IN THE SUPREME COURT
OF FLORIDA

CASE NO.: SC90635

IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL PROCEDURE - RULE 3.112 MINIMUM STANDARDS FOR ATTORNEYS IN CAPITAL CASES

COMMENTS OF FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) AFTER JANUARY 26, 2001 BOARD OF DIRECTORS MEETING

Pursuant to this Court's order of December 29, 2000 that directed FACDL, after its January 26, 20001 Board of Directors Meeting, to file additional comments on Rule 3.112, FACDL files the following comments.

A. Questions reviewed and voted upon at the Board of Directors Meeting.

At the January 26, 2001 Board of Directors Meeting, FACDL considered and voted upon the following questions:

1. Whether the minimum standards in Rule 3.112 should apply to retained counsel in capital trial, appellate or post-conviction cases in light of the general right of Defendants to hire counsel of their choice;
2. If the minimum standards do apply to privately retained counsel, should the standards contain an exception to permit the trial court to exercise its discretion to

permit counsel of known or demonstrable experience who does not meet all of the minimum standards to handle a capital case;

3. If the minimum standards do apply to retained counsel, would most private counsel who presently handle capital cases qualify under the minimum standards and if private counsel do not presently qualify, are there significant obstacles for such counsel to qualify.

B. FACDL's position on these three (3) issues.

1. Whether the minimum standards should apply to retained counsel: whether the minimum standards may override the right of Defendants to hire counsel of their own choice.

After extensive discussion about the constitutional issues inherent in this question, the Board of Directors (Board) voted that the minimum standards should apply to retained counsel - the need for special experience and skill in capital cases outweighs any right of Defendants to hire their own counsel. If the underlying rationale for the minimum standards is true (capital cases are different and they require unique experience and training), then there can be no logical rationale to apply the minimum standards to court-appointed counsel and Public Defenders

but not to retained counsel. FACDL resolutely believes that this court has the authority, either through this Rule or the Ethics Rules, to require that only a lawyer who meets the minimum standards may represent an individual charged or convicted with a capital crime.

This court sets standards of admission to the Florida Bar; sets qualification for certification of Bar members in specified areas of practice; sets standards for mediators and special masters. This court and all the other Florida courts (e.g. Federal Courts in this state) set standards for admission for practice for attorneys who are not members of the Florida Bar or the Bar of that particular court. These standards for admission to practice in a particular case include pro hac vice petitions and for the association of local counsel who is a member of the relevant court.

The practice of any lawyer who handles a capital case is sufficient state action such that this court may impose reasonable standards, above mere Florida Bar admission, to ensure due process and the integrity of judgments in capital cases. This court has inherent power to set the standards of admission and practice in this state. Ethics Rule prohibit an attorney from accepting a case that is beyond the expertise of that attorney. For the same reasons applied by this court to cases of ineffective assistance of privately retained counsel, this dourt has the authority to establish standards of competence that may, in a few limited

instances, override the wishes of an individual Defendant. See Vauner v. Wainwright, 398 So.2d 448 (Fla. 1981)

A Defendant could not insist that a non-member of the Florida represent him; a Defendant could not insist that a member of another State Bar but not the Florida Bar represent him if that attorney did not comply with pro hac vice rules of admission. Although the Defendant does have the general right to hire counsel of his/her choice, that counsel must meet the prescribed standards of admission for practice. The minimum standards are reasonable standards for admission.

The undersigned counsel learned after the Board meeting that the Illinois Supreme Court adopted minimum standards for capital cases; the Illinois Supreme Court applied this standards to private counsel. On Monday, January 29, 2001, the undersigned counsel **spoke** with Joe Tybor, Press Secretary of the Illinois Supreme Court. Mr. Tybor informed counsel that the Illinois Supreme Court had adopted the Capital Litigation Trial Bar Rule. Illinois created a Capital Litigation Trial Bar Rule that adopted minimum standards similar to the standards in Rule 3.112. The Rule is attached as Appendix I. The undersigned counsel also learned that the Rule has not yet become official (the official Rule will be promulgated in March). This court may verify this information by a call to Joe Tybor, 312/793-2323, Press Secretary of the Illinois Supreme Court. Mr. Tybor informed counsel that this court may

call him for information.

