

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**

CASE NO. SC13-2381

**COMMENTS OF THE CAPITAL COLLATERAL REGIONAL COUNSELS
FOR THE SOUTH AND MIDDLE REGIONS OF FLORIDA**

In response to the Petition of this Court's Capital Postconviction Proceedings Subcommittee, proposing rule changes which significantly alter capital postconviction procedure in this State, this Court invited public comment in the January 15, 2014 Edition of the Bar Journal. The Offices of the Capital Collateral Regional Councils for the South and Middle Regions of Florida submit the following comments in appreciation and support of this Court's efforts to improve the efficacy of capital procedure in this State.

3.851(d)(2) Reduced Time Periods for Successive Claims

Proposed Rule 3.851(d)(2) reduces the periods within which defendants must make successive claims based on newly discovered evidence or newly established constitutional rights. New evidence claims must be filed within 60 days of discovery, and claims based on newly established constitutional rights must be filed within 180 days of the time the right is made retroactive. Currently, defendants have a full year to investigate and develop claims.

Past experience suggests that the reduced timeframes are too restrictive and create the very real risk that meritorious claims will go unheard, including claims involving actual innocence. The Death Penalty Information Center reports that it took over a decade on average for the 143 individuals who have been exonerated from death row in this Country to reach that result. Florida having more exonerations than any other state, this Court should be particularly loath to reduce so radically the time available for defendants to raise claims of actual innocence

or other forms of successive relief. Indeed, individuals have filed meritorious claims in this State when given time to raise them, and we urge the Court to avoid foreseeable situations of injustice and violations of Due Process by rejecting this proposed amendment.

This Court has extended a certain postconviction process to individuals convicted at a time when a one-year period was provided. We cannot know to what extent an individual, prior to committing a crime, considers the amount of process he will be afforded if convicted, just as we cannot know the extent an individual considers the potential punishment, but we can honor the expectations that the law creates and not make such significant reductions in a process after it has been held out to a class of defendants. It is unclear from the scope provision of the proposed rules what effect the new timeframes will have on cases with unexpired successive periods of one year with no motions pending. If the new timeframes apply to any motion filed after the effective date of the rule, would defendants who discovered new evidence more than sixty days ago but had expected to have a year to investigate and utilize not be able to file a motion? Would such a motion not be outside the time restrictions of the new rule? And even if a motion is not filed, will individuals not lose the time to discover new evidence, which they had expected to receive and relied on? The rule, by its terms, may operate to cut off claims for existing cases.

Further, this Court has recognized the need for additional resources when creating more onerous restrictions in capital procedure in the past. Requiring capital postconviction attorneys to build cases in two months which are normally built over the course of a year could create a strain on resources. The Offices of the Capital Collateral Regional Counsel would urge this Court not to increase the need for speedy use of resources without considering the concomitant need to provide those resources.

3.851(j) Attorney General Notification to Clerk

This proposed rule seems to address a problematic lack of process created by the Timely Justice Act, in that the Clerk of this Court is required to make certifications to the Governor as to which defendants are warrant-eligible without input from the parties, guidance on debatable decisions, or a reporting system that carries an obligation to this Court that the information be correct.

Proposed Rule 3.851(j) requires that the Attorney General must notify the Clerk of this Court when it believes the defendant has completed his or her direct appeal, initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court. This attempts to cure a problem created by the Timely Justice Act, which requires that the Clerk of this Court certify to the Governor capital defendants who have completed the proceedings described in the rule but creates no mechanism by which the Clerk will be informed in order to make the sometimes difficult determination of when federal habeas proceedings are concluded or by which the parties can be heard on the matter. The infeasibility of putting this obligation on the Clerk is apparent in its first certification letter, which explained several points of difficulty and confusion.

The Clerk explained that “[t]he majority of this information comes from sources other than Florida Supreme Court case files. I believe the information is accurate but cannot say it is not subject to dispute.” Was the Clerk provided profiles to logon to the dockets of the several federal districts in Florida and the Eleventh Circuit? Did the Clerk have to rely on online news sources, or dedicated sites like SCOTUSblog to get information? It is problematic to require the Clerk to reach out of the jurisdiction of this Court to compile information from other sources that have no obligation of truth or accuracy to this Court.

