June 11, 2002

Via Priority U.S. Mail

Thomas D. Hall
Clerk, Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Amendment to Florida Rule of Appellate Procedure (Rule 9.142), SC02-770

Dear Mr. Hall:

I am filing these comments in case no. SC02-770, Amendment to Florida Rule of Appellate Procedure (Rule 9.142). I have been a member of the criminal rules subcommittee of the Appellate Rules Committee for several years. The subcommittee had drafted a rule proposal to respond to Trepal v. State, 754 So. 2d 702 (Fla. 2000), but it has shelved this proposal, now that this Court has issued its own proposal. Because the full Appellate Rules Committee does not meet until late June, the subcommittee was not able to prepare a response to this Court's proposal in time for the June 14 deadline. The following comments are my own, not those of the subcommittee or the full committee.

I. Specific Responses to this Court's Proposal.

I have reproduced this Court's proposed rule below, and my comments appear in italics under the relevant sections of the rule.

Rule 9.142 Petition Seeking Review of Nonfinal Orders in Capital Postconviction Proceedings.

Comment: I would change "Capital" to "Death Penalty," to avoid any reference to capital sexual battery cases. We made this same change some years ago to the heading in Rule 9.140(b)(6). I would also move the provisions of 9.140(b)(6) into this rule, to make rule 9.140 shorter and to unify the appellate provisions specifically relating to the death penalty.

(a) Applicability. This rule applies to proceedings that invoke the jurisdiction of the supreme court for review of nonfinal orders issued in postconviction proceedings following imposition of the death penalty.

(b) Treatment as Original Proceedings. Review proceedings under this rule shall be treated as original proceedings under rule 9.100 unless modified by this rule.

(c) Commencement; Parties

(1) Jurisdiction of the supreme court shall be invoked by filing a petition with the clerk of the supreme court within 30 days of rendition of the nonfinal order to be reviewed. A copy of the petition shall be served on the opposing party and furnished to the judge who issued the order to be reviewed.

(2) Either party to the capital postconviction proceedings may seek review under this rule.

Comment: Here again, I would change "capital" to "death penalty."

(d) Contents. The petition shall be in the form prescribed by rule 9.100, and shall contain

(1) the basis for invoking the jurisdiction of the court;

(2) the date and the nature of the order sought to be reviewed;

(3) the name of the lower tribunal rendering the order;

(4) the name, disposition, and dates of all previous trial, appellate, and postconviction proceedings relating to the conviction and death sentence that are the subject of the proceedings in which the order sought to be reviewed was entered; and

Comment: Delete the last "and."

(5) the facts on which the petitioner relies, with references to the appropriate pages of the supporting appendix;

(6) argument in support of the petition, including an explanation of why the order departs from the essential requirements of law and how the order may cause irreparable injury for which there is no adequate remedy on appeal, and appropriate citations of authority; and

Comment: The requirement to prove "irreparable injury" may be too strong, absent further clarification from the case law. According to Watts v. Department of Corrections, 800 So. 2d 225, 226 (Fla. 2001), the test is whether "the order would cause an injury that could not adequately be corrected on appeal from the final order," which is an arguably weaker test. Also, according to Trepal, this Court has jurisdiction in these cases as appeals, not as original writs. Consequently, the issue is not whether an adequate remedy exists "on appeal," but whether an adequate remedy exists "on appeal from a final order."

(7) the nature of the relief sought.

The petition shall be accompanied by an appendix, as prescribed by rule 9.220, which shall contain the portions of the record necessary for a determination of the issues presented.

Comment: For stylistic reasons, I would put this sentence in a separate subdivision with a heading "Appendix," although I recognize that the proposed

paragraph structure tracks Rule 9.100(g) in this respect.

(e) Order to Show Cause. If the petition demonstrates a preliminary basis for relief and a departure from the essential requirements of law that may cause irreparable injury for which there is no adequate remedy by appeal, the court may issue an order directing the respondent to show cause, within the time set by the court, why relief should not be granted.

Comment: My comments to subdivision (d)(6) also apply here. I would not include the substantive references to "essential requirements" and "irreparable injury" in this rule of procedure. Rule 9.100(h) has similar substantive provisions, but 9.100(h) uses "or" to imply that "a preliminary basis for relief" is all that is necessary to issue the order to show cause. This Court can decide for itself when it wants to issue an order to show cause and has no reason to say substantively in a rule of procedure when it will do so. For example, even if a petition does not by itself establish a departure from the essential requirements of the law, the petition may establish enough that this Court would want to know more about the facts and therefore issue the order to show cause. I would simply say: "If the petition demonstrates a preliminary basis for relief, the court may issue an order . . . ."

Also, according to Trepal, this Court's jurisdiction in these cases is by appeal, not by original writ. Review in appellate cases is mandatory, not discretionary, and the phrase "the court may issue an order" should therefore probably be "the court shall issue an order."

(f) Response. Unless ordered by the court, no response shall be required.

