

**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 POST CONVICTION RULES**

**CASE NO. SC13-2381**

---

**COMMENTS OF THE FLORIDA BAR CRIMINAL LAW SECTION**

The Florida Bar Criminal Law Section Executive Council (“CLS”), by and through its Chair, Susan Odzer Hugentugler, hereby files this comment on the report and petition of the Supreme Court’s Capital Postconviction Proceedings Subcommittee (“Subcommittee”).

The Executive Council of the Criminal Law Section of the Florida Bar, made up of experienced judges, prosecutors, public and private defense lawyers, and law professors, met on January 24, 2014, and discussed the proposed amendments in the Subcommittee’s petition. The CLS reviewed the Subcommittee’s proposed rules and a draft of the proposed comments of the Criminal Procedure Rules Committee.

The outstanding work of the Subcommittee in its detailed and thoughtful effort to reconcile the rules of procedure to the substantive enactments of the “Timely Justice Act” as adopted by the Legislature in Ch. 2013- 216, Laws of Florida (2013) is to be commended. The CLS also notes that the comments of the

Criminal Procedure Rules Committee are largely consistent with several areas of concern identified by the CLS, set forth below to assist the Court.<sup>1</sup>

1. Rule 3.112(k) and Rule 3.851(b)(4)

While minimum qualifications for defense counsel in capital trials and capital direct appeals currently exist, the new Rule 3.112(k) sets forth, for the first time, criteria necessary to qualify as “lead counsel” in a capital postconviction proceeding. Proposed Rule 3.851(b)(4) states that no attorney shall be allowed to appear for a “limited purpose” on behalf of a defendant in a capital postconviction proceeding. Some members of the CLS are concerned that these provisions, when read together, would act to prohibit or prevent a lawyer from a law firm with substantial resources from providing assistance, often *pro bono*, to a qualified “lead counsel” where that attorney would not qualify as “lead counsel” under the rules.

The CLS also was concerned whether the prohibition against appearing for a “limited purpose” meant that appearances as “co-counsel” are prohibited. For example, could an attorney apply *pro hac vice* to assist “lead counsel” only on a single issue like DNA? If so, would this attorney be considered “co-counsel?” Would this attorney be permitted to sign pleadings on behalf of the defendant or

---

<sup>1</sup> Some members of the CLS voiced their belief that additional time to study the proposed rule amendments would have been beneficial to more fully comment on them, however, a majority of members voted to provide these comments.

must all pleadings be signed only by the “lead counsel?” The CLS appreciates the need for an experienced “captain of the ship” to steer the postconviction proceedings, but also recommends that the duties and definition of the “lead counsel” be clarified.

## 2. Rule 3.851(c)(4)

The proposed amendment to the rule would require trial counsel to provide to postconviction counsel, within 45 days of the appointment of postconviction counsel, the “original file” including all work product not otherwise subject to a protective order and information pertaining to the defendant's capital case which was created and obtained during the representation of the defendant.

The CLS believes the production of the original file is problematic. Specifically, the CLS is concerned that once the original files are produced, portions of the file, i.e. trial notes and internal files, in whole or in part, may be lost or misplaced thereby depriving trial counsel of the opportunity to properly testify at any postconviction hearing. Requiring trial counsel to maintain the original file and produce copies would satisfy the need of postconviction counsel to have access to the complete file and allow trial counsel an adequate opportunity to testify accurately at any postconviction hearing. The CLS notes that the Criminal Procedure Rules Committee has indicated that it has approved, for submission in its next cycle report, an amendment to Rule 3.851(c)(4) that would address these

concerns and that is also consistent with the holding in Long v. Dillinger, 701 So. 2d 1168 (Fla. 1997), and with Rule 3.852(f).

### 3. Rule 3.851(e)(1)

The Subcommittee proposed that Rule 3.851(e)(1) be amended to eliminate the requirement that all motions be made under oath by the defendant. As proposed, the amended rule expressly provides that the motion “need not be under oath or signed by the defendant,” but *instead* must contain “a certification from the attorney that the motion is filed in good faith.”