And indeed, judgment-based determinations must be made as to whether some cases are completed. The Clerk explained that the certifications “involved a number of judgments in which reasonable people could reach different results.” In other words, the Clerk is making legal determinations, without input or review, that will determine who lives or dies in this State.¹ The Clerk also encountered difficulty with the requirement that the federal “appeal” be concluded:

Admittedly the word “appeal” is used and under state law is a term of art and would not include any discretionary review. Because such review is in federal court and would require an interpretation of federal law, I have assumed that such certiorari review in the United States Supreme Court, although discretionary, would mean that review would not be complete and to the extent there may be individuals under sentence of death in that posture, they are not included on the list.

Through no fault or failure of its own, the Clerk was required to make legal determinations that the Legislature took for granted as ministerial, forgone conclusions. That is simply not the reality of the matter.

With regard to the expiration of time to make filings, the Clerk explained, “I am not sure what legal effect the words ‘allowed the time permitted’ to expire has compared to ‘the time has expired.’ I have included on this list those persons where the time has, in my opinion, expired. I do not know if the individuals ‘allowed’ it to expire.” Here we see again the Clerk struggling with no guidance from the Legislature or directives from this Court to execute the procedure imposed on the Clerk by the Legislature.

It seems that this Court could attempt to cure these difficulties by altering its procedure to accommodate and add to that imposed on it by the Timely Justice Act. Proposed Rule 3.851(j) would have the Attorney General make the determination for the Clerk. In other words, the rule would attempt to fix the fact that the Clerk is required to make a judgment-based legal

¹ The Clerk explained that “the Supreme Court of Florida has made no determination of whether the individuals on these lists meet the statutory standard.”

determination—to decide who is eligible to be executed—by investing *one advocate and party to the litigation with sole authority to make that determination*. In recognition of the lack of clarity and certainty and reliability in the certification decision, the proposed rule would hand off the determination to an interested litigant in the proceeding. The proposed rule chooses the Attorney General over defense counsel as the preferred party on which to rely. The proposed rule betrays a failure to acknowledge bias and fallibility.

The rule does not cure the Timely Justice Act’s lack of process by continuing to exclude defense counsel from the certification decision. If the Clerk is correct that the determinations it has made were debatable, then we must acknowledge that a potential for over-certification exists. Allocating the authority to make certification decisions to the party to the litigation tasked with seeing the sentence carried out, while providing no opportunity for defense counsel to be heard, does nothing to reduce that risk.

If this Court chooses to adopt a procedure to support that created by the Timely Justice Act, it should do so with regard for the fact that this Nation has established an adversarial justice system so that critical judicial determinations arise from the discourse of two opposing parties.

3.851(e)(1) Separate Pleading of Claims

This proposed rule is offered in response to a perceived problem that some postconviction motions are “difficult to comprehend” because they contain arguments with sub-claims, or, in some cases, sub-claims found in footnotes. In order to make motions “more easily understood,” changes have been proposed to require that each claim be separately pled, contain only one legal argument, and be “separately and consecutively numbered.” The proposed rule also provides that, if a “violation” of the rule is found by the trial court, defense counsel shall be required to amend the motion within thirty days or else the “corresponding claim, sub-claim

and/or argument” will be deemed waived. The proposed rule adds all of these additional burdens on the pleading requirements yet fails to make a corresponding change to the length of an initial Rule 3.851 motion, which remains seventy-five pages.

The Offices of the Capital Collateral Regional Counsels are unaware of any pervasive problem with the manner in which Rule 3.851 motions are presently drafted. To the extent that a court or the State is in any way confused by, or has questions about, the precise nature of a factual and/or legal argument made in a motion, that issue can be adequately addressed during the requisite case management hearing.

In contrast to the standard that has been in place for years, the proposed rule would create additional litigation with regard to what constitutes a “separate claim,” what constitutes a “sub-claim,” particularly a “sub-claim” that posits a different legal theory from the principal claim. Capital defendants and their attorneys already operate under the current rule that requires a “detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought,” Fla. R. Crim. Pro. 3.851(e)(1)(D), and a “detailed allegation as to the basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been or was not raised on direct appeal.” Fla. R. Crim. Pro. 3.851(e)(1)(E). To muddle the extant clear and workable standard with a ill-conceived, untested one will create additional problems in the hope of alleviating a “problem” that does not exist.

