IN THE SUPREME COURT OF FLORIDA

LLOYD CHASE ALLEN, et al., **Petitioners,** **v.** **ROBERT A. BUTTERWORTH, et al.,** **Respondents.**	**CASE NO. SC00-113**

RESPONSE TO EMERGENCY PETITION, ETC.

COME NOW Respondents, Robert A. Butterworth and the State of Florida, by and through the undersigned counsel, in response to this Court's order of January 19, 2000, and request the Court deny all relief requested in the instant extraordinary petition for the reasons set forth below.

I. PRELIMINARY STATEMENT

The "Emergency Petition for Extraordinary Relief" filed by the Capital Collateral Regional Counsel for the Southern Region (CCRC-South) on behalf of all 59 of its clients asks this Court to enjoin Respondents from invoking or applying the Death Penalty Reform Act of 2000 (DPRA), and to declare the Act unconstitutional, apparently in its entirety. Petitioners contend that various provisions of the Act violate due process, equal protection, and the separation of powers doctrine. They also assert that the Act constitutes an

impermissible suspension of the writ of habeas corpus, and that it interferes with the right to effective assistance of counsel. Petitioners contend that problems with the Act literally "leap off the pages of the legislation" and "are too numerous to catalog in a short period of time." (Petition at 28).

The instant proceeding is not authorized under CCRC-South's enabling statute. Petitioners' counsel lack statutory authority, and Petitioners themselves lack standing to maintain this action. Despite the exhaustive litany of abuses allegedly perpetrated by the Act, counsel have not identified any client who imminently will be, or has been, harmed by the DPRA. Lastly, if the merits of Petitioners' arguments need be reached, such arguments lack merit and provide no basis for this Court to grant extraordinary relief.

II. ARGUMENT

A. THE INSTANT PETITION IS NOT AUTHORIZED, AND PETITIONERS LACK STANDING TO MAINTAIN THIS ACTION.

Petitioners essentially seek a declaratory judgment as to the constitutionality of the DPRA. Because the emergency petition does not expressly challenge the legality of the judgment or death sentence imposed upon any specific petitioner, CCRC-South is not authorized to file it, under the new law or precedent. *See e.g.,* State ex rel Butterworth v. Kenny, 714 So.2d 404, 408 (Fla. 1998)

(Florida Legislature has provided collateral representation to death sentenced inmates "for the sole purposes of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed.").

Also, this action greatly resembles the "class action habeas corpus petition" condemned by this Court in Brown v. Wainwright, 392 So.2d 1327, 1329-1331 (Fla. 1981). The 59 petitioners are not similarly situated; their cases run the procedural gamut of the capital collateral postconviction process.[1] It does not lie as an action for prohibition or mandamus,[2] and this Court's all writs jurisdiction does not provide a basis for jurisdiction, where no other basis exists. *See* Besoner v. Crawford, 357 So.2d 414, 415

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[1] The vast majority of the fifty-nine (59) named petitioners presently have actions pending in the state circuit courts -- thirty-two (32) -- some involving "shell" pleadings and perhaps a few, not. Twelve (12) have pending postconviction proceedings in this Court, whereas nine (9) have pending habeas corpus actions in the federal district court, with two (2) having federal appeals pending. Two inmates - Gregory Mills and Sonny Boy Oats - have already completed one full round of capital collateral litigation, while Cleo LeCroy has exhausted state challenges and is obliged to seek relief in the federal courts. Frank Lee Smith has died since this proceeding was initiated.

[2] Petitioners seek to make new law -– that the DPRA is facially unconstitutional--rather than enforce an existing right. If construed as a writ of mandamus, the emergency petition must be dismissed. Thompson v. Graham, 481 So.2d 1212, 1221, n.1 (Fla. 1985) ("Mandamus is available as a method of enforcing a clearly established legal right but not as a means of litigating and establishing a disputed right.").

(Fla. 1978); St. Paul Title Insurance Co. v. Davis, 392 So.2d 1304, 1305 (Fla. 1980). Finally, as a state officer, the Capital Collateral Regional Counsel for the Southern Region is an inappropriate litigant in this matter. *See* Department of Education v. Lewis, 416 So.2d 455, 458 (Fla. 1982) ("State officers and agencies must presume legislation affecting their duties to be valid, and do not have standing to initiate litigation for the purposes of determining otherwise.").

