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IN THE SUPREME COURT OF FLORIDA

NO. SC13-1123

DANE P. ABDOOL, ET AL.,

Petitioners,

v.

PAMELA JO BONDI, ETC., ET AL.,

Respondents.

REPLY TO RESPONSE TO EMERGENCY PETITION

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JURISDICTION

Pursuant to Article V § 3(b)(7) and (8) of the Florida Constitution, Petitioners alleged jurisdiction under this Court's powers to issue writs of mandamus and all writs necessary to otherwise exercise its jurisdiction.

In *Allen v. Butterworth*, this Court took jurisdiction pursuant to its mandamus authority, finding "that the functions of government will be adversely affected without an immediate determination of the constitutionality of the [Death Penalty Reform Act] . . . ." 756 So. 2d 52, 55 (2000). In *Allen*, the State made the same arguments to minimize the significance of the DPRA that it makes here to minimize the significance of the Timely Justice Act. This Court rejected those arguments in *Allen* and should reject them here.

In *Allen*, the State contended that "[o]pposing counsel simply seek an advisory opinion from this Court" (Response Brief, *Allen v. Butterworth*, Case No. SC00-113, filed February 11, 2000, at 5); here, the State contends that it is an "advisory opinion Petitioners are requesting." (Response at 1). The State was incorrect in *Allen* and is incorrect here. In *Allen*, the State contended that "Petitioners seek to make new law—that the DPRA is facially unconstitutional—rather than enforce an existing right" (Response in *Allen* at 3 n.2); here, the State contends that "Petitioners must identify a clear and certain right they are entitled to which is being denied" (Response at 3) and that this action is "to determine

whether the petitioner has a clear existing right . . .” rather than seeking “enforcement of the right . . . .” (Response at 4). The State was incorrect in *Allen* and is incorrect here. In *Allen*, the State contended that “it has never been alleged that the Reform Act has been applied, or has even been invoked, as to any Petitioner” (Response in *Allen* at 4); here, the State contends that “[t]he petition makes no effort to identify any actual impact upon any pending case that might be affected by the passage of the Timely Justice Act.” (Response at 6). The State was incorrect in *Allen* and is incorrect here. In *Allen*, the State contended that “[w]hen and if the new law is applied to any petitioner under a discrete set of facts, there will be ample opportunity to raise constitutional challenges” (Response in *Allen* at 4); here, the State asserts that “. . . the constitutionality of the statute can be reviewed by this Court on appeal from any adverse ruling just like every other appellate issue.”[1] (Response at 2). The State was incorrect in *Allen* and is incorrect here.

[1] There is irony in the State encouraging this Court to decline to review this action, and rather wait to resolve appeals from the 168 defendants involved, as so much of the debate over capital postconviction procedure, and the expressed purpose of the Timely Justice Act, is centered on the notion that delay in capital postconviction must be eliminated and is commonly caused by the defense bar. This notion stands in stark contrast to the massive effort undertaken by the offices that coordinated to bring this action in an effort to obtain efficient and expedient resolution of the claims involved. The State seeks to inundate circuit courts with successive motions. Petitioners are prepared to take that course, but believe that this Court’s mandamus and all-writs jurisdiction may properly be invoked to avoid it.

The State made these arguments in *Allen*, yet now, in an attempt to distinguish *Allen*, utterly reverses its position, conceding that "the DPRA addressed in *Allen* imposed radical changes to capital postconviction litigation" (Response at 21) and that the jurisdictional "finding was appropriate in *Allen*" because the DPRA "established new and different rules to govern all aspects of capital postconviction litigation by adopting new and different time frames and filing limitations for judicial proceedings." (Response at 5). In this case, the State makes the same arguments, the same misrepresentations, in the same way, with the same motivations, despite the jurisdictional ruling in *Allen* rejecting those arguments.