Rule 4-1.1, Rules of the Florida Bar, Competence, requires all lawyers to give competent representation. Rule 4-1.1 states that a lawyer need not have special training or prior experience if that lawyer may attain the necessary competence through necessary study or association with a competent lawyer. This court has already determined that the minimum standards are necessary because capital litigation is so specialized and complex that lawyers cannot become competent by study during the capital case. Consequently, Rule 4-1.1 permits this court to apply the minimum standards to capital cases. The Illinois Supreme Court in Rule 714 (Capital Litigation Trial Bar Rule) decided that minimum standards were the only way to ensure a minimum level of competent representation.

Although FACDL does not have comprehensive statistics on the subject, the consensus of the Board is that most privately retained (as opposed to court appointed conflict private counsel) will meet the minimum standards. From an anecdotal perspective, there is little available evidence that most retained counsel for capital cases would not meet the minimum standards. Discussions among FACDL Board members on the Board with experience with capital cases revealed that the hiring of privately retained counsel for a capital case is relatively rare. Most of the cases, as this court knows, are handled by the Public Defender's Office or court-appointed conflict counsel.

In summary, FACDL resolutely adheres to its prior position that the minimum standards should apply to retained counsel in trial, appellate or post-conviction cases. This court has the inherent authority to impose such standards upon private counsel. If the court imposes the standards upon privately retained counsel, there will not be a significant problem with private counsel not being qualified or not being able to satisfy, quite easily, the standards in the future. An integral part of FACDL's position on this issue derives from the procedures now in place to permit privately retained counsel to obtain the qualifications required by the minimum standards (FACDL will discuss this below in Section 3).

2. Whether there should be an exception (for good cause shown) in the minimum standards for privately retained counsel who have sianificant trial experience but who do not meet all the technical requirements of the standards?

The current standards contain an exception (or escape clause) for application of the standards if there are no available counsel who meet the standards. As applied to conflict counsel and Public Defender, FACDL understands the need for this exception. However, by the plain language of the exception, it does not apply to privately retained counsel. The question of whether the standards should not apply to retained counsel does not turn on whether

counsel is unavailable. For this reason, the Board voted to recommend that this exception not apply (to the extent it may apply) to privately retained counsel.

The Board also considered the question of whether this court should create an exception (to permit the trial court to exercise its discretion for good cause shown) for an attorney of significant and demonstrable skill and experience who does not meet the minimum standards (such an attorney may not have attended a Death Penalty Seminar; such an attorney may have tried many cases but has not tried a capital case in the manner described in the minimum standards).

FACDL voted to oppose an exception for experienced private counsel who do not meet the standards. A trial court could undermine the efficacy of the standards by allowing counsel of general trial **skills** (but who lacks the special skills for a capital case) to handle a capital case. This situation would make the minimum standards "standardless standards". FACDL primarily voted to oppose such an exception because it is not necessary in light of the CLE and case experience opportunities available for all private counsel who wish to represent a person charged with a capital crime. The exception is not necessary for the reasons stated below in Section 3. FACDL believes that if an attorney of significant experience in general criminal trial practice wishes to handle a capital case, then that attorney must become qualified

under the standards, Otherwise, the standards will become meaningless and only aspirational goals with little or ineffectual practical effect.

3. If the minimum standards do apply to retained counsel, would most private counsel who presently handle capital cases qualify under the minimum standards; if private counsel do not presently qualifv, are there significant obstacles for such counsel to qualify?

Although FACDL does not have exact statistics on this question, the consensus of the Board is that most private counsel retained for capital cases already meet the minimum standards. Privately retained trial counsel in a capital case is relatively rare. Several members of the Board handle such cases; these lawyers would qualify under the minimum standards. Some potentially retained counsel would not meet **the** standards. Consequently, FACDL then considered whether there are any significant obstacles for such counsel to qualify under the standards. The Board concluded there are no such obstacles; qualification under the standards will be easy.

The CLE requirement under the standards is readily available. FACDL and the Public Defender's Association each conduct yearly seminars on capital representation. At the very least, this court

should require retained counsel to comply with the CLE requirements of the minimum standards.

Mentoring programs exist throughout the state to permit private counsel to sit as second chair with court appointed counsel or with Public Defenders. West Palm Beach has such a program. Private counsel can either become an appointed second chair or counsel may volunteer time to sit in on a capital trial. Of course, private counsel could associate with another private counsel in a capital case. The potential systemic problem for private counsel (who otherwise have the requisite trial experience in noncapital cases) without prior capital case experience is how does one get the initial experience (if the minimum standards apply to retained counsel): The Board believed this is not a problem; private counsel can readily obtain such experience.