Even if construed as an action for declaratory relief -– which CCRC-South is not authorized to bring -– the petition does not allege facts showing a real and present need for a declaration by this Court. Petitioners thereby fail to meet even the minimal threshold for such relief.

When and if the new law is applied to any petitioner under a discrete set of facts, there will be ample opportunity to raise constitutional challenges. This Court's jurisdiction cannot be premised upon a mere request for an advisory opinion or one that the court act as a "roving commission . . . to pass judgement on the validity of the state's laws." Martinez v. Scanlan, 582 So.2d 1167, 1171 (Fla. 1991); Sandstrom v. Leader, 370 So.2d 3, 4 (Fla. 1979).

It is axiomatic that a petitioner may only raise a constitutional challenge to a statute, or a portion of a statute, which directly affects him or her. *See* State v. Hagan, 387 So.2d 943, 945 (Fla. 1980). Here, it has never been alleged that the Reform Act has been applied, or has even been invoked, as to any petitioner; the diverse procedural postures of their cases further underscores their lack of standing. Certainly, Brandy Jennings, who has not yet filed any postconviction motion, has little impact from any provision regarding successive motions (Petition, p. 22-24); whereas Gregory Mills and Sonny Boy Oats, who have already completed their entire round of state and federal litigation, have little stake in resolution of any matter concerning the "dual track" system. (Petition, p. 12). Opposing counsel simply seek an advisory opinion from this Court, and condemn provisions of the Act which have never been invoked and may not, in fact, be invoked for a considerable time.[3]

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[3] In the instant petition, opposing counsel note that, in Orange County, the prosecutor sought to have the defendant, Curtis Windom, file a "fully pled" postconviction motion when he filed one; Windom's shell motion has been pending since March of 1997. It must initially be noted that Windom is not a client of the Southern Region, and thus is not a named party to this action; although the agency which does represent him, the Capital Collateral Regional Counsel for the Northern Region, has filed its own challenge to the Reform Act, Asay et al. v. Butterworth, Florida Supreme Court Case No. SC00-154, the filing in Windom's case is nowhere mentioned as a basis for jurisdiction. In any

B. OVERVIEW

Respondents will briefly address, as an overview, a number of the specific constitutional challenges levied in the instant petition. Initially, a great many of Petitioners' due process complaints simply represent policy disagreements with the Legislature. However, a legislative enactment carries a strong presumption of constitutionality, including a rebuttable presumption of the existence of necessary factual support in its provisions. If any state of facts, known or to be assumed, justifies the law, the court's power of inquiry ends. Questions as

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event, it has not been demonstrated what action, if any, the circuit court took upon the State's motion or that Windom has, in fact, been adversely impacted thereby so as to vest standing. Likewise, although the Office of the Capital Collateral Regional Counsel – Middle Region has been allowed to join this action, such office, and its clients, lack standing for the reasons set forth above.

Additionally, registry counsel on behalf of Leonardo Franqui and Pablo San Martin have sought to join this proceeding. As neither alleges any specific injury, standing is lacking, and registry counsel's authority to pursue litigation of this kind would seem dubious at best, for the reasons set forth above.

Undersigned counsel notes that this Court has granted Franqui's motion to intervene and has set this cause for oral argument; in light of the many challenges to the Act and confusion as to its applicability to pending cases, this Court also, on February 7, 2000, ordered that Rules 3.850, 3.851 and 3.852 be readopted pending adoption of new rules under consideration. While the State recognizes the pragmatism of this Court's approach to the situation before it, it also respectfully maintains the above jurisdictional arguments.

to the wisdom, need, or appropriateness are for the Legislature. State v. Bales, 343 So.2d 9, 11 (Fla. 1977); State v. State Board of Education of Florida, 467 So.2d 294, 297 (Fla. 1985) (legislative enactments are presumed to be valid unless clearly erroneous, arbitrary or wholly unwarranted). It is not this Court's duty to "envision theoretical combinations of factors which, if present, might render a statute unconstitutional," Fieldhouse v. Public Health Trust of Dade County, 374 So.2d 476, 478 (Fla. 1979), and, indeed, in Doe v. Mortham, 708 So.2d 929, 934 (Fla. 1998), this Court expressly held "it is our duty to save Florida statutes from the constitutional dustbin whenever possible." (Emphasis in original).

