doubt that most of the Act's provisions are in actuality "practice and procedure" within the meaning of Art. V, § 2(a). This Court has described the difference between substance and procedure with respect to the criminal law:

As related to criminal law and procedure, substantive law is that which declares what acts are crimes and prescribes the punishment therefor, 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 236 (Fla. 1969) (emphasis added).

We have said that "practice" means the method of conducting litigation involving rights and corresponding defenses, Skinner v. City of Eustis, 147 So. 2d 116 (Fla.1941) or the manner in which the power to adjudicate or determine is exercised, Sheldon v. Powell, 128 So. 2d 258 (1930). It is also said that "practice" is the method of

conducting litigation. Dadswell v. State ex rel. Phillips, 186 So. 2d 274 (Fla. 2nd DCA 1966).

* * *

From extensive research, I have gleaned the following general tests as to what may be encompassed by the term "practice and procedure."

Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

Examination of many authorities leads me to conclude that substantive law includes those rules and principles which fix and declare the primary rights of individuals as respects their persons and their property. As to the term "procedure," I conceive it to include the administration of the remedies available in cases of invasion of primary rights of individuals. The term "rules of practice and procedure" includes all rules governing the parties, their counsel and the court throughout the progress of the case from the time of its initiation until final judgment and its execution. See Kellman v. Stoltz, 1 F.R.D. 726 (N.D. Iowa 1941).

The Revised Criminal Rules of Procedure describe the machinery by which substantive rights are protected and enforced. They are within the purview of the term "practice and procedure" as used in Fla. Cons., Art. V. 3, F.S.A.

In re Florida Rules of Criminal Procedure, 272 So. 2d 65, 65-66 (Fla. 1972)(emphasis added).

Some examples below demonstrate without question that the Act is an unconstitutional intrusion into the Court's exclusive power to regulate rules and procedure:

* Section 3 of the Act amends Chapter 119 and legislates the procedures by which capital defendants with state-paid counsel are to obtain public records.¹² The Act provides time frames, legislates the content of a demand for public records, the agencies to whom public records can be sought, and other explicit procedural steps to be met in order to get public records. Also legislates when an agency may object, and legislates the legal grounds for making such objections.

* Section 6 of the Act creates a new statutory provision legislating express time frames for the appointment of collateral counsel (15 days after the imposition of a death sentence by the trial court), time frames within which collateral counsel must file a notice of appearance or a motion to withdraw, legislates that a defendant "must cooperate with and assist postconviction counsel," legislates what documents must be turned over to postconviction counsel, legislates when the clerk of court must provide the record on appeal to collateral counsel, legislates when a postconviction action is deemed to be "commenced," legislates under what circumstances a court can grant an extension of time, legislates that no appeal may be taken from a denial of a request for an extension of time, legislates when a petition for state habeas corpus must be filed and what it must and must not contain, and legislates times frames for filing successive motion for postconviction relief.¹³

¹²As noted above, the Act repealed Fla. R. Crim. P. 3.852. The Act further removes the responsibility of managing the records repository from the Commission on Capital Cases to the Secretary of State. See § 119.19 (9) (as amended).

¹³The Act also sets forth a different standard for adjudicating successive motions, which standard is unduly restrictive and harsh, as discussed infra at Section IV.

* Section 7 legislates the time frame for filing successive motions, legislates that all pending postconviction motions are barred and shall be denied with prejudice unless "fully pled" in conformity with the definitions set forth in the Act.

* Section 8 expressly legislates "the procedures in actions for capital postconviction relief commencing after the effective date of this act unless and until such procedures are revised by rule or rules adopted by the Florida Supreme Court which specifically reference this section." Legislates that state-paid collateral counsel shall not file more than one postconviction motion, one appeal therefrom, and one action alleging ineffective assistance of appellate counsel, legislates the content of postconviction motions, legislatively precludes any amendment to a postconviction motion, and legislates when the State must file a response to a postconviction motion.

* Section 9 expressly legislates "the procedures in actions for capital postconviction relief commencing after the effective date of this act unless and until such procedures are revised by rule or rules adopted by the Florida Supreme Court which specifically reference this section." In addition to proscribing any amendments to capital postconviction motions, this section legislates the time periods for when a judge shall conduct a hearing to determine if an evidentiary hearing is required, when such evidentiary hearing shall commence if one is deemed necessary, when the trial court shall enter an order denying an action if no evidentiary hearing is ordered, when the defendant must file a witness list and the contents of such witness list, when the State shall file a witness list, and legislates that the State shall have a mental health expert evaluate the defendant and the effects of a defendant's "failure to cooperate"