Mandamus jurisdiction lies upon a showing that functions of government will be adversely affected without immediate review of an action. *Id*. at 55. In *Allen*, the DPRA did so by changing rules for many pending cases. *Allen*, 756 So. 2d at 55. The State contends that the Timely Justice Act is different because it "does not address postconviction litigation in any respect or bring any changes to the death penalty cases pending in this Court or throughout the trial courts of this State." (Response at 5). As described below, the State's position is contrary to the expressed legislative intent for and terms of the Timely Justice Act.

In determining whether a governmental function will be adversely affected by the Timely Justice Act such that this Court should exercise mandamus

jurisdiction, Petitioners urge this Court to consider what greater governmental function there may be than taking life. What degree of adverse affect would be acceptable to the capital punishment system before this Court would be justified in exercising jurisdiction? The Timely Justice Act required upon its effective date that likely more than 100 certifications issue from this Court's Clerk to the Governor, triggering a mandatory warrant signing provision, with only clemency as a precondition to execution. Neither the State, nor the Clerk, nor this Court, nor the Legislature can know how this Governor and future governors will treat that precondition of clemency, such that it is no precondition at all.[2] By the terms of the Act, over 100 individuals whose initial postconviction proceedings have been completed could have their executions scheduled in the coming weeks. The State insists that this will not happen. This Court may not expect it to happen. To be candid, the Petitioners have no way of knowing whether it will happen. But the fact remains that the Act, by its terms, contemplates that it will happen. And that—not predictions and speculations about any particular governor's clemency practice—is the critical fact where jurisdiction is concerned. An inundation of warrants is made possible by the Act, and this Court is fully justified to accept jurisdiction in anticipation of the adverse affects on governmental functions which

[2] In the past, certain governors have dealt with clemency at the conclusion of the direct appeal in capital cases.

would result, regardless of the perceived degree of likelihood.

With regard to all-writs jurisdiction, the State relies on *State ex rel. Chiles v. Pub. Employees Relations Comm'n*, 630 So. 2d 1093 (Fla. 1994), for the proposition that this Court has authority to issue all writs "necessary, *or proper*, to complete exercise of this Court's jurisdiction." (Response at 2 (emphasis added)). However, the *necessary and proper* formulation of this Court's all-writs jurisdiction was found in a past version of Article 5 § 5 that predates both *Chiles* and this action. *Chiles* and this action both concern the current Article 5 § 3 formulation, which contemplates only *necessary*, not *proper*, writs. In 1934, this Court explained the distinction with regard to the prior Section 5 provision:

> Under section 5 of article 5 of the Constitution, the Supreme Court has jurisdiction to issue all writs 'necessary' and all writs 'proper' to the 'complete exercise' of its jurisdiction. . . . [T]he jurisdiction of the Supreme Court to issue constitutional writs is not limited to those writs merely which are necessary to protect its jurisdiction, but may extend to the issuance of such writs as may be proper 'to the complete exercise' of its jurisdiction.

Wingate v. Mach, 154 So. 192, 193 (1934).[3]

[3] In 1942, this Court interpreted that provision to mean that "[t]he *organic power to issue such writs* is without any limitation upon the discretionary powers of the court as to the use of such discretionary writs when no other adequate remedy is offered by law." *Kilgore v. Bird*, 6 So. 2d 541, 544 (1942) (emphasis in original). The Petitioners agree with the State that the scope of jurisdiction described in *Kilgore* is embodied in the current Section 3 provision and should be applied here.

Yet, while the State's use of *Chiles* is incorrect, the State is certainly correct to urge this Court to interpret its current all-writs jurisdiction to extend not only to necessary writs, but to proper writs, because the *Chiles* interpretation of this Court's all-writs jurisdiction encompasses both forms of writs, distinguished under the former Section 5 provision.[4]

