In the Supreme Court of Florida

IN RE: **CASE NO: SC07-596**

AMENDMENTS TO FLORIDA RULE OF JUDICAL ADMINISTRATION 2.215

The Florida Court Education Council ("FCEC") responds to the inquiry of the Florida Supreme Court of October 4, 2007, through Vice-Chair, Judge Jennifer D. Bailey and Handling Capital Cases Subcommittee Chair, Judge Kevin M Emas.

In preliminary response to the Court's inquiry, the FCEC's concerns and the proposed rule change grew from a very specific problem which developed beginning in 2000. The rule as it exists requires experienced, previously death-qualified judges to complete anew the Handling Capital Cases ("HCC") course due to their certification having lapsed while on rotation to other divisions of the circuit court. As a consequence, class size substantially increased, diminishing the effectiveness of the course. (*See Charge letter from Judges Warner and Lewis, Exh.1*) The FCEC appointed a subcommittee to examine the issue.

The charges to the subcommittee are set out at page two of the Warner/Lewis letter. (*Exh.1)* The Florida Court Education Council did not undertake a complete review of Florida Rule of Judicial Administration 2.215, but addressed only the issues framed by the FCEC. The Council's full explanation follows.

In response to the Court's request for file reports, letters and supporting documents pertaining to its consideration of the rule, the following items are appended as exhibits:

1. 8/25/2004 letter from FCEC co-chairs, Judges Warner and Lewis, reflecting subcommittee charge and history of issue;
2. 2/14/2005 FCEC Ad Hoc Committee on Training Requirements for Handling Capital Cases;
3. FCEC Minutes 1/4/2004;
4. FCEC Minutes 3/7/2004;
5. FCEC Minutes 12/9/2004;
6. FCEC Minutes 3/6/2005;
7. FCEC Minutes 1/8/2006;
8. FCEC Minutes 4/13/2007.

A Brief History of 2.215(b)(10) (formerly 2.050(b)(10)):

Prior to the creation of Rule 2.050, judges were not required to meet any educational or experiential requirement before presiding over a capital case. In fact, the only rule of judicial administration addressing who may preside over such cases was found in Rule 2.050(b)(4), which was amended in 1996 to read as follows (amendatory language underlined):

> (4) The chief judge shall assign judges to the courts and divisions, and shall determine the length of each assignment. All judges shall inform the chief judge of any contemplated absences that will affect the progress of the court's business. If a judge is temporarily absent, is disqualified in an action, or is unable to perform the duties of the office, the chief judge or the chief judge's designee may assign a proceeding pending before the judge to any other judge or any additional assigned judge of the same court. The chief judge may assign any judge to temporary service for which the judge is qualified in any court in the same circuit. If it appears to the chief judge that the speedy, efficient, and proper administration of justice so requires, the chief judge shall request the chief justice of the supreme court to assign temporarily an additional judge or judges from outside the circuit to duty in the court requiring assistance, and shall

> advise the chief justice whether or not the approval of the chief judge of the circuit from which the assignment is to be made has been obtained. The assigned judges shall be subject to administrative supervision of the chief judge for all purposes of this rule. 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. Nothing in this rule shall restrict the constitutional powers of the chief justice of the supreme court to make such assignments as the chief justice shall deem appropriate.

In re Amendments to Florida Rules of Judicial Administration Regarding Death Cases, 672 So. 2d 523-24 (Fla. 1996).

Though not directly relevant here, it should be noted that the underlined language above was removed in a subsequent amendment to the rule. *See Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, and 3.993 and Florida Rule of Judicial Administration 2.050*, 797 So.2d 1213 (Fla. 2001). The rule, as amended, provides:

> 4) The chief judge shall assign judges to the courts and divisions, and shall determine the length of each assignment. All judges shall inform the chief judge of any contemplated absences that will affect the progress of the court's business. If a judge is temporarily absent, is disqualified in an action, or is unable to perform the duties of the office, the chief judge or the chief judge's designee may assign a proceeding pending before the judge to any other judge or any additional assigned judge of the same court. The chief judge may assign any judge to temporary service for which the judge is qualified in any court in the same circuit. If it appears to the chief judge that the speedy, efficient, and proper administration of justice so requires, the chief judge shall request the chief justice of the supreme court to assign temporarily an additional judge or judges from outside the circuit to duty in the court requiring assistance, and shall advise the chief justice whether or not the approval of the chief judge of the circuit from which the assignment is to be made has been obtained. The assigned judges shall be subject to administrative supervision of the chief judge for all purposes of this rule. 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~~a judge qualified to conduct such proceedings under subdivision (b)(10) of this rule. Nothing in this rule shall restrict the constitutional powers of the chief justice of the supreme court to make

such assignments as the chief justice shall deem appropriate.