C. RESPONSE ON THE MERITS

1. Equal Protection

Of the specific challenges asserted, Petitioners' equal protection claim is easiest to reject. Although opposing counsel contend that the Act's provisions "only apply to collateral counsel who are paid by the State, namely CCRC counsel or counsel appointed under the Registry" (Petition at 5), in fact, the Act's provisions apply to all death sentenced defendants, regardless of whether their counsel is state appointed or private. Thus, §5 of the Act simply provides that a person sentenced to death or that person's

counsel may file only one postconviction action and appeal, unless authorized by law; this provision applies to all defendants. Likewise, the provisions of §6 governing successive motions apply to all capital defendants, as does §8 which sets forth the prerequisites for properly filed postconviction actions. While it is true that §2 directs that state appointed counsel "shall file only the postconviction or collateral actions authorized by statute," this admonition, consistent with language specifically addressed to all capital defendants, is simply one to follow the law. Further, this Court's opinion in State ex rel. Butterworth v. Kenny, *supra*, does in fact resolve the fact that the Legislature may properly set parameters for state funded collateral litigation. Petitioners' arguments are simply unavailing.

2. Due Process

Petitioners' due process claims overlap their arguments concerning separation of powers. Petitioners' criticism of certain provisions of the Act as too "draconian" (Petition, p. 8-13) simply represent value judgements on opposing counsels' part, and do not provide a viable basis for a facial challenge to the Act. Similarly, Petitioners' complaints often presuppose a specific factual pattern which may never occur, and again provide an insufficient basis for a challenge to the facial constitutionality

of a statute. *See*, Fieldhouse, *supra*. *See also*, Ford v. Wainwright, 451 So.2d 471, 474 (Fla. 1984) (denying habeas corpus petition, and observing: "this Court has stated that reversible error cannot be predicated on conjecture").

Petitioners' complaints concerning the curtailment of amendments to postconviction actions (Petition, p. 10-12) or as to successive motions (Petition, p. 21-24) are likewise unconvincing. The Legislature is legitimately concerned with the delay endemic in capital collateral proceedings. It has concluded a significant contributor to delay is the unfettered amendment of pleadings and the proliferation of successive pleadings, which do not present claims of actual innocence as they must in the federal system; the standard for successive motions is the same as that enacted by the Congress of the United States, and expressly found constitutional by the Supreme Court of the United States in Felker v. Turpin, 518 U.S. 651 (1996).

This Court recognized in Booker v. State, 514 So.2d 1079, 1081-2 (Fla. 1987) that the Legislature could properly prescribe the means and method by which appellate review may be obtained, and, indeed, as a matter of substance, could specifically preclude review of certain matters, such as the extent of departure of a sentence from the guidelines. Surely, if the Legislature can

properly set the parameters of appellate review, it may likewise, as a matter of substance, set the parameters of a defendant's statutory right to capital postconviction relief.

Further, this Court has consistently upheld §921.141 itself from challenges that it improperly attempts to regulate practice and procedure, and held in Vaught v. State, 410 So.2d 147, 149 (Fla. 1982), that references to certain changes in the law as procedural, concerning the manner in which defendants who had committed murder before the new law took effect should be sentenced, were not meant "to be used as shibboleths for deciding whether the new law violates Article V, Section 2(a) of the Florida Constitution by regulating the practice and procedure in Florida courts." No less is required here.

3. Separation of Powers

This Court has consistently held that the Legislature may properly set statutes of limitations or time limitations within which litigation must commence or particular parties must act. *See, e.g.,* Kalway v. Singletary, 708 So.2d 267 (Fla. 1998) (legislation setting forth time limits for filing challenges to certain procedures not violation of separation of powers); Williams v. Law, 368 So.2d 1285 (Fla. 1979) (Legislature has authority to set statute of limitation governing time for filing certain action); S.R. v. State, 346 So.2d 1018 (Fla. 1977) (Legislature may properly set time limit for filing of petitions alleging delinquency). It should additionally be noted that the Eleventh Circuit Court of Appeals has construed the present filing deadlines for postconviction relief under Rule 3.850 to be statutes of limitations. *See,* Webster v. Moore, No. 99-4201 (11th Cir. Jan. 4, 2000). The Reform Act specifically states that it is setting forth statutes of limitations, see §5(1), as well as limitations upon actions, *see infra*, and such is clearly the Legislature's prerogative.

Additionally, the entire area of substance and procedure has been described as a "twilight zone," in that a statute or rule will be characterized as substantive or procedural according to the

nature of the problem for which a characterization must be made. *See* In re Rule of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1973) (Adkins, J concurring). Further, the fact that some provisions of the Act may be characterized as procedural is not fatal to their own constitutionality or to the Act as a whole.