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[4] In *Chiles*, this Court defined the current Section 3 provision to include "all writs necessary to aid the Court in exercising its 'ultimate jurisdiction.'" 630 So. 2d at 1095 (citing *Florida Senate v. Graham*, 412 So. 2d 360 (Fla. 1982)). The State invites this Court to consider how the *Wingate* distinction between *necessary* and *proper* writs fits into that current model. In light of the critical nature of this case, Petitioners agree that such consideration is appropriate. In fact, it seems that Article V § 3 *must* be interpreted to include proper writs as well as necessary writs, because the *Wingate* distinction between writs *necessary to protect jurisdiction* and writs *proper to the complete exercise of jurisdiction* are both, in fact, *necessary* to achieve the Section 3 scope of jurisdiction described in *Chiles*. Where writs are proper to complete exercise of jurisdiction, they are necessary to aid this Court in exercising its jurisdiction, because this Court cannot exercise its ultimate jurisdiction incompletely.

Thus, the State correctly implicates *proper* writs here, and regardless of whether this Court deems it *necessary to protect* its jurisdiction from infringement by the Timely Justice Act, it must certainly be said that review of this action is *proper to the complete exercise* of this Court's jurisdiction over capital case procedures. Prior to the passage of the Timely Justice Act and as recognized in the Legislative Intent provision, this Court issued Administrative Order AOSC13-11, creating the Capital Postconviction Proceedings Subcommittee and directing the subcommittee to undertake a comprehensive review of capital postconviction proceedings and to make recommendations as to whether court rules should be amended to improve efficiency. CS/CS/HB 7083 lns. 846-53. That effort is an exercise of this Court's ultimate rulemaking authority over the capital postconviction system, but was preempted by the Legislature's action in that field with the Timely Justice Act, which explicitly states that it was drafted "[i]n support of these efforts," referring to the AOSC13-11 subcommittee. CS/CS/HB 7083 ln. 853. In order to complete this Court's exercise of its jurisdiction over rulemaking with AOSC13-11—in

However, regardless of the formulation of all-writs jurisdiction applied here, *Chiles* can only be read to support jurisdiction over this action. In *Chiles*, the source of original jurisdiction sought to be preserved under the all-writs provision was Article V § 15, which "vests this Court with the 'exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.'" *Chiles*, 630 So. 2d at 1095. This Court found that "[b]ecause the regulation of attorneys falls within the Court's ultimate power of review, the all writs clause could arguably be invoked as a basis for this Court's jurisdiction." *Id.* However, this Court ultimately denied jurisdiction because at issue in *Chiles* was a state-agency[5] ruling regarding collective bargaining by state-employed attorneys,

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order to complete that already initiated effort—this Court must accept jurisdiction here, permit the subcommittee to make recommendations as intended, consider any conflicts between the subcommittee's recommendations and the Timely Justice Act, and reconcile these inter-governmental efforts, which address the same concerns at the same time.

Petitioners submit that the jurisdictional scope asserted by the State is correct in this regard. It is necessary and proper for this Court to review the Act in a collective and expeditious manner, rather than adjudicating 168 individual appeals, overburdening the Court system, delaying review, and failing to provide an adequate legal remedy under *Kilgore*.

[5] Jurisdiction based on writs of prohibition was denied in *Chiles* only because "the plain language of this provision specifically limits the issuance of writs of prohibition to *courts*" and not "a state agency . . . ." *Chiles*, 630 So. 2d at 1094. Here, circuit courts, not agencies, will apply the provisions of the Act, requiring that they impose a legislative penalty on attorneys found ineffective, that they impose an ethical rule requiring disclosure of privileged information to demonstrate attorney-client conflicts, that they operate under a time-certain

which did not affect the Court's "jurisdiction over the admission of attorneys to the practice of law or the discipline of attorneys." *Id*. Collective bargaining fit neither category. However, in this case, creating the penalty of a five-year prohibition on capital practice for ineffective representation is, by its very nature, disciplinary and related to admission to practice.[6] Denying attorneys the privilege to engage in a practice law because they have previously done so poorly is soundly a matter of professional discipline, whether the desired result is to punish attorneys or to improve the quality of representation.