For example, a claim of ineffective assistance of counsel is often raised both as to the guilt and penalty phases of a capital trial, and generally raises factual allegations and legal arguments about various aspects of both phases. Is an allegation of ineffective counsel for failing to investigate and present family member mitigation a “separate claim” from, or a forbidden “sub-part” of, an allegation that counsel failed to investigate and present mental health

mitigation? Is an allegation that counsel failed to litigate a pretrial motion to suppress prior to trial a “separate claim” from, or a “sub-part” of, an allegation that counsel failed to investigate an alibi defense at the guilt phase of a capital trial? Is an allegation that counsel failed to object to a prosecutorial argument in closing statements based on a “Golden Rule” violation a “separate claim” from, or a “sub-part” of, an allegation that counsel failed to object to prosecutorial argument that improperly denigrated the defendant and his or her counsel? The proposed rule does not provide an answer to these hypothetical questions, which represent an infinite variety of other questions that will have to be litigated.

Courts are also required to conduct cumulative analysis of errors alleged by a capital defendant. *See, e.g., Lightbourne v. State*, 742 So. 2d 239 (Fla. 1999); *Swafford v. State*, 125 So. 3d 760 (Fla. 2013). Breaking out pieces of an ineffective assistance of counsel claim, factually or legally, in order to satisfy an arbitrary framework is not just unreasonable, it is actually contrary to the constitutional framework for the analysis.

The rule as presently written has proved workable, and the proposed rule is unnecessary, unduly burdensome, confusing, and ultimately unwarranted. This Court has reviewed hundreds of capital Rule 3.851 motions over the years and, on occasions, has granted relief even where alternate theories are advanced by the defendant. *See, e.g. State v. Gunsby*, 670 So. 2d 920 (Fla. 1996) (granting relief due to combined effects of ineffective assistance of counsel and violations of *Brady v. Maryland*, 373 U.S. 83 (1963)); *Haliburton v. Singletary*, 691 So. 2d 466 (Fla. 1997) (addressing ineffective assistance of counsel and *Brady* claim alleged in the alternative). The Court should decline to experiment with the present, workable language contained in the current version of the rule.

Should the Court agree to new pleading requirements, the Offices of the Capital

Collateral Regional Counsels take the position that the page limitation currently set forth in the rule must be deleted in its entirety. If capital defendants are required to follow the “separate claim/separate legal argument” proposal as written, it will, by necessity, substantially lengthen Rule 3.851 motions to the point where a definitive page limitation would work to deny the capital litigant due process, the right to be heard, access to the courts, and equal protection under the law. Because so often the most effective and sensible way to organize claims involves sub-claims all relating to one recitation of relevant facts and one statement of governing law, breaking out sub-claims will necessarily call for extreme repetition of facts and law that will lengthen motions unpredictably and needlessly.

Rule 3.851(b)(6) Self-Representation

The proposed revision adding Rule 3.851(b)(6) states in pertinent part:

- (6) A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only bases for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule.

The only basis for the dismissal of counsel under the proposed rule is an “actual conflict.”² At present, if an actual conflict is found by the circuit court, a defendant is not required under Rule 3.851 to accept any substitute counsel, whether such counsel is another CCRC office, registry counsel or a private attorney. This implicit right to self-representation in state postconviction which has been affirmed in cases where counsel has first been discharged by the

² The Florida Statutes set up a baseline for determining potential conflicts of interest and “the performance of assigned counsel” by the circuit courts in capital postconviction cases “to ensure that the capital defendant is receiving quality representation.” Fla. Stat. § 27.711(12). The statute goes on to state that the court should “receive and evaluate allegations that are made regarding the performance of assigned counsel” and even outlines some of the areas of inquiry, such as misconduct, failure to meet CLE requirements or failure to file “appropriate motions in a timely manner.” *Id.* This statutory language appears to be based in part on the rule of *Nelson v. State*, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973) (“whether . . . there is reasonable cause to believe that the court appointed attorney is not rendering effective assistance to the defendant”); *Hardwick v. State*, 521 So. 2d 1071 (Fla. 1988). Thus, claims by prisoner/defendants of conflicts due to misconduct or ineffective assistance can potentially result in the discharge of assigned counsel and the appointment of substitute counsel. *See* Fla. R. Crim. Pro. 3.851(b)(3).

prisoner/defendant, although no conflict or misconduct is found, then re-appointed by the court as stand-by counsel with the defendant then allowed to represent him or her self. *See McDonald v. State*, 952 So. 2d 484 (Fla. 2006); *compare McKenzie v. State*, 29 So. 3d 272 (Fla. 2010).

Despite this Court's acknowledgment of the right implicit in the rule, the Committee's commentary bases the proposed rule change, eliminating the opportunity for self-representation in state postconviction, on the finding that because there is no federal constitutional right to self-representation or to attorney representation under the Sixth Amendment, Florida's statutory right under Rule 3.851 does not require an option for self-representation.