Id. at 1234.

In February 1997, the Florida Supreme Court enacted Rule 2.050(b)(10) "[i]n order to prevent the assignment of new judges, with no prior experience trying criminal cases, to death penalty cases…." *In re Amendment to the Florida Rules of Judicial Administration 2.050(b)(10),* 688 So.2d 320 (Fla. 1997). At the time of its enactment, the rule provided:

> 10) The chief judge shall ensure that no judge presides over a capital case in which the state is seeking the death penalty or collateral proceedings brought by a death row inmate until that judge has served a minimum of six months in a felony criminal division and has successfully completed the "Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies within the last five years. The Chief Justice may waive this requirement in exceptional circumstances at the request of the chief judge.
> *Id.*

Nine months later, the Supreme Court amended the rule by creating a "refresher course" requirement (and eliminating the requirement that the judge complete the full HCC course at least every five years). The amended rule provided:

> 10) The chief judge shall ensure that no judge presides over a capital case in which the state is seeking the death penalty or collateral proceedings brought by a death row inmate until that judge has served a minimum of ~~six~~ 6 months in a felony criminal division and has successfully completed the "Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies ~~within the last 5 years~~. Each judge must complete the "Handling Capital Cases" course as soon as practicable upon entering the criminal division. Once a judge success fully completes the "Handling Capital Cases" course, the judge must thereafter attend a "refresher" course during each of the subsequent continuing judicial education reporting periods. The ~~C~~chief ~~J~~justice may waive ~~this~~ the course requirement in exceptional circumstances at the request of the chief judge. This requirement shall not preclude a judge from presiding in collateral proceedings in a case in which the judge presided over the trial or an earlier collateral proceeding.

In re Amendment to the Florida Rules of Judicial Administration, Rule 2.050(b)(10), 701 So.2d 864, 865 (Fla. 1997).

In the comments section to the rule, the Court added: "Failure to complete the refresher course during the three-year judicial education reporting period will necessitate completion of the original "Handling Capital Cases" course." *Id.* at 865.

Evolution of the Educational Issue

At the same time as the Court was further specifying the nature and character of the education necessary to preside over death cases, many circuits were moving toward more comprehensive judicial assignment rotation plans between divisions of their circuits. Many judges who took the HCC course eventually rotated out of the criminal division and into other divisions. When those judges were no longer in the criminal division, they focused on the education most pertinent to their current assignment. As a result, many judges' capital case qualification lapsed because they did not take the refresher course while they were assigned to other divisions. Under the current rule, those judges are required to take and complete the HCC course again (which is currently a four-day course). As a result, in order to assure that the judges sitting in felony divisions were capital-qualified, the HCC class size almost doubled, due to the number of judges having to re-qualify to preside over death penalty cases.

The HCC course is most effective with a limit of 25 participants. As noted in the charge letter from Judges Warner and Lewis, when the student population exceeds twenty-five, opportunities for individual learning experience decreases exponentially.

Since 2000, the limitation has been exceeded every year, with class sizes averaging 50% over the cap and in some years exceeding the cap by over 70%.

FCEC Action in Response

As a result of the increase in the size of the HCC classes due to judges having to repeat the HCC course, the FCEC assigned a subcommittee to investigate and recommend a solution to the issue. *(See Exh. 3, FCEC minutes 1/4/2004).* The charge letter from Judges Warner and Lewis *(Exh.1)* sets forth the review to be conducted by the committee far more clearly than the 1/4/2004 minutes. The Report of the Subcommittee to the Florida Court Education Council is attached. *(See Exh. 2).* Pertinent portions of the minutes of the Council are excerpted below for ease of reference. Full copies of the minutes are attached as Exhibits 3-8.