Thus, jurisdiction lies under this Court's powers to issue writs of mandamus and all writs necessary to otherwise exercise its jurisdiction.

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execution deadline to resolve successive litigation, and that they reconcile conflicting court rules and statutory provisions governing public records.

[6] Petitioners address here the disciplinary provision because it is closely related to the facts of *Chiles*. It is not, however, the only source of all-writs jurisdiction in this case. The attorney-client conflict provision addresses ethical matters related to attorney discipline. This Court must review this action in order to complete its exercise of jurisdiction over standards of professional conduct. The warrant-issuance provision creates a time-certain execution deadline even for cases with successive litigation pending at the time the initial proceedings conclude, triggering the mandatory death warrant provision. This Court must review this action in order to complete its exercise of jurisdiction in those cases and to protect its jurisdiction over successive litigation. The public records provisions, unabashedly described by the Act as "establishing *procedures* for public records production in postconviction capital cases [*sic*] proceedings," CS/CS/HB 7083 lns. 29-31, represent an overt usurpation of this Court's sole authority over rules of procedure. This Court must review this action in order to complete its exercise of jurisdiction over those rules.

BACKGROUND

The long-view historical background provided in the Petition describes the evolution of capital postconviction procedures in this State and the tragic consequences of moments when those procedures failed to provide sufficient protections to capital defendants. The State contends that "[c]iting a history of difficulties . . . is entirely irrelevant and distracting" (Response at 26). Yet, the State by no means denies that history of difficulties.[7] (Response at 26). The

[7] However, there is a shocking moment in the State's argument in which it refers to the Petitioners' "stories of alleged 'exonerations' . . . ." (Response at 25). Here, the State seems to betray an impulse to repress its memory of its greatest injustices. The State might consider the twenty-four Florida death row exonerees included on the 142-person list of death row exonerees maintained by the Death Penalty Information Center. *Innocence: List of Those Freed From Death Row*, Death Penalty Information Center, http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row. The State's failure to appreciate the need for postconviction protections is hubris for which it has already paid a price, yet failed to learn the lesson.

Similarly, the State refers to "[c]iting a history of success stories generated by successive postconviction litigation" as "immaterial and insufficient." (Response at 26). Again, the State seems to treat its greatest injustices as imaginary or fantastical. Each of these "stories" represents misplaced efforts by the State to wrongly take the life of an individual, and they should be taken seriously. The State's failure to take them seriously is related to its failure to respect the need for sufficient postconviction protections.

As for the Petition's citation to an article asserting that, had the Timely Justice Act "been in place at the time [of the Juan Melendez exoneration,] there's a good chance Melendez and others like him would have been killed for crimes they did not commit," (Petition, p. 26), the State asserts that "if Petitioners had taken the time to research the Melendez case, it would be readily apparent that no execution due to the Timely Justice Act would have occurred, since Melendez had never

Petitioners urge that this Court consider that there is a direct historical link between the strained or diminished procedural protections of the past and those of the Timely Justice Act. The State takes the view that moments in the past in which it recklessly barreled ahead with the taking of life despite diminished procedural safeguards, and paid a heavy price, are wholly unrelated to its rash defense of the Timely Justice Act and eagerness for more, faster executions, despite the reduced protections of the Timely Justice Act. But the more inclined the State is to dismiss history as "irrelevant," the more likely the State is to repeat it. (Response at 26). Petitioners urge that this Court should not take that same shortsighted view.