In Smith v. Department of Insurance, 507 So.2d 1080, 1092 (Fla. 1987), this Court held that while certain provisions of the act in question had "procedural aspects that will require immediate examination by this Court," such provisions were necessary to implement the substantive provisions of other parts of the statute; accordingly, no violation of the separation of powers was found. Conversely, should this Court deem any single portion of the Reform Act impermissibly procedural, such provision can be severed, so that the constitutional provisions of the Act may be given full force, and was done in Leapai v. Milton, 595 So.2d 12 (Fla. 1992).

The Leapai Court reversed the district court, which had invalidated an entire statute. It held that to strictly construe the nonseverance principle "would make it increasingly difficult to adopt new judicial process proposals that have both substantive and procedural aspects," and stated:

> The judiciary and the legislature must work to solve these types of separation-of-powers problems without encroaching upon each other's

> functions and recognizing each other's constitutional functions and duties.

Id. 595 So.2d at 14

This Court specifically cited therein to the Florida Evidence Code as an example of such "cooperative effort" between the branches of government, noting that such Act had been adopted both by the court and the Legislature, the court adopting as rules of court portions of the code deemed procedural, recognizing the legislative action as a statement of public desire. *See also* In re Rule of Criminal Procedure, 281 So.2d 204, 205 (Fla. 1973). The Legislature recognized that this Court would, in all likelihood, adopt rules to implement the substantive provisions of the Act, *see* §8 and 9, and the State respectfully contends that, consistent with Florida's constitutional scheme, this Court should, as it has in the past, expeditiously adopt as rules those portions of the statute necessary to effectuate the Legislature's intent. *See e.g.,* In re Florida Evidence Code, 372 So.2d 1369 (Fla. 1979) (in order to avoid "multiple appeals and confusion," this Court adopted all provisions of the Evidence Code to the extent that they were procedural, and published such for comment); Timmons v. Combs, 608 So.2d 1, 3 (Fla. 1992) (this Court adopted as its own rule procedural aspects of statute relating to offers of judgement and attorneys' fees); Amendments to Florida Rules of Criminal Procedure

– Rule 3.852, etc., 723 So.2d 163 (Fla. 1998) (this Court amended rule relating to public records, in light of legislative repeal of a prior rule and new legislation on this subject).

One thing is clear. The Legislature unquestionably had the authority to repeal those rules of criminal procedure cited in the Reform Act. Petitioners' reliance upon State ex rel Boyd v. Green, 355 So.2d 789 (Fla. 1978), is misplaced.

4. Suspension of Habeas Corpus

Petitioners' suggestion the DPRA has somehow "suspended" the writ of habeas corpus is without merit. The Act provides that any death sentenced inmate may not only seek a statutory remedy of postconviction relief, but may also file an original postconviction action in this Court (§8). If it is Petitioners' position that no time limits for filing, limitation upon successive petitions, or limitation upon content, may be constitutionally imposed in regard to writs of habeas corpus, it is clear that Petitioners have not kept abreast of this Court's precedent, as this Court has already approved such limitations, and the Reform Act is in conformity therewith. *See e.g.,* Francois v. Wainwright, 470 So.2d 685, 686 (Fla. 1985) (successive habeas corpus petitions seeking the same relief are not authorized); Blanco v. Wainwright, 507 So.2d 1377, 1384 (Fla. 1987) (habeas corpus petitioner could not present claims

which had previously been resolved in prior proceedings, or which could or should have been raised in earlier proceedings or which were waived at trial); McCray v. State, 699 So.2d 1366 (Fla. 1997) (habeas corpus petition could be deemed untimely not only under doctrine of laches, but also as violative of rule of procedure.)