January 4, 2004 Minutes (Exh. 3):

> 10. Discussion of Rule 2.050(b)(10), Florida Rules of Judicial Administration, regarding education course requirements for presiding over a capital case.
>
> Judge Warner noted that there was an issue as to whether OSCA staff or the chief judge were responsible for making sure that judges who hear capital cases are in compliance with the rule. Judge Bailey noted that it is important to deal with this issue and that AJS was now seeing the practical effects of the rule. She said that she would be happy to serve on a committee studying the issue and moved that the Council establish a committee to determine if changes to the rule should be recommended. Judge Lewis suggested that some capital cases faculty should be recruited to serve on the subcommittee. Judge Warner added that a chief judge should serve on the committee. The Council decided to establish a committee with Judge Bailey serving as chair. Judge Bailey said that she would talk with Judge Miller and Judge Kevin Emas, a Handling Capital Cases Refresher faculty member. Judge Miller said that he would call Judge O. H. "Bill" Eaton, an AJS Handling Capital Cases course faculty member.

March 7, 2004 Minutes (Exh. 4):

Finally, it was reported that Judge Kevin Emas will chair the Capital Cases Education Committee. Judge Bailey and Judge Miller will serve on the committee, and Judge Miller will try to contact Judge O. H. Eaton to serve as well.

December 9, 2004 Minutes (Exh. 5):

Committee on Training Requirements for Handling Capital Cases: Ms. Leseman reported that this committee met by conference call and reached a conceptual agreement, but members are still circulating a draft proposal.

March 6, 2005 Minutes (Exh. 6):

4. Receive Committee on Training Requirements for Handling Capital Cases Report from committee chair, Judge Kevin Emas.

Judge Emas stated that he was reporting for an ad hoc committee appointed by the Council to consider the impact that Rule of Judicial Administration 2.050(b) (10) has on education programs and whether any amendment or clarification of the Rule was necessary. In addition to Judge Emas, the members of this committee were Judge Bailey, Judge O.H. "Bill" Eaton, Judge Miller and Chief Judge Stan Morris. Judge Emas stated that there were two main issues which the committee considered. The first was whether the intent of the rule was that a judge must sit for six months in the felony criminal division before taking the Handling Capital Cases Course, and the second issue the committee considered was exactly what was necessary to maintain a judge'=s qualification to hear a capital case. (A copy of the current text of Rule 2.050, the committee's proposed amendment to Rule 2.050, and the text as amended by the Council are attached hereto as Exhibit A.)

The committee's proposed amendment to Rule 2.050(b) (10) is as follows:

2.050. Trial Court Administration

(b) Chief Judge.
(10)(A) The chief judge shall not assign a judge to preside over a capital case in which the state is seeking the death penalty, or collateral proceedings brought by a death row inmate, until that judge has become qualified to do so by:
(i) Serving a minimum of 6 months in a felony criminal division or in a division that includes felony criminal cases, and
(ii) Successfully completing the "Handling Capital Cases" course offered through the Florida College of Advanced Judicial Studies. A judge whose caseload includes felony criminal cases must complete the "Handling Capital Cases" course as soon as practicable.

(B) The chief justice may waive these requirements in exceptional circumstances at the request of the chief judge.
C) Following completion of the Handling Capital Cases Course, a judge shall remain qualified to preside over a capital case for three calendar years, and may maintain that qualification by attending a "Capital Case Refresher Course" during each following three-year period. A judge who has completed the Handling Capital Cases Course and who has not taken the "Capital Case Refresher Course" within three years must requalify to preside over a capital case by attending the refresher course.
(D) The refresher course shall be at least a six-hour course and must be approved by the Florida Court Education Council. The course must contain instruction on the following topics: penalty phase, jury selection, and proceedings brought pursuant to rule of criminal procedure 3.851.
(E) This rule shall not preclude a judge from presiding in collateral proceedings in a case in which the judge presided over the trial or an earlier collateral proceeding.

Judge Emas reviewed the proposal with the FCEC, explaining that it clarified that in order to hear a death penalty case, a judge must have been in the felony criminal division for six months and have successfully completed the Handling Capital Cases course. He explained that if a judge's qualifications lapsed due to the judge's failure to take the refresher course within three years, the judge would be required to take the refresher course again in order to re-qualify. There was some discussion about the procedure of actually getting the proposed rule change approved by the Court, and it was suggested that the possibility of fast-tracking the rule change process should be considered, but that, in any event, it would be prudent to get the input and agreement of the Florida Conference of Circuit Judges, the Judicial Administration Section of the Florida Conference of Circuit Judges, the Criminal Court Steering Committee, and The Florida Bar Criminal Rules Committee.