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completed any 'habeas corpus proceedings and appeal therefrom in federal court' as required by the Act prior to certification." (Response at 27). The State then declares that "[t]he fact that the petition is founded on inaccurate case dispositions and emotional appeals rather than facts and legal analysis reflects the frivolous nature of this proceeding." (Response at 27). Here, the State relies on mere coincidence to defend the undeniable effect of the provisions of the Act. Juan Melendez was granted relief on his *third* successive motion, after years of litigation during which this Court denied relief numerous times before the circuit court finally granted relief. *See Melendez v. State*, 612 So. 2d 1366 (1992); *Melendez v. State*, 644 So. 2d 983 (1994); *Melendez v. State*, 718 So. 2d 746 (1998). The mere coincidence that Melendez's ongoing federal proceedings happened to be outpaced by consecutively running state proceedings—a circumstance which is exceedingly rare—does not change the fact that under the Timely Justice Act, which does not allow for successive litigation at all, Melendez and others like him face a greater risk of being executed for crimes they did not commit, whether happenstance ultimately swings in their favor or not. The State's willingness to rely on happenstance to determine whether innocent individuals should be executed is troubling. Further, this Court twice denied relief to Melendez prior to the Anti-terrorism and Effective Death Penalty Act of 1996 and its one-year deadline for filing federal habeas petitions. *See* 28 U.S.C. § 2244(d)(1). Today, the coincidental delay of federal proceedings that occurred in Melendez is not possible.

CLAIMS FOR RELIEF

The State primarily responds to each of the claims in the Petition with the same flawed defense of the Timely Justice Act: it is not unconstitutional because it does not actually do anything. The State defends the constitutionality of the Act by assuring this Court that it will simply not do what the Legislature intended or what its terms dictate. Generally, the State makes the sweeping contention that the Timely Justice Act "does not address postconviction litigation in any respect or bring any changes to the death penalty cases pending in this Court or throughout the trial courts of this State." (Response at 5). This will no doubt come as a surprise to the Legislature that drafted and passed the Act, because the Legislative Intent codified in Florida Statutes § 924.057, explicitly states that the Act is intended to support efforts "to improve the overall efficiency of the capital postconviction process," CS/CS/HB 7083 lns. 852-53, and during floor debates, proponents of the Act explained that it was intended to "change the structure, . . . to expedite the process." (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 14:23)). In fact, applause broke out in response to statements that "we have judges in this state who have refused to issue orders in these key matters for up to six years" and "we have lawyers who for money have pretended and filed documents that in defending those accused that they have done so incompetently." (Audio

Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 5:16)). It is clear that the Act was based on the notion that *judges* and *litigants* are accountable for delays, and, because the judicial system has failed to do so, the Legislature must repair and accelerate capital postconviction litigation in the State of Florida.

Mandatory warrant-issuance provision

With regard to the claim that the automatic warrant-issuance provision usurps and violates this Court's authority to determine by rule the timing of postconviction litigation, the State contends that "the timing of the warrant is still left to the Governor's broad discretion" because the automatic warrant provision contains a precondition of clemency. (Response at 9). The State takes that position despite the fact that the sponsors of the Act have proclaimed that "exactly what this legislation was designed to put a stop to" is "legal filings" which "delay the inevitable," Dara Kam, *New Florida law to hasten executions faces lawsuit challenge*, The Palm Beach Post, June 26, 2013, http://www.palmbeachpost.com/news/news/crime-law/new-florida-law-to-hasten-executions-faces-lawsuit/nYXDg/ (quoting sponsor), that the Act is intended to ". . . improve Florida's death penalty system by limiting frivolous appeals and ensuring that we have . . . appropriate and timely justice," (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement

of sponsor beginning 00:13)), and that the Act is intended to "fix the death penalty" because "[i]t's a blight on our whole justice system that we have folks hanging around for decades when there is no dispute about guilt or innocence," so the Act will accelerate the executions of "those where guilt or innocence is not in question" out of a desire to "put these monsters to death." (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of sponsor beginning 46:20)). The lawmakers that pushed for and won approval for this Act did so on the basis that it will fix capital postconviction *litigation* by speeding it up. That is the purpose of the Act. The State's defense of the Act is to assure the Court that that purpose was illusory, just for show, and that the Act will actually do no such thing. The State defends the Act by rejecting it, which is no defense at all.