with such mental health expert. The section next legislates when the transcripts of an evidentiary hearing shall be completed, when the trial court shall enter an order on the motion following an evidentiary hearing, when an appeal to this Court may be taken, and proscribes interlocutory appeals and motions for rehearing. The section next legislates the manner in which this Court is to dispose of appeals, including a "summary" procedure for motions on which no evidentiary hearing was held and time frames relative thereto. This section further legislates the time period in which this Court shall decide an appeal and mandates that a death warrant may issue from the Governor following an affirmance from this Court. Finally, the section legislates that no action may be considered if filed outside the time frames set forth, and that the Attorney General "shall" deliver to the Governor, the Speaker of the House, and the Senate President "a copy of any pleading or order that alleges or adjudicates any violation of this provision."¹⁴

The foregoing discussion only highlights the blatant procedural aspects of the Act passed by the Florida Legislature. It is patently clear that the Act's provisions legislate "the manner in which the power to adjudicate or determine is exercised." In re Rules of Criminal Procedure, 272 So. 2d 65, 66 (Fla. 1972) (citing Sheldon v. Powell, 128 So. 2d 258 (1930)). Only the "Criminal Rules of Procedure describe the machinery by which substantive rights are protected and enforced." Id. The Act is procedural because it limits the "method of conducting litigation involving [Petitioners'] rights." In

¹⁴This mandate, of course, would include any violation by this Court or any trial court of the time frames set forth in which a is required to adjudicate a capital postconviction motion or appeal.

re Florida Rules of Criminal Procedure, 272 So. 2d 65, 65-66 (Fla. 1972) (citing Skinner v. City of Eustis, 147 So. 2d 116 (Fla. 1941)) Nothing in the Act defines a crime or the punishment prescribed to that crime, and thus the Act is an unconstitutional intrusion into the judiciary and must be stricken in its entirety.¹⁵

This Court has also made clear that a remedy for when the Legislature has repealed a rule of criminal procedure and replaced it with a law that is subsequently stricken down as violative of separation of powers, is to reinstate the rule that was repealed. State ex rel. Boyd v. Green, 355 So. 2d 789, 795 (Fla. 1978). "Where a repealing act is adjudged unconstitutional, the statute (or in this case the rule) it attempts to repeal remains in force." Id. (citing cases). In accordance with this principle, Petitioners submit that, in light of the clear violation of the separation of powers, Rules 3.850, 3.851 and 3.852 should remain in full force and should govern all cases.

IV. THE ACT IS A SUSPENSION OF THE WRIT OF HABEAS CORPUS.

In severely curtailing a death-sentenced defendant's ability to collaterally challenge a judgment of conviction and attendant sentence of death, the Act passed by the legislature is a clear suspension of the writ of habeas corpus. Art. I, § 13 of the Florida Constitution provides that the right to relief through habeas corpus must be

¹⁵While "[a]n unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions," if the various provisions of the Act "are so connected and dependent on each other as to warrant the belief that the Legislature intended them as a whole[,] . . . [w]here one provision is unconstitutional, all provisions dependent on it must fall." State ex rel. Boyd v. Green, 355 So. 2d 789,795 (Fla. 1978). The result is the same even though the Act contains a severability clause. Id.

"grantable of right, freely and without cost." This right to habeas corpus is a "basic guarantee of Florida law." Haag v. State, 591 So. 2d 614, 616 (Fla. 1992). Rule 3.850 is a "procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus." State v. Bolyea, 520 So. 2d 562, 563 (Fla. 1988). Thus, any encroachment on a defendant's ability to seek relief under Rule 3.850 clearly implicates the writ of habeas corpus. Haag, 591 So. 2d at 616.¹⁶

Petitioners do not contend that no restrictions can be placed on time limits for seeking postconviction relief; this Court has previously approved former Rule 3.851, establishing a one-year time frame for capital defendants to seek postconviction relief. However, as this Court has made clear, any restrictions on the right to seek postconviction relief, including an intent to "speed up the process," cannot yield to "fundamental principles of fairness." Haag, 591 So. 2d at 616. See also Swafford v. State, 679 So. 2d 736, 741 (Fla. 1996) (Harding, J., concurring) ("I recognize that the postconviction process still may appear inordinately long to the general public in some cases. However, neither public perception nor the reality of a lengthy postconviction process justifies foreclosing meritorious claims of newly discovered evidence"); State ex rel. Butterworth v. Kenny, 714 So. 2d 404, 408 (Fla. 1998) (in postconviction proceedings, it is required that "the defendant have meaningful access to the judicial process"). Even the Court, in its commentary to then-Rule 3.851, explicitly recognized that under certain circumstances which impinged on collateral counsel's ability to

¹⁶Such restrictions also violate the constitutional right to access to courts under the Florida Constitution.

properly represent its clients, "the reduction in the time period would not be justified and would necessarily have to be repealed." And while the Court has previously emphasized that CCR/CCRC is empowered to "challenge the validity of a capital defendant's conviction and sentence only through traditional postconviction relief proceedings in criminal and quasi-criminal proceedings," Kenny, 714 So. 2d at 408, the Act, by harshly limiting the nature of the postconviction process, has inalterably and intolerably compromised the Petitioners' ability to seek meaningful redress in the courts of this State through the "traditional postconviction relief proceedings."