Judge Hammond raised a question about whether the rule addressed only those judges sitting in a felony criminal division or if it was broad enough to include general jurisdiction judges whose dockets included felony criminal cases. Judge Emas responded that the language in subsection (A) (i) which reads "or in a division that includes felony criminal cases" would cover that situation.

Judge Gross raised a concern regarding the language in section (10) (A) (i) of the rule, suggesting that the word "serving" should be changed to "presiding." Judge Gross pointed out that "serving" could encompass time served as a public defender or state attorney. Judge Emas clarified that the intent was that the time should only include time spent as a judge. Judge Gross offered that the use of the word "presiding" rather than "serving" would clarify that issue. There was also some discussion that

perhaps the comments to the rule should reflect that the six months of time did not need to be immediately preceding the taking of the Handling Capital Cases course. Judge Thomas moved to change the word "serving" to "presiding" in section (10) (A) (i), and Judge Gross seconded the motion. The motion passed unanimously. Judge Miller made a motion to accept the committee's proposed amendment to Rule 2.050, as amended by the Council, and Judge Drayton seconded his motion. The motion passed, and the proposed amendment to Rule 2.050 was accepted as amended.

Judge Emas stated he would take the necessary steps to move the proposed rule change forward and the Council authorized him to get the needed input from other groups and proceed. Judge Tygart agreed to put the matter on the agenda for the Executive Committee of the Florida Conference of Circuit Judges. (It should be noted that both the Florida Conference of Circuit Judges and the Criminal Court Steering Committee subsequently approved resolutions in favor of the proposed amendment.)

January 8, 2006 Minutes (Exh. 7):

e. Report from Judge Kevin Emas on status of proposed change in Rules of Judicial Administration re: HCC.

Council members were directed to the attachments to item 7 of the agenda for the status of the proposed changes to Rule 2.050(b)(10). The requested changes were submitted to the Judicial Administration Rules Committee, and the request was forwarded to a subcommittee for consideration. On November 10, the subcommittee unanimously recommended approval of the amendment to Rule 2.050(b)(10) and to consider it as an out-of-cycle amendment. (Post meeting note from Judge Emas dated January 24, 2006: At the Rules of Judicial Administration meeting on January 19, 2006, the full committee unanimously approved the proposed amendments to Rule 2.050(b)(10) regarding certification of judges to preside over death penalty cases. It will be sent to the Florida Supreme Court as an out-of-cycle amendment.)

April 13, 2007 Minutes (Exh. 8):

HCC Rule Change Update.

Judge Bailey gave the background of the proposed change in the Rules of Judicial Administration insofar as the Handling Capital Cases rule is concerned. The Florida Bar has recommended the rule change, and it will now be up to the Florida Supreme Court. The Council concurred in the proposed HCC rule change. (Note: The proposed rule change was to

appear in the June 1, 2007 edition of the Florida Bar News for comment. Comments are due by July 2, 2007.)

FCEC's Answers to the Court's Inquiries

The rule change was intended primarily to solve this specific problem by requiring that previously capital-qualified judges who had lapsed due to rotation could re-qualify by taking the one-day Refresher Course, which can accommodate a greater number of participants, instead of requiring judges to repeat the four-day HCC Course, which caused the course to far exceed optimal student limitations.

In answer to the specific questions posed by the Court:

(1) In respect to the clarification that a judge must have presided a minimum of six months in a felony criminal division or in a division that includes criminal cases, could the amendment as proposed result in a judge qualifying to preside over capital cases without having heard felony criminal cases for a six-month period?

It is theoretically possible, but the committee believes it to be a virtual impossibility. The only way that a judge could preside over a death-penalty case without having heard felony criminal cases for a six-month period would be if a waiver were granted by the Chief Justice or in the extremely unlikely event that the judge assigned to a mixed-docket division (more common in rural circuits) has no felony cases on the docket when the judge begins serving in the division, and none are filed in that judge's division during the subsequent six-month period. This mixed-docket issue was raised in Judge Hammond's comments in the March 6, 2005 FCEC minutes excerpted above and attached as Exhibit

6. The amendatory language was included to address those circuits in Florida where judges do not have an exclusively criminal docket, but rather preside over both civil and criminal matters. Under the current rule, judges sitting in a mixed-docket division arguably would not meet the experiential requirement. The language in the proposed amendment serves to clarify this requirement.

(2) The proposal permits the chief justice to waive the requirements of presiding over felony criminal cases for six months and of successfully attending the "Handling Capital Cases" course. Was it the intent to permit waiver of both requirements, where the original rule only provided for waiver of the course requirement, and if so, on what basis?

