IN THE

Supreme Court of Florida

IN RE: CLARIFICATION OF FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.060(b).	Case No. _____ Original Proceeding

PETITION TO CLARIFY FLORIDA RULE OF JUDICIAL ADMINISTRATION 2.060(b)

Petitioner Robert Augustus Harper Law Firm, P.A., by and through undersigned counsel and pursuant to article V, section 2(a) of the Florida Constitution, moves the Court to clarify the scope of Florida Rule of Judicial Administration 2.060(b) and alleges:

1. On 01 September 2002, Michael Robert Ufferman, Esq., joined the Robert Augustus Harper Law Firm. Prior to that date, Mr. Ufferman served for five years as a senior staff attorney for the Honorable Major B. Harding, former Chief Justice of the Supreme Court of Florida. Mr. Ufferman's term of service with Justice Harding began in August of 1997 and ended in August of 2002.

2. Florida Rule of Judicial Administration 2.060(b) provides:

> **Clerks and Secretaries Not to Practice**. No one serving as a research aide or secretary to a justice or judge of any court shall practice as an attorney in any court or before any agency of government while continuing in that position, nor participate in any manner in any

> proceeding that was docketed in the court during the term of service or prior thereto.

The Petitioner requests clarification of the rule specifically as it relates to the representation of capital defendants by former Court employees. Cases involving capital defendants are unique because generally every capital defendant will have two or more appearances before the Court.

3. In October of 2002, Mr. Ufferman sent a letter to Justice Harding requesting the Court to clarify the application of rule 2.060, specifically as applied to Mr. Ufferman. As of the date of this motion, Mr. Ufferman has not received a response from the Court.

4. There are two attorneys in the law firm of undersigned counsel: Robert Augustus Harper, Esquire, and Mr. Ufferman. The firm specializes in criminal appellate law and regularly represents clients in the Supreme Court of Florida. *See e.g., Chavez v. State*, — So. 2d —, 27 Fla. L. Weekly S991, 2002 WL 31642373 (Fla. 2002). The firm presently has two cases on the docket of the Court: *Gibson v. Florida Department of Corrections*, Case No. SC02-2362, and *Jupiter v. State*, Case No. SC03-22. The law firm has a long and consistent history of representation of defendants in capital cases in trial proceedings, in the Supreme Court of Florida, and in federal courts: *Darden v. State*, 372 So. 2d 437 (Fla. 1979); *Darden v. Wainwright*, 513 F. Supp. 947 (N.D. Fla. 1981); *Smith v. State*, 445 So. 2d 323 (Fla. 1983); *Darden*

v. Wainwright, 715 F.2d 502 (11th Cir. 1983); *Shriner v. State*, 452 So. 2d 929 (Fla. 1984); *In re Shriner*, 735 F.2d 1236 (11th Cir. 1984); *Darden v. Wainwright*, 725 F.2d 1526 (11th Cir. 1984); *Bundy v. State*, 455 So. 2d 330 (Fla. 1984); *Darden v. State*, 475 So. 2d 214 (Fla. 1985); *Darden v. State*, 475 So. 2d 217 (Fla. 1985); *Darden v. Wainwright*, 767 F.2d 752 (11th Cir. 1985); *Darden v. Wainwright*, 772 F.2d 666 (11th Cir. 1985); *Darden v. Wainwright*, 772 F.2d 667 (11th Cir. 1985); *Darden v. Wainwright*, 772 F.2d 668 (11th Cir. 1985); *Darden v. Wainwright*, 495 So. 2d 179 (Fla. 1986); *Darden v. State*, 496 So. 2d 136 (Fla. 1986); *Darden v. Wainwright*, 803 F.2d 613 (11th Cir. 1986); *Darden v. Wainwright*, 477 U.S. 168 (1986); *Demps v. Dugger*, 514 So. 2d 1092 (Fla. 1987); *Demps v. State*, 515 So.2d 196 (Fla. 1987); *Darden v. Dugger*, 825 F.2d 287 (11th Cir. 1987); *Demps v. Dugger*, 832 F.2d 1233 (11th Cir. 1987); *Darden v. State*, 521 So.2d 1103 (Fla. 1988).

5. The Harper Law Firm currently has one capital case pending in the Court: *Monlyn v. State*, No. SC02-1729 (appeal from the denial of Mr. Monlyn's postconviction motion).[1] The postconviction record on appeal in Mr. Monlyn's case

[1]The Petitioner has also filed a motion to clarify rule 2.060(b) in the *Monlyn* case. The Petitioner has filed both the instant petition and the motion in *Monlyn* in order to provide the Court with multiple options for disposing of this matter. By addressing the matter pursuant to the petition, the Court will have the option to issue a published opinion providing clarification of rule 2.060. Or the Court could simply rule on the motion in the *Monlyn* case and dismiss the petition as moot. Due to the importance of the issue and its impact on all court employees in Florida, the Petitioner respectfully suggests that a published opinion would be the best vehicle to address the

was filed in the Supreme Court in December of 2002, and Mr. Monlyn's initial brief is to be served on or before 30 April 2003. In 1998, the Supreme Court affirmed Appellant Monlyn's conviction and sentence on direct appeal. *See Monlyn v. State*, 705 So. 2d 1 (Fla. 1998). Mr. Ufferman was employed at the Court in 1998 but did not directly work on Mr. Monlyn's case.

