

**IN THE SUPREME COURT OF FLORIDA**

**IN RE: AMENDMENTS TO THE FLORIDA  
RULES OF JUDICIAL ADMINISTRATION;  
THE FLORIDA RULES OF CRIMINAL  
PROCEDURE; AND THE FLORIDA RULES  
OF APPELLATE PROCEDURE--CAPITAL  
POSTCONVICTION RULES**

**CASE NO. SC13-2381**

**ATTORNEY GENERAL'S COMMENTS TO AMENDMENTS  
TO FLORIDA RULES OF CRIMINAL PROCEDURE**

COMES NOW, the State of Florida, Office of the Attorney General, by and through undersigned counsel and files its comments to the proposed amendments to Florida Rule of Criminal Procedure 3.851 and Florida Rule of Criminal Procedure 3.852 as submitted by the Capital Postconviction Proceedings Subcommittee,<sup>1</sup> and would show:

**(1) Rule 3.851, Collateral Relief After Death Sentence Has Been Imposed  
And Affirmed On Direct Appeal - amendment to subsection(e)(1)**

The amendment to subsection (e)(1) entitled "Initial Motion" strikes the language that has historically required postconviction motions be filed under "oath".

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<sup>1</sup> The Capital Postconviction Proceedings Subcommittee was tasked with reviewing postconviction proceedings and recommending to this Court amendments "to improve the overall efficiency of the capital postconviction process." In re: Subcommittee on Capital Postconviction Proceedings, Fla. Admin. Order No. AOSC13-11 (March 22, 2013). In this regard, various amendments have been proposed to amend the Rules governing postconviction proceedings.

This proposal is problematic for a number of reasons. Under the proposed amendment, a postconviction motion could be filed without a Defendant being aware of the contents, without a Defendant being aware of the filing, and without a Defendant's input or consent. The proposed amendment creates a situation where a Defendant may no longer make choices regarding postconviction proceedings, where true and correct allegations are not required, and where unnecessary litigation may arise in our federal courts. Removal of the oath requirement sacrifices accuracy and accountability, and compromises the integrity of the process.

This Court has repeatedly held that the oath is required. Spera v. State, 971 So. 2d 754, 762 (Fla. 2007); Groover v. State, 703 So. 2d 1035, 1038 (Fla. 1997); Gorham v. State, 494 So. 2d 211, 212 (Fla. 1986); see also Scott v. State, 464 So. 2d 1171 (Fla. 1985) (noting requirement is that Defendant must be able to affirmatively say allegation is true and correct and false statement may serve as basis for perjury prosecution). The only exception recognized by this Court has been in the case where a Defendant's competency is being questioned. See Carter v. State, 706 So. 2d 873, 876 (Fla. 1997).

Moreover, this Court has recognized that a Defendant has the right to make choices regarding his representation. Hojan v. State, 3 So. 3d 1204, 1211-12 (Fla. 2009); Nixon v. Singletary, 758 So. 2d 618, 625 (Fla. 2000). In this regard, this Court

has recognized a Defendant has the right to withdraw a postconviction motion filed on his behalf. Sanchez–Velasco v. State, 702 So. 2d 224 (Fla. 1997); see also Hernandez-Alberto v. State, 126 So. 3d 193, 200 (Fla. 2013)(recognizing this Court has consistently held right to prosecute postconviction claims may be waived).

The filing of postconviction motion without a Defendant's knowledge or consent is inconsistent with this Court's precedent. Lastly, it should be noted that striking the oath requirement will foster litigation in federal courts where a Defendant can now claim that due to postconviction counsel's errors his claim was not properly presented in state court. See Martinez v. Ryan, 132 S. Ct. 1309 (2012). This is especially true where motions could now be filed without a Defendant's input, knowledge, or consent. Moreover, striking the oath requirement is contrary to this Court's recent amendments to Fla. R. Crim. P. 3.850 where this Court expanded the oath requirement. See In re: Amendments to Fla. R. Crim. P., \_\_\_ So. 3d \_\_\_, 2013 WL 6331351, \*12 (Fla. Dec. 5, 2013). This Court should maintain the oath requirement.

**(2) Rule 3.851, Collateral Relief After Death Sentence Has Been Imposed And Affirmed On Direct Appeal - amendment to subsection(c)(4)**

The amendment to subsection (c)(4) entitled "Duties of Defense Counsel" creates a new Rule where trial counsel now must relinquish his original trial file to

postconviction counsel. Maintaining the integrity of trial counsel's files in a capital case is paramount to postconviction proceedings, and subsequent judicial proceedings where the actions of trial counsel are questioned or attacked.