Retained counsel could also avoid this problem by association with an attorney who meets the minimum standards. The cost of adequate representation may simply be the need to associate qualified counsel. The minimum standards require two (2) cases as lead counsel or co-counsel in cases where the death penalty was sought. Retained counsel can easily obtain experience as co-counsel,

CONCLUSION

This court should apply the minimum standards to retained

counsel. Although Defendants have the right to hire counsel of their own choice, such counsel must be competent. This court has the inherent authority to impose minimum standards to attempt to ensure competent representation. The Illinois Supreme Court decided the only practical way to improve the competency of lawyers in capital cases is to impose minimum standards on all counsel. Such standards will not guarantee competency; such standards will not eliminate claims of ineffective assistance of counsel. However, such standards will improve the quality of representation. Consequently, FACDL urges this court to apply Rule 3.112 to retained counsel in trial, appellate and post-conviction capital cases.

Respectfully Submitted,

James T. Miller
Flo 'da Bar No.: 0293679
Chair, Amicus Curiae Committee,
Florida Association of Criminal
Defense Lawyers, on behalf of
David Rothman, President, FACDL
Miami, Florida

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail on this 29th day of January 2001 to: all the names on the service list included in this court's order of December 29, 2000.

James T. Miller

(additions to original proposal are indicated in **bold underline;** deletions in ~~**bold strikeout**~~)

SUPREME COURT RULE 714. CAPITAL LITIGATION TRIAL BAR

(a) Statement of Purpose - This rule is promulgated to insure that counsel who participate in capital cases possess the ability. knowledge and experience to do so in a competent and professional manner. To this end, the Supreme Court shall certify duly licensed attorneys to serve as members of the Capital Litigation Trial **Bar. ~~For purposes of this rule, a capital case is a case in which a defendant is being tried for first degree murder and the State has filed a Notice of Intent to Seek Death Penalty, or has failed to provide any notice pursuant to Rule 416 (c).~~**

(b) Qualifications of Members of the Capital Litigation Trial **Bar -** Unless **exempt under paragraph (c), or the Supreme ~~this~~** Court determines that **an** attorney otherwise has the competence and ability to participate in a capital case **pursuant to paragraph (d),** trial counsel must meet the following minimum requirements:

Lead Counsel: Qualifications

1) Be a member in good standing of the Illinois **Bar** or be admitted to the practice pro hac vice;

2) Be an experienced and active trial practitioner with at least five (5) years of criminal litigation experience;

3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois;

4) Have prior experience as lead or co-counsel in no fewer than eight (8) felony jury trials which were tried to completion. at least two (2) of which were murder prosecutions; and either

(i) Have completed ~~within two (2) years prior to appointment~~ at least twelve (12) hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, **within two (2) years prior to making application for admission;** or

(ii) Have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to. mental health, pathology and DNA profiling evidence.

Co-Counsel: Qualifications

1) Be a member in good standing of the Illinois Bar or be admitted to the practice pro hac vice;

2) Be an experienced and active trial practitioner with at least three (3) years of criminal litigation experience;

3) Have substantial familiarity with the ethics, practice, procedure and rules of the trial and reviewing courts of the State of Illinois;

4) Have prior experience as lead or co-counsel in no fewer than five (5) felony jury trials which were tried to completion: and either

(i) Have completed ~~within two (2) years prior to appointment~~ at least twelve (12) hours of training in the preparation and trial of capital cases in a course approved by the Illinois Supreme Court, **within two (2) years prior to making application for admission;** or

(ii) Have substantial familiarity with and extensive experience in the use of expert witnesses, and forensic and medical evidence including, but not limited to, mental health. pathology and DNA profiling evidence.

(c) The Attorney General or duly elected or appointed State's Attorney of each county of this State shall not be disqualified from prosecuting a capital case because he or she is not a member of the Capital Litigation Trial **Bar.**

(d) Waiver - If an attorney cannot meet one or more of the requirements set forth above. the Supreme Court may waive such requirement upon demonstration by the attorney that he or she, by reason of extensive criminal or civil litigation. appellate or post-conviction experience or other exceptional qualifications, is capable of providing effective representation as lead or co-counsel in capital cases.