5. Regulation of State-Funded Counsel

Finally, Petitioners' complaints regarding the regulation of state-funded collateral counsel are difficult to grasp. The zealousness of counsel's representation has always been bound by Florida's Code of Ethics, and Petitioners have failed to demonstrate that any of the new legislation has adversely affected their advocacy. As this Court held in Remeta v. State, 707 So.2d 719 (Fla. 1998), "Every government official must account to some governing body as to how it allocates its resources," and a conflict of interest is not created any time a governmental oversight committee "asks questions" or, presumably, has concerns. Contrary to Petitioners' arguments, this Court has already held that those statutes creating the original state agency to represent death-sentenced inmates, CCR, did not add anything to the substantive state-law or constitutional rights of such persons, *see*, Troedel v. State, 479 So. 2d 736 (Fla. 1985), and that Florida does not recognize claims of "ineffective assistance of collateral counsel," *see*, Lambrix v. State, 698 So.2d 247 (Fla. 1996); State ex rel. Butterworth v. Kenny, *supra*. In Kenny, this Court specifically followed the holdings of Murray v. Giarratano, 492 U.S. 1 (1989) and Pennsylvania v. Finley, 481 U.S. 51 (1987).

D. Specific Statutory Provisions

The individual provisions of the Reform Act will now be addressed:

Section 1

Popular name; no response necessary.

Section 2

This section amends §27.702(1), Florida Statutes, relating to the duties of counsel. It authorizes collateral counsel, and private counsel appointed under §27.710 to file only those motions authorized by statute.

This provision has nothing to do with the procedure or substance of practicing of law. It does not address the substance, timing, number or place of filing for such motions. Instead, it is a substantive limit on the authority of public-paid counsel. Such counsel cannot file motions not authorized by law.

Alternatively, this language places a substantive limit on the statutory right to postconviction representation. It says such right extends only to those postconviction or collateral motions otherwise authorized by law. In so doing, it places CCRC counsel, and private counsel appointed under §27.710, on the same footing. Ironically, Petitioners object (on separation of powers grounds) to the Legislature's attempt to place CCRC and private appointed counsel on equal footing.

Section 3

Amends several parts of §119.19, Florida Statutes, relating to the provision of public records for use in capital postconviction proceedings. Generally, this section has nothing to do with the practice law or court procedure. In several places, it directs the prosecuting attorney, the public defender, etc., to take certain acts. For example, §119.19(5)(a) requires the public defender, etc., to provide written notice of specified matters to the Attorney General within 60 days of imposition of a death sentence. This is not related to court procedure or court administration.

Several specific items need mentioning. Section 119.19(1)(b) is amended to read:

> (1) As used in this section, the term "trial court" means:
>
> (a) The judge who entered the judgment and imposed the sentence of death; or
>
> (b) If a motion for postconviction relief in a capital case has been filed and a different judge has already been assigned to that motion, the judge who is assigned to rule on that motion.

This language has the effect of directing public records matters to the judge already presiding over the postconviction proceeding generally. It could be construed as a matter of "administrative supervision" reserved to this Court under Art. V, §2(a). If so, it

is completely consistent with Fla.R.Jud.Admin. 2.050(b)(4), which requires the chief circuit judge:

> When assigning a judge to hear any type of postconviction or collateral relief proceeding brought by a defendant who has been sentenced to death, the chief judge shall assign to such cases the judge who presided over the original proceeding if that judge is active or otherwise available to serve unless otherwise directed by the supreme court.

Any separation of powers point is moot.

In several places, this section directs law enforcement agencies, etc., to produce records, except that records deemed confidential or exempt from disclosure under ch. 119 must be delivered "to the clerk of the court." Again, this has nothing to do with the practice of law, court procedure, or court administration.

This section does address the trial court's role when a demand for public records is made. Under §119.19(7)(b), an agency receiving a public records demand may object in the trial court; the new language specifies 25 days(formerly 60) to do so. Under §119.19(8)(b), counsel seeking additional public records must file an affidavit of diligent search in the trial court; the court is given 15 (formerly 30) days to order additional records production under certain conditions.

The 25 and 15 day deadlines function to define the right to obtain public records and are integral to defining the duration of that right.

As noted, in Smith v. Department of Ins., 507 So.2d 1080 (Fla. 1987), this Court upheld provisions of the Tort Reform and Insurance Act relating to punitive damages, remittitur and additur, optional settlement conferences, an itemized verdict for damages, etc., against a separation of powers challenge. Quoting the lower court's order with approval, it said:

> The Court is of the view that both sections create substantive rights and further that any procedural provisions of these sections are intimately related to the definition of those substantive rights.

Id., 1099 at n.10. The same is true here. The shortened deadlines are integral to defining an expedited process for obtaining public records in capital postconviction litigation.