Comment: This wording implies that responses to the petition are permitted but not required. If responses are permitted, however, then presumably replies are permitted. In addition, this wording would mean that this Court could not start working on a petition until some unspecified time period has elapsed for the filing of permitted responses and replies. Then, if an order to show cause is entered, this Court would receive another round of responses and replies. This procedure seems

unduly cumbersome. To allow the court immediately to begin working on the petition, I would say that, unless ordered by the court in the order to show cause, no response is permitted. Due process would be satisfied under this procedure, because this Court would not vacate the order under review without first getting a response pursuant to the order to show cause.

For clarity, this provision should at least contain a time limitation, because rule 9.100(j) does not contain one.

(g) Stay.

(1) A stay of proceedings under this rule is not automatic; the party seeking a stay must petition the supreme court for a stay of proceedings.

(2) During the pendency of a review of a nonfinal order, unless a stay is granted by the supreme court, the lower tribunal may proceed with all matters except that the lower tribunal may not render a final order disposing of the cause pending the review of the nonfinal order.

Comment: I would add a comma after "matters."

(h) Other pleadings. The parties shall not file any other pleadings, motions, replies, or miscellaneous papers without leave of court.

(i) Time Limitations. Seeking review under this rule shall not extend the time limitations in rule 3.851 or 3.852.

II. General Response to Trepal

I also write to express my disagreement with Trepal's decision to find that this Court has appellate rather than original jurisdiction for review of nonfinal orders in death penalty postconviction cases. The appellate rules generally enforce and comply with the distinction between appeals and writs. In this instance, however, although

Trepal found appellate jurisdiction for review of nonfinal orders in death penalty postconviction cases, proposed rule 9.142 clearly treats these cases as writ proceedings, not appeals. As proposed, rule 9.142 is inconsistent with the distinctions that otherwise govern the appellate rules.

While I recognize the necessity to find some basis for jurisdiction in these cases, I do not agree that this Court was required to find appellate jurisdiction under the death penalty review provisions of Article V, Section 3(b)(1), of the Florida Constitution, when this Court could have taken certiorari jurisdiction under the all writs provision of Section 3(b)(7). This provision allows this Court to issue "all writs necessary to the complete exercise of its jurisdiction." When the State argued in Trepal that this Court could take jurisdiction under Section 3(b)(7), the entirety of Trepal's argument rejecting the State's position is the following statement: "This Court, however, does not have jurisdiction to entertain petitions for common law certiorari." 754 So. 2d at 706. Trepal cites no authority for this proposition, and I am aware of none. Given the absence of supporting authority, this far-reaching statement about this Court's jurisdiction was worthy of further discussion before being announced as a settled principle of law.

For several reasons, the jurisdictional locus of rule 9.142 and postconviction nonfinal death penalty review cases should be in Section 3(b)(7), not Section 3(b)(1). First, this result is consistent with the plain language of these constitutional provisions. See Fuchs v. Wilkinson, 630 So.2d 1044, 1046 (Fla. 1994) ("This Court . . . has no authority to circumvent . . . the plain language of the [constitutional] amendment."). By its terms, section 3(b)(1) applies to appeals from final judgments, while rule 9.142 applies only to nonfinal orders. In contrast, the plain language of Section 3(b)(7) authorizes this Court to exercise writ review of nonfinal orders, if this review is necessary for the complete exercise of the jurisdiction that this Court otherwise has or will have. Because this Court will eventually have jurisdiction in death penalty cases when the final order is rendered, certiorari review of nonfinal orders under the all writs provision can be appropriate to assure that this Court will be able to take complete jurisdiction of all of the issues raised in the final appeal. See

Florida Senate v. Graham, 412 So.2d 360, 361 (Fla. 1982) ("Because jurisdiction of the issue of apportionment will vest in this Court . . .we have the jurisdiction conferred by article V, section 3(b)(7), to issue all writs necessary to the complete exercise and in aid of the ultimate jurisdiction imposed by article III, section 16(b), (c) and (f)."). The text of the relevant provisions strongly supports allowing certiorari review of nonfinal orders in death penalty postconviction proceedings.

Second, interpreting Section 3(b)(7) not to allow certiorari review in this Court leads to illogical results in several ways. In the first place, this interpretation forced this Court in Trepal to review a nonfinal order under the jurisdictional authority of Section 3(b)(1), which appears to permit review only of final orders. Moreover, while Section 3(b)(7) does not specify what writs are included within its domain, it presumably does in fact authorize this Court to issue various writs, such as the writs of execution or of error coram nobis. Nothing in the text of Section 3(b)(7) or any other constitutional provision offers a logical basis for permitting this Court to issue all writs necessary for the complete exercise of its jurisdiction, except the writ of certiorari. Finally in this connection, if this interpretation of Section 3(b)(7) were correct, then Florida's citizens illogically intended to prevent this Court from issuing writs of certiorari, even when certiorari is necessary for the complete exercise of this Court's jurisdiction. Florida's citizens cannot have meant to permit this Court to accept jurisdiction in cases while simultaneously hamstringing its capacity to exercise this jurisdiction completely. These illogical results counsel in favor of allowing certiorari review under the all writs constitutional provision of Section 3(b)(7).