Further, the State relies entirely on coincidence to represent to this Court that the Act will not have an adverse impact on capital postconviction litigation: "no warrant deadline is fixed or unconditional but in fact is dependent upon the completion of a clemency determination." (Response at 10). Here, the State relies on current practice from the Governor's Office regarding the timing and method of clemency, but that practice could change at any time, removing the precondition of clemency. A governor could decide that clemency should occur earlier or be

restricted to a one-hour proceeding.[8] A governor could decide that defendants who had clemency under the former method, after their direct appeal, do not need an additional, present-day clemency determination. The State has no basis to represent to this Court that a governor will not change the clemency process and, in so doing, make the automatic-warrant provision unconditional and immediately operable in every case. The State relies on nothing more than the coincidence of recent practice to contend that the warrant provision is not automatic. But the language of the Act, requiring that the Governor "shall" sign warrants, leaves no other conclusion.

However, this Court has adopted a rule of capital postconviction procedure that permits one year after the discovery of new evidence or the establishment of a new constitutional right for a defendant to file a successive claim on those bases. Fla. R. Crim. Pro. 3.852(e)(2); *Jimenez v. State*, 997 So. 2d 1056, 1064 (Fla. 2008) (successive motions must be "filed within one year of the date upon which the claim became discoverable through due diligence."). New evidence may come to light and new rights may be established up to and on the day initial proceedings conclude. Under this Court's rules, a defendant would have one year to file a claim. Under the Timely Justice Act, that defendant would be executed long before

[8] Rule 15 C. (Monitoring Cases for Investigation) of the Rules of Executive Clemency state that "[t]he investigation by the Parole Commission shall begin at such time as designated by the Governor."

the one-year filing deadline.[9] That is a fact based on the black-letter law of the Act that the State cannot explain away.

With regard to the argument that the warrant-issuance provision interferes with this Court's rulemaking authority and case law, the State contends that the Act "cannot possibly interfere with judicial rulemaking because the issuance of a death warrant is not a judicial act or proceeding." (Response at 9). But it is fallacious to contend that the only way to interfere with something is to alter it directly.[10] Requiring governmental officers to take actions that preclude the

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[9] The State contends that "[t]here would be no reason for the Act to specifically address successive litigation, since that involved judicial proceedings governed by the Court's rules." (Response at 13-14). Yet the same can be said of the "initial proceedings" addressed by the Act, which the State asserts to be proper. By treating successive actions as a secondary, inferior class of legal vehicle, as ancillary, as afterthoughts, the Legislature acted contrary to this Court's rules and case law. The warrant-issuance provision could have made exception for litigation pending at the time initial proceedings conclude, but it did not.

[10] To interfere is "to interpose in a way that hinders or impedes." interfere. 2013. Merriam-Webster.com, http://www.merriam-webster.com/dictionary/interfere. The Act can hinder and impede rules of this Court without explicitly altering them. To provide an extreme example to demonstrate the flaw in the State's reasoning, under its analysis, the Legislature could pass a law requiring the Clerk of this Court to certify to the Governor any instance where a criminal defendant has failed to bring a postconviction challenge within one day of the direct appeal mandate, at which time the Governor would have thirty days to schedule an execution. It could be said that no judicial rule was altered. However, just like the Act's warrant-issuance provision, judicial rules would be preempted or contradicted. Under the State's view, the provision creating a one-day timeframe for filing a collateral proceeding is beyond this Court's review, because it does not alter a judicial rule directly. In that way, the State seeks to doubly limit this Court's authority. By stating that "under our Constitution, the Legislature has the authority and the obligation to set

operation of judicial rules interferes with those rules without changing the rules themselves.[11]

As with the automatic-warrant provision, intended to make executions occur faster but dismissed by the State as not altering "the Governor's broad discretion" in any way (Response at 9), the State dismisses the certification provision as simply inoperable, stating that "[t]here is no time frame in which the Clerk is required to act and no enforcement provision if the Clerk fails to act." (Response at 14). Again, the State simply assures the Court that the State does not expect the Act to operate as intended. Because there is no deadline or enforcement provision for the Clerk's certification requirement, it is no requirement at all, and perhaps the Clerk simply will not do it, making the automatic-warrant provision a non-issue.