Alternatively, the statutory deadlines are part of an "interim," legislatively-set time frame which this Court should adopt by rule.[4] *See* Kalway v. Singletary, 708 So.2d 267, 269 (Fla. 1998) (observing, in a challenge to a 30-day statutory deadline for

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[4] The prior deadlines had already been adopted in the most recent version of Rule 3.852. *See* Amendments to Florida Rules of Criminal Procedure 3.852, 24 Fla.L.Weekly S328 (Fla. 1999). The shortened deadlines reflect public policy, and should be adopted in any new public records rule contemplated.

mandamus writ petitions filed by inmates: "The setting of an interim time . . . is a technical matter not outside the purview of the legislature. We do not view such action as an intrusion on this Court's jurisdiction over the practice and procedure in Florida courts."). In this exact context, the Court has done so in the recent past. *See* Amendments to Florida Rules of Criminal Procedure – Rule 3.852 [etc.], 723 So.2d 163 (Fla. 1998) ("We hereby adopt on an emergency basis the Committee's proposed rule 3.852 and the accompanying forms set forth in the attached appendix.").

Section 4

One of the more important parts of the Act, §4 is substantive, and crucial to delineating the statutory right to postconviction representation. It amends §922.095, Florida Statutes, to read:

> 922.095 Grounds for death warrant; limitations of actions. – A person who is convicted and sentenced to death must pursue all possible collateral remedies within the time limits provided by statute. Failure to seek relief within the statutory time limits constitutes grounds for issuance of a death warrant under s. 922.052 or s. 922.14. Any claim not pursued within the statutory time limits is barred. No claim filed after the time required by law shall be grounds for a judicial stay of any warrant.

This language imposes an absolute bar to untimely collateral remedies, in the nature of a statute of limitations.[5] Thus, its effect is substantive, because a "right which can be enforced no longer by an action at law is shorn of its most valuable attribute." Merkle v. Robinson, 737 So.2d 540, 542 (Fla. 1999) (treating statute of limitation as substantive for purposes of resolving choice of law question). *See* Fulton County Administrator v. Sullivan, 24 Fla.L.Weekly S557 (Fla. Nov. 24, 1999) (same,

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[5] In fact, §5 of the DPRA alludes to the character of the language as a limitation provision, by declaring: "A person sentenced to death or that person's capital postconviction counsel must file any postconviction legal action in compliance with the statutes of limitation established in s. 924.056 and elsewhere in this chapter." [e.s.].

declaring "statutes of limitations are to be treated as substantive law" for purposes of deciding which state's law applies); Webster v. Moore, *supra*.

The last sentence quoted above forbids late claims from being grounds for a stay. Again, this is a substantive provision implementing the absolute bar created by the preceding language. Facially, it presents no separation of powers problem.

Section 5

Amending §924.055, Florida Statutes, both subsections declare legislative intent. To such extent, no response is needed. Subsection (2) requires the Attorney General to deliver a copy of any court pleading deemed violative of the Act to the House Speaker and Senate President. Such act of delivery has absolutely nothing to do with the practice of law, court procedure, or court administration. In reality, the law merely assigns a duty to the Attorney General as a member of the executive branch of government. The Legislature is well within its constitutional authority to do so.

Section 6

This section creates §924.056, Florida Statutes, and is also one of the most important features of the DPRA. It implements the statutory right to postconviction counsel for all inmates sentenced

to death after the effective date of the Act. *See* S.R. v. State, 346 So.2d 1018, 1019 (Fla. 1977) (holding statute which provided juvenile shall be free from further prosecution if delinquency petition not filed within 30 days after complaint received creates a substantive right).

Subsection (1)(a) requires the trial court to appoint CCRC or private counsel within 15 days after a death sentence is imposed, and requires CCRC to file a notice of appearance or motion to withdraw within 30 more days. It gives the defendant the opportunity to decline appointed counsel.

Requiring the trial court to appoint counsel is inseparable from the statutory right to counsel. Requiring CCRC to file a notice or withdrawal motion is a substantive condition on CCRC's exercise of its statutory authority to represent a murderer.

Except for the 15-day deadline just noted, subsection (1)(a) is substantive law. The 15-day time period reflects public policy for prompt appointment of counsel, and is also an interim time frame pending rule adoption by this Court. It does not violate separation of powers. Kalway.

Subsection (1)(b) places a substantive and reasonable condition on a defendant's right to counsel –- cooperation by that defendant. It has nothing to do with the practice of law, court

procedure, or a given trial judge's response to an obstructive defendant. It does not, of itself, mandate withdrawal of representation when a defendant is obstructive. Instead, it leaves the determination of a defendant’s obstructiveness to the discretion of the sentencing court. It does not forbid preliminary, lesser sanctions than withdrawal of representation, thereby giving an obstructive defendant an opportunity to correct his conduct.