By restricting clients of state-paid collateral attorneys to the filing of one postconviction motion, one appeal therefrom, and one state habeas corpus petition alleging ineffective assistance of appellate counsel, in addition to the unduly restrictive successor provisions, the Act stands in stark contrast to the right to habeas corpus as well as Florida's Declaration of Rights:

Indeed, both simplicity and fairness are equally promoted by the right to habeas relief that emanates from the Florida Constitution and has been partially embodied within Rule 3.850. Art. I, § 13, Fla. Const.; Bolyea, 520 So. 2d at 563. The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality. Art. I, Fla. Const.

Haag, 5912 So. 2d at 616.

Due to the clear restrictions on the filing of postconviction motions and habeas petitions placed on state-paid counsel, Petitioners' counsel would be precluded from invoking this Court's original habeas jurisdiction to remedy a wrong not correctable

under Rule 3.850 or in which no forum exists due to the restrictions on filing postconviction motions. For example, the Act limits successor petitions to a very narrow class of cases and does not allow at all for a successive motion for postconviction relief which alleges a defendant's innocence. Previously, a free-standing claim of actual innocence was available under Florida law. See Jones v. State, 591 So. 2d 911 (Fla. 1991). However, under the Act's provisions, a successor motion in a capital case filed by state-paid counsel "shall be barred" unless "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the defendant guilty of the underlying offense." § 924.056 (5) (as amended). This is the exact same standard as the federal standard, and the federal courts have made it very clear that "[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding." Herrera v. Collins, 506 U.S. 390, 400 (1993). See also id. at 404 ("a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits").¹⁷ Moreover, the Act precludes a large class of non-innocence type claims from ever

¹⁷This standard is arguably stricter than the one struck down by the Court in Jones v. State, 591 So. 2d 911 (Fla. 1991); at best, it is an equally harsh standard as the one found by the Court to be "almost impossible to meet" and ran "the risk of thwarting justice in a given case." Id. at 915.

being heard in the courts of Florida. For example, were a capital defendant to discover information which does not prove innocence but rather proves a deprivation of an impartial judge, see, e.g. Porter v. State, or information which demonstrates that the defendant might not be eligible for the death penalty, see, e.g. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), or new information giving rise to a method-of-execution challenge, see, e.g. Bryan v. Moore, __ So. 2d __ (Fla. 1999), these claims would be barred in a successive postconviction motion,¹⁸ and no state-paid counsel would be allowed to invoke the original jurisdiction of this Court because of the "one motion, one appeal, one habeas" restriction.¹⁹ This result is not only unfathomable, but it is a blatant suspension of the writ of habeas corpus.

Other due process concerns are not addressed in the Act. For example, Section 6 provides that any defendant who "accepts the appointment of postconviction counsel must cooperate with and assist postconviction counsel." If the court finds that the defendant is "obstructing the postconviction process," the defendant is immediately stripped of state-paid collateral counsel.²⁰ However, what were to happen if a defendant is incompetent? See Carter v. State, 706 So. 2d 873 (Fla. 1997).²¹ A

¹⁸Under the AEDPA, it is doubtful that any federal forum is available for such claims either.

¹⁹Of course, no restrictions apply to privately-retained or *pro bono* counsel. See Section II, supra.

²⁰It remains to be seen what the definition of "obstructing the process" means exactly. This phrase is impermissibly vague and can only lead to unfair results.

²¹Nothing in the Act allows for any consideration of the implications of an incompetent client in accordance with due process and the right to effective representation principles recognized by the Court in Carter.

defendant who might appear "obstructionist" or "uncooperative" might simply be mentally ill, yet such a defendant would be barred from state-paid representation if it is determined he is not "cooperating." This result not only implicates grave due process concerns, but also would serve as a suspension of the writ for incompetent defendants. And to make matters worse, a state-paid attorney who attempted to follow the procedures in Carter for alleging incompetency--such as filing an attorney oath--would not only risk the client having forever waived any postconviction claims, but would also be subject to punitive sanctions and to action by the Florida Legislature at the behest of the Attorney General. The Act should be stricken as an unconstitutional suspension of the writ of habeas corpus.