(e) **Application for Admission to the** Capital Litigation Trial **Bar** - In support of an application. an attorney shall submit to the Illinois Supreme Court a form approved by the

Administrative Office of the Illinois Courts. It shall require the attorney to demonstrate that he or she has fully satisfied the requirements set forth above. The attorney shall also identify any requirement that he or she requests be waived, and shall set forth in detail such criminal or civil litigation, appellate or post-conviction experience or other exceptional qualifications that justify waiver. **Applications for certification as lead counsel by attorneys previously certified as co-counsel, shall be handled in the same manner as original applications for admission to the Capital Litigation Trial Bar.**

(f) Creation of Capital Litigation Trial Bar Roster - The Administrative Office of the Illinois Courts shall review each application to determine that it is complete. All completed applications shall be delivered, within 30 days of their receipt, to the screening panel designated by the Supreme Court to consider such applications. Within 30 days of receipt of the application the screening panel shall designate those attorneys deemed qualified to represent parties in capital cases, and shall report those findings to the Supreme Court. Upon concurrence by the Supreme Court, the court shall direct the Administrative Office to maintain and promulgate a roster of attorneys designated as members of the Capital Litigation Trial Bar. **The roster shall indicate whether the attorney is certified as lead counsel or co-counsel.**

(g) Removal of Eligibility - The Supreme Court may remove from the roster of the Capital Litigation Trial Bar any attorney, who, in the court's judgment, has not provided ethical, competent, and thorough representation.

COMMITTEE COMMENTS

SPECIAL SUPREME COURT COMMITTEE ON CAPITAL CASES

Rule 714

The most important safeguard of the fairness and accuracy of capital trials is the competence, professionalism, and integrity of the attorneys who try those cases. Upon comparing the roles of the prosecution and the defense (including public defenders, appointed counsel, and retained counsel), the committee concluded that no group could be singled out as the source **of** the "problem" in capital trials, or the sole object of a "solution." Fair and accurate results in a capital trial are the result of quality advocacy by both the prosecution and the defense, Rule 714 is based on the committee's unanimous finding that reasonable, minimum standards for training and experience, consistently applied as a condition of trial bar admission, are the only way to ensure significant, system-wide improvement in the quality of advocacy in capital trials.

Rule 714 draws on a rule adopted by the Nevada Supreme Court in 1990, which establishes minimum qualifications for appointed and retained defense counsel in capital cases. The committee also considered the Illinois State Bar Association's recommended qualifications for appointed and retained defense counsel in capital cases. In addition, the use of trial bar membership requirements as a means of improving the quality of trial advocacy finds precedent in the trial bar rules of the United States District Court for the Northern District of Illinois. Rule 714 incorporates ideas from each of these sources, but is designed to achieve uniform application of qualification standards throughout the State by placing Capital Litigation Trial Bar membership matters under the exclusive jurisdiction of the Supreme Court.

All defense counsel and assistant prosecutors appearing as lead or co-counsel in a capital case must be members of the Capital Litigation Trial Bar. See Rule 416(d), and Rule 701(b). The trial bar requirement does not apply to an elected or appointed state's attorney of the county of venue or to the Attorney General. Defense counsel must be aware that they should not agree to provide representation in a potentially capital case, unless they are properly certified members of the Capital Litigation Trial Bar. See, committee comments, Rule 416(d) and Rule 701(b).

Counsel may only serve in the capacity (lead or co-counsel) in which they are admitted to the Capital Litigation Trial Bar. Sole counsel in a capital case must be qualified as lead counsel. The distinction between lead and co-counsel is not intended to imply that lead counsel must be present for every pretrial matter in a capital case. Co-counsel may participate in any manner approved by the lead attorney, however, lead counsel must, at a minimum, be present at the initial case management conference (Rule 416*(f))*, and at all stages of the trial of the case.

Paragraph (e) provides that an application for certification as lead counsel by an attorney previously admitted to the Capital Litigation Trial Bar as co-counsel is handled in the same manner as an original application for admission. The separate application process in such cases is not intended to imply that certification as lead counsel requires training in addition to that required for admission. However, all Capital Litigation Trial Bar members are encouraged to view the training required for admission as a minimum standard, and participate in additional training whenever possible.

Attorneys who are not members of the Capital Litigation Trial Bar may participate in capital

trials in the capacity of "third chair," provided such participation by a third attorney for the prosecution or defense is under the direct supervision of lead or co-counsel, Although participation in a capital trial as third chair will not satisfy the experience requirements of Rule 714, the experience gained may be considered for the purposes of a request for waiver under paragraph (d).