The current proposed amendment should not be adopted. A sounder approach would be to have trial counsel maintain the original file and provide postconviction counsel with a copy. This approach is favored by the Florida Bar Criminal Procedure Rules Committee which has recently approved a rule taking this approach. This approach aids trial counsel in defending against ineffective assistance of counsel claims. It ensures the State is able to examine trial counsel's file, which it is entitled to do when ineffective assistance of counsel claims have been lodged. See Reed v. State, 640 So. 2d 1094, 1097 (Fla. 1994). It assists postconviction counsel in cases where postconviction counsel's actions regarding the trial file are questioned. Moreover, having trial counsel maintain the original file also benefits the judiciary who may be in the position to have to examine whether a certain document exists, or was provided.

Beyond these policy considerations, it should be noted that trial counsel files are the property of trial counsel. Long v. Dillinger, 701 So. 2d 1168 (Fla. 1997); see also Florida Ethics Opinion 88-11 (Reconsideration). It appears questionable whether a Rule can rightfully divest an attorney of his property. Furthermore, the propriety of such a rule is even more questionable in these circumstances where the owner of the

original trial file (the trial attorney) is being placed in an adversarial position by turning over the file to collateral counsel to investigate ineffective assistance of counsel claims. The proposed amendment should not be adopted.

**(3) Rule 3.852, Capital Postconviction Public Records Production**

The Subcommittee has proposed an amendment that, as noted in its commentary, requires the State Attorney and Attorney General to "manage and ensure compliance with the public records process." First, neither the State Attorney nor the Attorney General has any authority or control over the various State, county, and municipal agencies throughout the State that are involved in the public records process. See generally proposed Fla. R. Crim. P. 3.852(j)(trial court has authority to compel disclosure of records and require representatives from agencies to appear and address public records issues). Second, requiring the State Attorney or the Attorney General to ensure compliance is inconsistent with the adversarial system currently in place, and as noted below is contrary to this Court's precedent regarding public records.

This Court has made it clear that Fla. R. Crim. P. 3.852 is a discovery rule for the defense. In re: Amendments to Fla. R. Crim. P. – Capital Postconviction Public Record Production, 683 So. 2d 475 (Fla. 1996). In that regard, this Court has held that a Defendant has a duty to diligently seek this discovery or waives the requests. See Pace v. State, 854 So. 2d 167, 180 (Fla. 2003); Vining v. State, 827 So. 2d 201, 218-19

(Fla. 2002); Reaves v. State, 826 So. 2d 932, 942-43 (Fla. 2002); Cook v. State, 792 So. 2d 1197, 1204-05 (Fla. 2001). Under the proposed Rule, if the responsibility to ensure public records production falls upon the State Attorney and Attorney General, the Defendant bears no duty to seek discovery when in fact, it is the Defendant who is in the best position to know if discovery has been completed and to file a motion to compel if it has not. The proposed amendments should not be adopted.

#### **(4) Case management orders**

The Subcommittee had sought approval for capital case management orders and recommended they be used for educational purposes. However, the orders present a number of inconsistencies (which appear simply to be an oversight).

The first order requires the central records repository to deliver sealed records to the trial court without any defense request. This is inconsistent with Fla. R. Crim. P. 3.852(f) which contemplates the defense moving for an in camera inspection.

The first and second orders both assume that a petition for certiorari is always filed in the United States Supreme Court. This is not always the case. In the first order, it is noted a second case management order will be entered "after disposition of the USSC petition for writ of certiorari." In the second order, it indicates collateral counsel shall file the initial postconviction motion one year from the date of the "USSC certiorari disposition". This timing is inconsistent with Fla. R. Crim. P. 3.851(d) which

recognizes a postconviction motion shall be filed within one year upon the expiration of the time permitted to file a petition for writ of certiorari or in the cases where a petition is filed within one year of the certiorari disposition.

WHEREFORE, the Attorney General respectfully requests that this Honorable Court reconsider its adoption of Florida Rule of Criminal Procedure 3.851 and Florida Rule of Criminal Procedure 3.852 as currently proposed.

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically to the below listed parties on this 17th day of February, 2014:

The Honorable Kevin Emas  
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### **CERTIFICATE OF FONT COMPLIANCE**

I HEREBY CERTIFY that the size and style of type used in the Attorney General's Comments is 14-point Times New Roman.

/s/ Carolyn M. Snurkowski  
CAROLYN M. SNURKOWSKI  
Associate Deputy Attorney General