V. INTERFERENCE WITH RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Although maintaining the statutory appointment of collateral counsel, the Act's provisions are so pervasively intrusive and restrictive as to render meaningless the provision of counsel. When the State establishes a right to counsel, "this statutory right necessarily carries with it the right to have effective assistance of counsel." Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990). "The appointment of counsel in any setting would be meaningless without some assurance that counsel give *effective* representation." Id. (emphasis in original). See also Easter v. Endell, 37 F. 3d 1343, 1345 (8th Cir. 1994) ("once such a [state statutory right to counsel] is granted by the state, its operation must conform to the due process requirements of the 14th Amendment").

The draconian restrictions placed on collateral counsel by the Act, as well as the overt threat of sanctions, have created an undue restriction on CCRC-South lawyers' ability to practice law and zealously represent their clients, as well as a conflict of interest. Here, a third party has placed collateral counsel in an ethical dilemma. Collateral counsel are paid by the State, yet the State has severely restricted counsels' ability to zealously represent their clients. The Rules of Professional Conduct clearly establish that the Legislature's actions have created a conflict of interest for CCRC-South counsel. Rule 4-1.7 (b) provides that "[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."²²

"The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages." State ex re. Smith v. Brummer, 426 So. 2d 532, 533 (Fla. 1983). However, this principle has been openly violated by the Florida legislature. CCRC-South counsel are now placed in a position of adverse loyalties. On the one hand, they owe Petitioners their undivided attention to investigate and pursue all available legal remedies, which include successor postconviction litigation and other litigation which were previously available under the law. On the other hand, to properly represent their clients, Petitioners must not have their hands tied to the

²²The comment to this rule is enlightening as to the conflict present in this case. "Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interest. The conflict in effect forecloses alternatives that would otherwise be available to the client."

extent they are under the Act. For example, the Act precludes any interlocutor appeals, yet the ethical rules permit an attorney to seek appellate review of certain matters in order to preserve client confidentiality. See Fla. Bar R. Prof. Conduct 4-1.6 ("[w]hen required by a tribunal to reveal such [attorney-client privileged] information, a lawyer may first exhaust all appellate remedies"). The Florida legislature has no authority to legislate the ethical duties and obligations of attorneys. The conflict is clear. "If an attorney's own personal interests or the interests of someone else to whom the attorney owes a duty (usually another client) conflict with the interests of a client, [h]e will be restrained in [his] ability to represent that client zealously." Freund v. Butterworth, 117 F. 3d 1543, 1574 (11th Cir. 1997). The Florida ethical canons emphasize "an attorney's duty to `exercise independent professional judgment on behalf of a client.'" Id. See also Wood v. Georgia, 450 U.S. 261, 268 (1981) ("if petitioner's counsel was serving the employer's interest . . . this conflict in goals may well have [affected the strategy decisions in the case]." Id. at 268. A risk inherent in such situations is that "the party paying the fees may have had a long-range interest in establishing a legal precedent and could do so only if the interests of the defendants themselves were sacrificed." Id. at 270.

VI. CONCLUSION.

The constitutional and ethical problems associated with the Death Penalty Reform Act are too numerous to catalogue in a short period of time. However, the constitutional violations described above leap off the pages of the legislation. Petitioners are aware that other challenges might be available to the legislation, and anticipate that such challenges will be made. Due to the urgency of the situation and the fact that the Act is presently in effect, Petitioners wanted to bring forth this preliminary challenge immediately and ask the Court to immediately enjoin the Act's enforcement until this and other challenges are fully reviewed. Petitioners' counsel recognizes that proper review of this Act will require that the process be halted during this challenge. CCRC-South and others repeatedly warned the Florida Legislature that this Act would be challenged and even further delays would result. However, in its zeal to push these reforms through so that Respondent can begin to strap Petitioners onto a gurney and "rock and roll" in Florida's lethal injection chamber,²³ the Legislature has abdicated its constitutional responsibilities and ensured that the death penalty process in Florida will be mired in yet more legal challenges as the Death Penalty Reform Act of 2000 is scrutinized in the coming months and years. This Court's intervention is warranted.

²³See Becker and Yardley, *Bush Backs Off Firm Limit to Death Row Appeals*, THE ST. PETERSBURG TIMES, Jan 5, 2000, at 8A ("What I hope is that we become like Texas," [Governor Bush's top policy advisor Brad] Thomas said. "Bring in the witnesses, put them on a gurney, and let's rock and roll").

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 January 18, 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, Steve White, and Curtis French
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