

IN THE
SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES OF CRIMINAL PROCEDURE 3.851 AND 3.690	Case No. 05-1165
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**COMMENTS OF
THE FLORIDA ASSOCIATION OF CRIMINAL
DEFENSE LAWYERS**

The Florida Association of Criminal Defense Lawyers [AFACDL@] submits the following comments regarding Florida Rule of Criminal Procedure 3.851 and urges the Court not to adopt Subsection (i) of the Rule, allowing prisoners under sentence of death to discharge counsel and dismiss pending post-conviction proceedings, for the following reasons:

In non-capital cases, a defendant is allowed to voluntarily dismiss his or her appeal. Fla.R.App.P. 9.350. Not so in capital cases. When a death-sentenced defendant seeks to waive his right to direct appeal, this Court has required appellate counsel to provide diligent advocacy on appeal as to both the judgment and sentence. See *Klokoc v. State*, 589 So.2d 219 (Fla. 1991). The same should be required of post-conviction counsel.

Prior to filing his initial brief on direct appeal, Victor Klokoc voluntarily moved to dismiss the appeal of his death sentence and be executed. This Court rejected his request

to dismiss his direct appeal and directed appellate counsel to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of the appellant's interests. The Court explained that "in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence." 589 So.2d at 222.

Even when a competent defendant waives his or her right to present mitigating evidence in a penalty phase, this Court has directed that the trial court engage in a careful analysis of possible statutory and non-statutory mitigating factors and weigh those against the aggravating factors to assure that death is appropriate. *See Hauser v. State*, 701 So.2d 329 (Fla. 1997). The purpose of this ruling and that in *Klokoc* is to ensure proper application of the death sentence. *See Ocha v. State*, 826 So.2d 956, 964 (Fla. 2002). (*Klokoc* reiterates this Court's interest in ensuring that every death sentence is tested and has a proper basis in Florida law). The purpose of post-conviction proceedings in capital cases, like that of the direct appeal, is to protect the integrity of the death penalty process before an execution makes the process irrevocable. For that reason, this Court should extend its holding in *Klokoc* to post-conviction proceedings and require that counsel provide diligent advocacy of the client's interests in post-conviction regardless of the defendant's wishes to dismiss the proceeding and be executed.

This Court has repeatedly recognized that "death is different." Because it is different, and because of the severity and irrevocable nature of the ultimate punishment,

death-sentenced defendants receive direct appellate review by the Supreme Court as well as an automatic right to collateral review, with the right to appointed counsel. In capital cases, post-conviction proceedings are a natural and necessary extension of appellate review in order to review all issues which, for whatever reason, were not subject to review in the direct appeal. Post-conviction is a second layer of review which often involves issues not previously litigated, such as claims of ineffective assistance of counsel and newly discovered evidence, and as such, should be accorded the same respect as the direct appeal. These are serious claims which should not escape review because a defendant wishes to expedite his execution.

A thorough review in post-conviction is essential to preserve the integrity of the death penalty process. All too often investigations in the post-conviction process uncover material information, through public records requests, more detailed investigations, or the revelation of newly discovered evidence, which should have been presented in either the guilt or penalty phases. The presentation of such evidence before the trial court, and the review of such evidence by the appellate court, is a necessary step in the determination that the ultimate penalty of death is the appropriate penalty in a given case. Just as it does on direct appeal, this Court has a duty in the appeal from the denial of a motion for post-conviction relief to engage in a careful review of the evidence supporting the judgment and sentence, as well as the proportionality of the death penalty. Dismissal of a post-conviction proceeding before that investigation is completed, or before that information

can be presented and reviewed by this Court, diminishes the integrity of the death penalty process.

Review of death penalty cases, both in the direct appeal and post-conviction stages, creates an undeniable burden on this and the trial courts= time and resources. The proposed rule will do little to decrease the burden in the trial court or this Court as it will require thorough competency evaluations and evidentiary hearings and subsequent review of those proceedings in lieu of hearings and appeals on the merits of the post-conviction motions. However, the proposed rule will exact a heavy toll if the state puts someone to death who is not deserving of the death penalty but for waiving his or her right to collateral review. The degree of certainty required before an execution is carried out will be diluted by allowing defendants the right to voluntarily discharge counsel and dismiss pending post-conviction proceedings.

For these reasons, FACDL urges this Court not to adopt proposed Rule 3.851(i).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to Judge O.H. Eaton, 101 Bush Boulevard, Sanford, FL 32773 by U.S. mail this 1st day of November, 2005.

Respectfully submitted,

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