As for the usurpation of the constitutional authority of the Governor to

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policy for the State of Florida" (Response at 12), the State neglects that legislative actions are checked by the constitutional review in this Court. The existence of the power does not in and of itself justify every use of that power.

[11] The State seems to miscomprehend the issue of interference with judicial authority, stating "[t]he petition challenges the Act as violating separation of powers by infringing upon this Court's rulemaking authority as the first claim presented, and offering the same principle as a new subclaim does not add anything to the substance of the petition." (Response at 13). Yet, the principles of the usurpation claim and the interference claim are separate and distinct. Separation of Powers is not a single rule with a single mode of violation; it is a field of rules that can be violated in various ways. The Legislature can violate the principle of Separation of Powers by attempting to create rules, as described in the first subclaim, or by passing laws that have the effect of interfering with rules, as described in the second subclaim.

determine the time of executions, the State recognizes that "[t]he Governor's authority to issue death warrants is . . . generally bestowed by the constitutional mandate for the Governor 'to see that the laws be faithfully executed.'" (Response at 17). The State acknowledges the Governor's warrant-signing authority as constitutionally-bestowed even while defending the Act's limitation of that power. Yet, the Legislature cannot circumscribe a power granted by the Constitution.

Attorney disciplinary provision

With regard to the claim that the five-year prohibition on practice violates this Court's disciplinary authority over members of the bar by prohibiting them from a practice of law, the State takes the position that "the Act does no such thing," that the Act ". . . places no restrictions on the practice of law beyond the representation of capital defendants at state taxpayer expense," and that "[a]ny attorney found to have provided ineffective assistance of counsel on two occasions may still practice criminal law and is not required to complete any remedial measures or suffer any other adverse consequences." (Response at 31). In other words, the prohibition is so inconsequential as not to be punitive to practitioners.[12] However, when the Governor signed the Act into law, he believed the purpose of

[12] The State neglects the fact that a public defender engaged in capital litigation could lose their livelihood if precluded from capital practice. As the provision specifically applies to court-appointed counsel and imposes no suspensions at all on private counsel—a fact which clearly contradicts the expressed purpose of improving the quality of capital representation—this is the more likely result.

this provision to be that it "promotes effective representation of death-sentenced persons . . ." (State's "Exhibit" A, June 14, 2013 letter from Governor Scott to Secretary of State), and the State, contradictorily, also has contended that the provision "is not a disciplinary measure but is simply a means of insuring [*sic*] that capital defendants will be adequately represented." (Response at 31). Yet, how might the provision promote effective representation, or discourage poor representation, if it has no impact on the attorneys to which it is applied? There is no way to read the provision other than to penalize poor performance in order to discourage it (whether the goal be a benefit to the clients or a detriment to the attorneys, the result is the same), and that is the sole province of this Court. This Court has "exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Fla. Const. Art. 5 § 15. That "exclusive" jurisdiction leaves no room for the Legislature to bar certain practices of law from certain attorneys based on poor performance in those areas.

Public records provisions

With regard to the claim that the Legislature's adoption of public records rules violates this Court's rulemaking authority, the State assures the Court that "these changes operate only to bring the statute current and reflect the procedures previously adopted by this Court" and that "[b]ecause the Act does not change current law with regard to the procedures for postconviction public records

disclosures, it cannot impact any currently pending cases . . . ." (Response at 6 n.1). Again, this must come as a surprise to the Legislature, since the intent expressed in the Act for these provisions is "establishing procedures for public records production in postconviction capital proceedings," CS/CS/HB 7083 lns. 29-31, and a sponsor of the Act declared during the floor debate that "[w]e have some good language in the bill on public records requests because that process has been abused to delay justice being carried out." (Audio Recording of Senate Floor Debate, Regular Session, April 26, 2013, HB 7083 (statement of sponsor beginning 9:36:13)). The legislative intent is to eliminate abuse in the public records process, yet the State contends that the public records provisions do nothing.