6. The Court's decision regarding the application of rule 2.060(b) to Mr. Ufferman will affect the ability of the Harper Law Firm to continue to represent capital defendants. The law firm appears on the Capital Case Registry of Attorneys for North Florida. If Mr. Ufferman were to be precluded from working on particular capital cases, it will affect the ability of the law firm to accept capital cases, and may precipitate delay or cause future claims of conflict of interest. It would be impossible to establish a so-called "Chinese wall" in a two-lawyer firm. Therefore, undersigned counsel requests the Court to narrowly construe rule 2.060(b), thereby permitting Mr. Ufferman (and the undersigned law firm) and other former Supreme Court law clerks to work on pending capital cases and future capital cases.

7. It is suggested that a lawyer in the position of Mr. Ufferman should not be automatically disqualified by mere employment as a staff attorney at the Court. An appropriate distinction should be made between cases that were simply filed during

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matter.

Mr. Ufferman's tenure and cases or "particular matters" that Mr. Ufferman directly worked on. The Department of Justice of the United States has issued guidelines regarding government attorneys which may be of assistance to the Court.[2]

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[2]The Code of Federal Regulations states the following regarding post-employment conflicts of interest for government employees:

> (c) Policy and limitations. These regulations bar certain acts by former Government employees which may reasonably give the appearance of making unfair use of prior Government employment and affiliations.
> (1) When a former Government employee who has been involved with a particular matter decides to act as the representative for another person on that matter, such "switching of sides" undermines confidence in the fairness of proceedings and creates the impression that personal influence, gained by Government affiliation, is decisive.
> (2) Similarly, when a former high-level employee assists in representing another by personal presence at an appearance before the Government regarding a matter which is in dispute, such assistance suggests an attempt to use personal influence and the possible unfair use of information unavailable to others. Different considerations are involved, however, with respect to assistance given as part of customary supervisory participation in a project funded by a Government contract or grant, since a former employee's knowledge may benefit the project and thus the Government, and regular communications with associates may properly be regarded as inherent in managerial responsibility. Such assistance, when not rendered by personal presence during an appearance, is not covered by the statute.
> (3) When a former Senior Employee returns to argue a particular matter to the employee's former agency in the period immediately following the termination of official employment, it appears that Government-based relationships are being used for private ends.
> (4) Former officers and employees may fairly be required to avoid such activities in the circumstances specified by statute and in these regulations.

(5) The provisions of 18 U.S.C. 207 do not, however, bar any former Government employee, regardless of rank, from employment with any private or public employer after Government service. Nor do they effectively bar employment even on a particular matter in which the former Government employee had major official involvement except in certain circumstances involving persons engaged in professional advocacy. Former Government employees may be fully active in high-level supervisory positions whether or not the work is funded by the United States and includes matters in which the employee was involved while employed by the Government. The statutory provisions are not intended to discourage the movement of skilled professionals in Government, to and from positions in industry, research institutions, law and accounting firms, universities and other major sources of expertise. Such a flow of skills can promote efficiency and communication between the Government and private activities, and it is essential to the success of many Government programs. Instead, only certain acts which are detrimental to public confidence in the Government are prohibited.

(6) Departments and agencies have primary responsibility for the administrative enforcement of the post employment restrictions found in the Act. The Department of Justice may initiate criminal enforcement in cases involving aggravated circumstances; agency heads are required to report substantiated allegations of violations of 18 U.S.C. 207 to the Department of Justice and the Director, OGE. It is essential that Title V of the Act be enforced so as to advance its objectives, which include improvement in government efficiency, equal treatment for equal claims, greater public confidence in the integrity of their government, elimination of the use of public office for private gain, and securing the integrity of the government's policy-making processes. Departments and agencies should avoid enforcement actions that do not advance these objectives but instead frustrate the Government's ability to employ the skilled persons who are needed to make the programs of the Federal Government succeed. Special attention should be given to the need to preserve the free

8. Assistant Attorney General Charmaine M. Millsaps has been contacted and agrees that it would be appropriate for the Court to clarify rule 2.060(b).

WHEREFORE, the Petitioner respectfully requests the Court to clarify the scope of rule 2.060(b).

> flow of expertise, especially in scientific, technological and other technical areas, from private activities to the government.
> (7) The examples contained in these regulations are intended to give guidance, but are illustrative, not comprehensive. Each agency may provide additional illustration and guidance in its own regulations, consistent with that contained herein, in order to address specific problems arising in the context of a particular agency's operations.
> (8) Agencies have the responsibility to provide assistance promptly to former Government employees who seek advice on specific problems. The Office of Government Ethics will provide advice, promptly, upon request, to designated agency ethics officials in such situations, but will first coordinate with the Department of Justice on unresolved or difficult issues.

5 CFR § 2637.101.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Charmaine M. Millsaps
Department of Legal Affairs
PL01, The Capitol
Tallahassee, Florida 32399-1050

by hand/mail delivery this _____ day of January, 2003;

John F. Harkness, Jr.
Executive Director, The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

by hand/mail delivery this _____ day of January, 2003;

The Honorable Peter D. Webster
Chairman, Rules of Judicial Administration Committee
First District Court of Appeal
301 South Martin Luther King Jr. Boulevard
Tallahassee, FL 32399-1850.

by hand/mail delivery this _____ day of January, 2003.

Respectfully submitted,

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