The intent of the subcommittee was to alter the rule to permit the Chief Justice, in exceptional circumstances, to waive both requirements for presiding over a capital case instead of the current rule, which gives the Chief Justice the authority to waive only the educational requirement. This proposed change is intended solely to promote consistency. The committee's thinking was that if waiver was allowed of one criterion, it would make sense to permit waiver of the other criterion.

The subcommittee remains convinced that waiver is the least attractive of any potential solution to assigning a judge to preside over a capital case. Waivers have seldom, if ever, been granted and the subcommittee and the FCEC urge that the same stringent standard continue to be applied. Judge Bailey, Judge Emas, and Judge O.H. "Bill" Eaton, are unaware of any waiver ever being granted by any Chief Justice of the Florida Supreme Court. Given the fact that such waivers require exceptional circumstances and have rarely, if ever, been granted, this proposed amendment to create

consistency is also a reflection of the FCEC's confidence in the appropriate exercise of the Chief Justice's discretion.

(3) The proposed amendment to rule 2.215(b)(10) does not address the exception of the requirements for a judge to preside in capital collateral proceedings in a case in which that judge had presided over the trial or earlier collateral proceeding. Is that exception necessary and, in light of the complexity of capital litigation, should it be retained?

The proposed amendment to the rule was designed to deal with the specific educational problem of HCC class size and lapse of qualification. The subcommittee did not consider the issue of a judge's qualification to preside over a collateral proceeding in a capital case. At this time, as reflected in the history of the rule above, Chief Judges are given the authority to assign the judge to preside over a capital collateral proceedings and there is no requirement that the Chief Judge, if possible, assign the matter to the judge who presided over the original proceeding (such a provision did exist under former versions of this rule).

Because this question extends beyond the scope of the FCEC's charge or the subcommittee's action, the FCEC is not in a position to comment further, except as to its potential educational impact. Were the Court to require judges to re-take the HCC Course before presiding over capital collateral proceedings, the Council would again face the same class size issues and educational dynamic problems that the proposed rule change is designed to resolve.

The Handling Capital Cases course is most effective with a limit of 25 participants. As noted in the charge letter from Judges Warner and Lewis, when the student population

exceeds twenty-five, opportunities for individual learning experience exponentially decrease. Since 2000, the limitation has been exceeded every year by an average of 50%.

The significance of the issues in capital cases require the most competent faculty we can provide. There are a limited number of individuals who are willing and able to effectively teach these courses. Past and current instructors reflect the best talent on the bench: Susan Schaeffer, Stan Morris, Phil Padavano and Stan Blake represent part of our past faculty and current faculty members include O.H. Eaton, Kevin Emas, Mary Barzee and Michael Weatherby. Because of the mandatory nature of the course, the fact that the HCC and Refresher Courses are both taught every year, and the significance of the subject matter, this particular faculty is carefully selected, and each member makes a long-term commitment to teach the courses. Many of these faculty members continue to teach the course even though they are no longer assigned to a criminal division. The HCC faculty spends hundreds of hours each year updating materials, staying current on the law, and expanding and revising the HCC and Refresher courses to meet the changing needs of judges handling these complex cases.

The Refresher Course is likely more relevant to collateral proceedings (the postconviction portion of the Refresher Course is 2½ hours of the 7½-hour course). However, if the Court were to require judges to take the Refresher Course prior to presiding over capital collateral proceedings, such a requirement would likely result in a significant delay in the postconviction proceedings while judges re-qualified prior to commencing the proceedings. Collateral proceedings can involve not only an initial motion for postconviction relief, but successive motions, petitions for extraordinary writs, and proceedings once the death warrant has been signed. The interest of addressing and

handling these proceedings in an expeditious manner could be undermined if a judge must first attend the Refresher Course (which, like the HCC course, is offered once a year).

We urge the Court to resist directing that the HCC Course (a four-day course) or Refresher Course (a one-day course) simply be taught more frequently. We do not have the faculty resources to achieve that goal and maintain the quality of these courses. In addition, FCEC is embracing new challenges in terms of educating our non-judicial court partners, engaging in across-the-board diversity education, and exploring new ideas to bring judicial education into the 21st century. The HCC and Refresher Courses are too unique and demanding to replicate more than once per year.

We hope this information is of assistance to the Court.

Respectfully submitted, this _____ day of November, 2007.

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