However, the actual provisions of the Act demonstrate that the Legislature's true intent to alter the rules—to make the rules more restrictive—is realized in the Act. Florida Rule of Criminal Procedure 3.852(g)(3), which governs defendants' demands for additional public records from agencies who provided records after notice from the State of the affirmance of the death sentence, requires the circuit court to conduct a hearing on any agency objections to production. The corresponding provision of the Act makes no allowance for a hearing and anticipates that the court will make a ruling on the agency objections without allowing the defendant to be heard. Similarly, Rule 3.852(l), which governs the scope of production and resolution of disputes, requires that the circuit "shall" hold

hearings to resolve motions to compel and objections to production, whereas the corresponding provisions of the Act make no allowance for the agencies or defendants to be heard. Additionally, the Act conspicuously excludes any procedure by which capital defendants may seek public records once the Governor has signed a death warrant, as opposed to the current Rule 3.852(h)(3), which "is intended [to permit] an update of information previously received or requested" upon the issuance of a warrant. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). In contending that the public records provisions of the Act change nothing, the State brazenly offers a falsehood to this Court.

Attorney-client conflict provision

With regard to the claim that new requirements to establish attorney-client conflicts violate this Court's authority to establish ethical rules, the State takes the position that "no reasonable reading of the statute would require an attorney to disclose confidential information in order to identify the particular adverse interests creating a potential conflict,"[13] (Response at 36), despite the fact that the purpose for this provision expressed during the floor debate was as follows: "We're talking about regulating conflict counsel and making sure they don't

[13] The State takes that position despite having earlier described this provision as defining "the extent to which the Office of Capital Collateral Regional Counsel [CCRC] must disclose conflicts of interest compelling withdrawal from representation." (Response at 6).

frivolously admit to being conflicted out so that appeals are delayed. That happens all the time." (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of proponent beginning 3:01)). The drafters and proponents of this provision intended it to add new disclosure requirements such that counsel cannot conflict off without providing its basis to the court, reading it in a manner the State describes as unreasonable in order to defend it.

And the language of the provision itself, which adds to Florida Statutes § 27.703 the requirement that courts must determine that actual conflicts exist, rather than the prior requirement that courts designate new counsel upon *counsel's* determination that a conflict exists, is consistent with the legislative intent to require disclosure. Courts must have some factual basis on which to make factual findings. The State's representations to the contrary deny the language of the Act.

CONCLUSION

There is an inexplicable disconnect between what the Timely Justice Act is intended to do, the terms of the Act, and what the State contends the Act will actually do. The Legislature's purpose has been clearly expressed over and over: the judicial system is failing to properly administer capital postconviction litigation so the Legislature must step in to fix the system. Equally clear and repeatedly expressed is the State's view of what the Act will actually do: nothing. And that disconnect is not important merely because it demonstrates the irrationality and

disingenuousness surrounding the unthinking manner in which the Act was passed and justified, it also demonstrates that the State's arguments are unrelated to the Act's constitutionality.

Nowhere does the law say that Separation of Powers violations are allowable as long as there is no great harm done, such that the State's primary defense of the Act—that it will do nothing—is utterly irrelevant to the primary claims of the Petition. Article II § 3 of the Florida Constitution states that "[n]o person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches . . . ." The State is unable to point to any authority which interprets that provision to apply only where a harm is demonstrated. Thus, even though Petitioners describe numerous, practical and realistic harms that will result from the Act, the State's primary defense of the Act is no defense at all.

The Act is about rulemaking, expressed as rulemaking, described by its drafters as rulemaking, but rhetorically defended by the State as being about substantive policy. Petitioners urge that this Court should not permit its capital postconviction system to be, to any extent, supplanted by such measures.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to PAMELA JO BONDI, ATTORNEY GENERAL, by e-mail on this 29th day of July, 2013.

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