Subsection (1)(b) requires predecessor collateral counsel to "provide all information" to successor counsel. No issue of separation of powers is implicated. Subsection (1)(b) makes exceptions to disclosure for information lawfully withheld under "state or federal law."

Toward its conclusion, subsection (1)(b) provides for a defendant who seeks replacement of an attorney without good cause. This, too, is a substantive condition on a defendant's right to representation. It has nothing to do with self-representation; it does not prevent a court from having a hearing to determine if a defendant understands the implications of seeking to discharge counsel.

Subsection (2) requires the clerk of court to provide a copy of the record on appeal to the postconviction attorney, the state

attorney, and the Attorney General within 60 days after appointment of post conviction counsel, and for a 30 day extension of this deadline. Since all Petitioners are represented by counsel, they are unaffected by this provision and do not have standing to contest where the copy of the record goes. Under Fla.R.App.P. 9.140(b)(6), the chief judge of the appropriate circuit monitors preparation of the record for "timely filing." Any conflict between "timely filing" and the 60 day deadline is speculative and trivial at this point.

Subsection (3)(a) defines "commencement" of a postconviction action as the filing of a "fully pled" [motion or petition]. Presumably, Petitioners do not dispute the obvious –- that no action can begin until some initial document is filed. Their real complaint is that the initial document must be "fully plead" as defined by §928.058(2). As this provision is clearly in the nature of a statute of limitations, it is permissible for the reasons previously stated.

To the extent the content of a "fully pled postconviction action" is specified in the remainder of subsection (3)(a), such requirements -– i.e., "all cognizable claims" –- such content is a substantive requirement placed on an inmate's exercise of his right to postconviction counsel. *See* Mantilla v. State, 615 So.2d 809,

810 (Fla. 3d DCA 1993) (statute requiring certificate of eligibility to obtain expungement of records not procedural but a substantive requirement the "file will not be deemed complete and eligible for consideration on the merits until the certificate of eligibility is submitted").

Moreover, the concluding language in subsection (3)(a) again specifically defers to "any superseding rule of court;" and is not violative of separation of powers. Finally, subsection (3)(a) creates an absolute procedural bar based on failure to preserve issues. This is a codification of caselaw already recognizing such bars, and is a substantive matter which does not intrude on this Court's rule making authority.

Subsection (3)(b) bans claims of ineffective assistance of collateral postconviction counsel in state court. The implication is obvious –- by creating a statutory right to postconviction counsel, the Legislature is expressly not creating a state cause of action or claim for relief in state court. This, in essence, is a limit on the subject matter jurisdiction of state courts.

Subject matter jurisdiction of state courts is a matter of substantive law, set forth generally in Art. V, §§3-6, Florida Const. The ban, which is in accord not only with federal precedent, but also with State ex rel. Butterworth v. Kenny, 714

So.2d 404 (Fla. 1998) and Lambrix v. State, 698 So.2d 247 (Fla. 1996), itself is substantive and does not violate separation of powers.

Subsection (3)(d) prohibits tolling of the time for commencement of a postconviction action, and bars amendments to postconviction actions if untimely. This language does two things: by prohibiting tolling, it effectively makes the time limit for commencing a postconviction action operate as a statute of repose. It also prevents easy circumvention of the limitations period by filing a skeletal postconviction action and amending later. Just as statutes of limitation are substantive, the conditions for tolling are substantive. Merkle, Fulton County Administrator.

Subsection (4) establishes a 45 day deadline to file an action raising ineffectiveness of direct appeal counsel. This time limit is an interim time frame of the sort approved in Kalway.

Subsection (5) places substantive conditions on successive postconviction actions. These conditions are tantamount to codifying the prima facie elements of a cause of action and reflect caselaw on the showing necessary to obtain postconviction relief on the basis of newly discovered evidence. This statute is definitely a matter of substance within the Legislature's purview.

Section 7

This section creates §924.057, Florida Statutes, and specifies how the substance of the DPRA will apply to postconviction cases in which the death penalty was imposed before the new law took effect. It also establishes bars, in the nature of statutes of limitation or repose, to initial or successive postconviction actions under certain circumstances; and provides an absolute statute of limitation of one year (Jan. 8, 2001) for actions not otherwise barred. As explained in the discussion of section 6, such provisions are matters of substantive law.