The CLS is concerned that this amendment may result in the filing of spurious claims and may unduly burden limited judicial resources. The oath requirement provides some measure of protection from intentionally false or perjured statements in the pleadings and at a later evidentiary hearing. While it is true that many strict legal issues may be raised in good faith by an attorney based upon a review of the records, many postconviction claims are based on mixed questions of law and fact. As written, the amended rule would allow an attorney to certify that a motion is filed in good faith where only the lawyer believes that the facts and allegations set forth in the motion are true and correct and are in the best interest of the client. As written, the amendment would not require the attorney to even speak to the defendant, have the defendant adopt the factual assertions in the motion, or even approve of the motion for relief. See, e.g., Sanchez-Velasco v.

Secretary of Dept. of Corrections, 287 F. 3d 1015 (11th Cir. 2002)(while decision centered around attorney's lack of "next-friend" standing to file motion for habeas corpus relief on behalf of the defendant, the language used by the Court demonstrated the importance of proceeding with the defendant's knowledge and consent). Thus, it is the recommendation of the CLS that all motions filed under this rule continue to be filed under oath and with the knowledge and consent of the defendant.

Additionally, Rule 3.851(e)(1) as amended would prohibit "sub-claims involving a different legal argument." Some members of the CLS believed that such a limitation is not sufficiently defined. Others felt that the common definition of sub-claim sufficed to put all on notice of the requirement to succinctly and sequentially set forth all possible claims. A majority of the CLS members thought this issue should be brought to the Court's attention as a cause for concern.

#### 4. Proposed Case Management Orders

Some members of the CLS expressed concern that a case management order was required after each and every hearing or conference, whether evidentiary or not. The CLS agrees that the trial court must direct the orderly course of the proceedings, however, it was expressed that the proposed form case management orders are too long and not applicable to every situation.

In light of the time limitations set for comments, The Criminal Law Section would respectfully bring this Court's attention to the areas of concern set forth above. The CLS would welcome the opportunity to assist this Court further and in more detail if requested.

Respectfully submitted this 17<sup>th</sup> day of February, 2014.



---

SUSAN ODZER HUGENTUGLER  
Chair, Criminal Law Section  
Office of the State Attorney  
201 SE 6<sup>th</sup> Street, Suite 660A  
Fort Lauderdale, FL 33301  
Tel: 954-831-7913  
Florida Bar No. 378615  
[shugentugler@sao17.state.fl.us](mailto:shugentugler@sao17.state.fl.us)

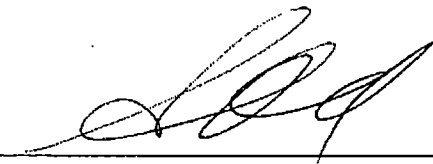
### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing comment was forwarded on this 17 day of February, 2014, by e-service, to the following:

Honorable Kevin Emas, Chair  
Criminal Court Steering Committee  
Third District Court of Appeal  
2001 S.W. 117<sup>th</sup> Avenue  
Miami, FL 33175  
[emask@flcourts.org](mailto:emask@flcourts.org)

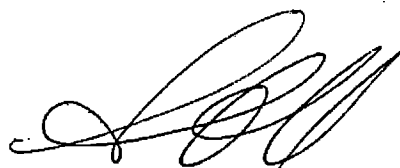
Mr. Bart Schneider  
Office of the General Counsel  
500 S. Duval Street  
Tallahassee, FL 32399  
[schneidb@flcourts.org](mailto:schneidb@flcourts.org)

Mr. John F. Harkness, Jr.  
Executive Director  
The Florida Bar  
651 East Jefferson Street  
Tallahassee, FL 32399  
[jharkness@flabar.org](mailto:jharkness@flabar.org)

  
\_\_\_\_\_  
SUSAN ODZER HUGENTUGLER  
Chair, Criminal Law Section

### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that this comment complies with the font requirements of Florida Rule of Appellate Procedure 9.100(l).

  
\_\_\_\_\_  
SUSAN ODZER HUGENTUGLER  
Chair, Criminal Law Section