Third, if this Court's jurisdiction in these cases is appellate rather than original, then it does not have the power to decline in its discretion to consider the case. Its review is mandatory, not discretionary as certiorari review would be. "[C]ommon-law certiorari is entirely discretionary with the court, as opposed to an appeal which is taken as a matter of right." Haines City Community Development v. Heggs, 658 So.2d 523, 526 n.3 (Fla. 1995). Moreover, treating these cases jurisdictionally as appeals would arguably allow litigants to raise numerous other issues at the same time, under the familiar principle in appeals that, once the court has jurisdiction of one

issue, it has jurisdiction over the whole case. McNamara v. State, 357 So.2d 410, 411 (Fla. 1978) ("Although it is unnecessary to the disposition of this cause to resolve the constitutional question and, therefore, we will not do so, this does not divest us of jurisdiction to dispose of the other issues involved sub judice."). Attempts to raise other issues in this Court are particularly common in death penalty litigation. By contrast, "the scope of review by common-law certiorari is traditionally limited and much narrower than the scope of review on appeal." Haines City Community Development, 658 So.2d at 526 n.3. In these respects, Trepal reduces the discretion of this Court and increases the jurisdiction of this Court beyond the intent underlying the relevant constitutional provisions.

Fourth, Trepal's decision not to use the all writs power in death penalty postconviction cases was apparently based on the history of the 1980 constitutional amendment, which removed this Court's power to review by certiorari the decisions of Florida's district courts of appeal. On occasion, if following the plain language of a statutory or constitutional provision leads to improbable results, courts may appropriately look to historical context or other external factors to reach a different conclusion. When the plain language leads to rational and logical results, however, courts should not use history to adopt an illogical interpretation. Here, the plain text of the relevant constitutional provisions supports the reasonable conclusion that this Court has certiorari powers under Article V, Section 3(b)(7). Because this conclusion is reasonable and the language is clear, this Court should not rely on the historical circumstances surrounding the 1980 constitutional amendment as the basis for an implausibly different interpretation

In any event, the 1980 amendment only restricted this Court's power to review specified district court decisions; it did not generally remove its certiorari power under the all writs provision. This Court's discussion in Jenkins v. State, 385 So.2d 1356 (Fla. 1980), of the amendment does not indicate a broad purpose to prevent all certiorari review, even in cases in which this Court already has or will have jurisdiction on other grounds. The purpose of the 1980 amendment instead was to reduce this Court's caseload. Restricting certiorari review under the all writs

provision does not accomplish this goal, because the all writs power presumes by definition that this Court already has or will have jurisdiction of the case in any event. Indeed, removing this Court's power to prevent irreparable injuries before they occur can increase this Court's caseload, if this Court must then deal with the consequences of these irreparable injuries during the final appeal.

From a historical perspective, this Court should look not to the 1980 amendment but to Couse v. Canal Authority, 209 So. 2d 865 (Fla. 1968). In Couse, the trial court passed on the constitutionality of an eminent domain statute. The defendants petitioned for certiorari review in this Court, arguing that this Court would eventually have jurisdiction of the constitutionality issue and that certiorari was necessary to avoid irreparable injury from the trial court's order transferring possession and title of the property.

At the time of Couse, Article V, Section 4(2), of the Florida Constitution provided that this Court could "directly review by certiorari interlocutory orders or decrees passing upon chancery matters which upon a final decree would be directly appealable to the supreme court." Notwithstanding this provision, which implied that interlocutory trial court decisions in actions at law were not subject to this Court's certiorari review, this Court found that the all writs provision of Article V allowed this Court to review the constitutionality issue by certiorari.

> Article, V, Sec. 4, by providing for Supreme Court review of interlocutory orders in chancery, which "upon a final decree would be directly appealable" here, does imply that routine review of such orders in law actions shall be deferred until appeal from the final judgment. We think, however, that this implied limitation does not proscribe a limited review by the discretionary writ of certiorari repeatedly held to be available in the absence of other effective appellate process. We recognize, as in previous cases, that the jurisdiction of this Court is limited to that prescribed in amended Article V, and that the power to use the writ of certiorari as an ultimate method of review is now vested

> in our courts of general appellate jurisdiction, the district courts of appeal. A point not previously considered, however, is that the additional express and unqualified provision in Art. V that the "supreme court may issue all writs necessary or proper to the complete exercise of its jurisdiction" provides ample constitutional authority for use of the writ of certiorari in the situation now presented. The writ, in sum, is essential, even indispensable, to the complete and effective exercise of the prescribed jurisdiction of this Court to decide all appeals from final judgments passing on the validity of a statute.

Id. at 867 (footnote omitted).

In 1982, this Court cited Couse with approval with respect to this Court's power to accept review under the all writs provision, thus establishing that Couse continued to be valid even after the 1980 amendment. See Florida Senate v. Graham, 412 So.2d 360, 361 (Fla. 1982). Couse unequivocally determined that certiorari was one of the writs included within the all writs power of Section 3(b)(7). This principle is still sound today, notwithstanding the 1980 amendment which did not materially change the text of the all writs provision. This Court should retreat from Trepal, to the extent that Trepal suggests otherwise.

Thank you for allowing me to file these comments.

Sincerely,

Stephen Krosschell