Section 8

Creating §924.058, Florida Statutes, this section expressly sets forth a procedure for postconviction actions. In the opening paragraph, the statute declares it applies until its procedures are revised by rules of this Court. To the extent this section is procedural, it declares itself to be an interim time frame, and does not invade this Court's exclusive authority. Kalway.

This section also establishes a substantive conditions for maintaining a postconviction action. In subsection (3), it bars actions not complying with other parts of the DPRA. Depending on the stage at which other provisions of the Act apply to an action, these conditions may be conditions precedent to maintaining an action, or be in the nature of continuing requisites. In either

event, the bars to non-complying actions and untimely amendments are substantive.

Section 9

This section creates §924.059, Florida Statutes, and also recognizes the possibility of superseding rules by this Court. Respondents rely on their comments about Section 8 of the Act.

Section 10

Section 10 of the Act reads:

> Rule 3.850, Florida Rules of Criminal Procedure, relating to the grant of a new trial, is repealed to the extent that it is inconsistent with this act. Rule 3.851, Florida Rules of Criminal Procedure as amended January 15, 1998, relating to collateral relief after death sentence has been imposed, is repealed. Rule 3.852, Florida Rules of Criminal Procedure, relating to capital postconviction public records production, is repealed.

This language is an exercise by the Legislature of its authority under Art. V, §2(a), Florida Constitution, which provides:

> . . . Rules of court may be repealed by general law enacted by two-thirds vote of the membership of each house of the legislature.

The DPRA passed by exactly two-thirds (80) of the House membership, and by 30 (of 40) members of the Senate. On its face, this section properly repealed Rules 3.851 and 3.852. As an expressly

authorized power under Art. V, legislative repeal of this Court's rules cannot violate separation of powers under Art. II, §3 ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."). Petitioners cannot state a separation of powers claim. Since the Act sets forth a careful process for capital postconviction relief, and has no bearing on non-capital postconviction proceedings, Rule 3.850 is unaffected and continues in force as to non-death cases.

Section 11

This section amends two subsections of §27.710, Florida Statutes, which relates to the "registry" of private counsel appointed to represent death-sentenced inmates when CCRC cannot do so. Since all Petitioners are represented by CCRC, they are not affected by these statutory changes and do not have standing to attack them. Isaac v. State, 626 So.2d 1082, 1083 (Fla. 1st DCA 1993), *rev. den.* 634 So.2d 624 (Fla. 1994) ("[A]ppellant lacks standing because it is apparent from the record that he has not been adversely affected by the asserted infirmity in the statute."), *citing* State v. Hagan, 387 So.2d 943 (Fla.1980).

Sections 12-15

Not challenged in either petition. No response needed.

Section 16

This section amends §27.711, Florida Statutes, which relates to payment of appointed counsel. Petitioners are not affected by this statute, and do not have standing to challenge it. Isaac.

Section 17

This section creates §924.395, Florida Statutes. It begins with a statement of intent, that the Legislature "strongly encourages" the imposition of sanctions under certain conditions. The statute then lists sanctions the court "should consider."

Nowhere is there any mandatory language. To the contrary, court action is always contemplated, but not required. This Court's exclusive authority to adopt rules of procedure is simply not implicated.

Sections 19-22 (end)

Not challenged in either petition. No response needed.

The DPRA is a major substantive recognition and delineation of a death-sentenced inmate's statutory right to postconviction counsel at public expense. This provision is integral to defining the substantive right to postconviction counsel. Those procedural aspects not necessary to define the substantive right are expressions of public policy on a very important matter –- the fair but timely effectuation of the death penalty. (*See* preamble to the

Act.). Petitioners' separation of powers argument must be rejected, or rendered moot by this Court's adoption of appropriate rules. Finally, Petitioners' argument against severance is without merit.

III. CONCLUSION

WHEREFORE, for the aforementioned reasons, Respondents respectfully move this Court to deny all requested relief.

Respectfully submitted,

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COUNSEL FOR RESPONDENTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by U.S. Mail to Todd G. Scher, Assistant Capital Collateral Regional Counsel, Office of the Capital Collateral Regional Counsel, Southern Region, 101 Northeast Third Avenue, Suite 400, Ft. Lauderdale, Florida 33301, this ____ day of February, 2000.

_____
Richard B. Martell
Chief, Capital Appeals