This conclusion overlooks the facts of the case cited in the commentary, *Murray v. Giarratano*, 492 U.S. 1, 10 (1989). There, Joe Giarratano, a *pro se* death row inmate in Virginia filed a § 1983 petition in federal district court seeking the creation of an appointment system for state postconviction representation for indigent Virginia death row inmates. The United States Supreme Court reversed and remanded the *en banc* Fourth Circuit Court of Appeals holding that Virginia was constitutionally required to provide attorneys to represent death row inmates in state collateral proceedings, holding that "State collateral proceedings are not constitutionally required as an adjunct to the state criminal proceedings and serve a different and more limited purpose than either the trial or appeal . . . We therefore decline to read either the Eighth Amendment or the Due process Clause to require yet another distinction between the rights of capital case defendants and those in noncapital cases." *Id.* Florida made a decision when it created a statutory system for capital postconviction representation that cured the problem that defendants seeking judicial relief from their sentence in state court proceedings were not constitutionally entitled to counsel. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987). Indigent defendants could not take advantage of a capital postconviction system that did not provide them

counsel to do so.

The Steering Committee additionally concluded that the elimination of self-representation will result in the capital postconviction process “function[ing] more effectively.” Eliminating self-representation may be more efficient, but it is unreasonable to interpret *Giarratano* as support for the position advocated in the new rule. If death row inmates in Florida under the statutory system of representation cannot represent themselves, they will structurally have an additional impediment to meaningful access to the courts than non-capital defendants under Rule 3.850 who are proceeding *pro se*.

Finally, there is an inherent conflict in the proposed rule. Subsection (i) of Rule 3.851 concerns circumstances where the defendant “seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel.” In other words, the defendant is seeking to fire counsel and to drop “all pending postconviction proceedings.” If the defendant is competent to proceed and is found by the court to be “knowingly, freely and voluntarily” requesting the dismissal of proceedings and the discharge of collateral counsel, the circuit court “shall” enter an order allowing same. Even under those extreme circumstances the discharged counsel still has the duty under the rule to (1) file a notice seeking review of the lower court’s decision in the Florida Supreme Court; and (2) serving an initial brief with the Florida Supreme Court. However, the defendant is allowed under the rule to represent himself before the Florida Supreme Court to the extent that the rule states that “[b]oth the defendant and the state may serve responsive briefs. Therefore there is an internal conflict with the proposed rule change, Rule 3.851(b)(6), and the existing Rule 3.851(i) to the extent that a defendant under 3.851(i) is allowed a measure of self-representation.

Rule 3.851(f)(4) Amendments to Motions

This proposed rule extends the time for amending, upon a showing of good cause and with permission from the trial court in the court's discretion, from thirty days before the scheduled evidentiary hearing to forty-five days before an evidentiary hearing. The rule retains the provision that would only allow a continuance of the evidentiary hearing if a "manifest injustice would occur if a continuance was not granted."

The Subcommittee reasoned that the extra fifteen days would afford the State extra time to address the matters in the amendment prior to the evidentiary hearing. In theory, the forty-five day limit is not a substantial change from the existing rule. However, the recent practice of trial courts across the State has been to schedule the dates of the evidentiary hearing before the completion of public records litigation, or even before the case management conference has been held, such that the strict enforcement of this rule may result in a violation of due process and less reliable hearings.

Even given the relatively long period of time afforded the State and state agencies in rule 3.852, there remains an ongoing problem with the late production of public records, with the defendants bearing the resulting burden. There is no recognition in the rule that the primary basis for seeking amendment following the filing of the initial motion is the late receipt of public records. In cases where the State or state agency has not timely produced records, the defendant should not be required to show a manifest injustice would occur before re-scheduling the evidentiary hearing.

Rule 3.851(f)(5)(D) Taking Testimony By Video Conference

This proposed rule allows for the taking of testimony by "contemporaneous video communication equipment that makes the witnesses visible to all during testimony." The

proposed rule allows this to occur upon motion of the parties or on the trial court's own motion without consent of the parties.

The Offices of the Capital Collateral Regional Counsels have no objection in principle to the parties to a hearing being allowed to elicit live testimony by video conferencing upon motion of either party. However, they are troubled by the provision that the trial court may enforce video conferencing at the behest of the trial court without consent of the parties. The proposed rule appears to be tailored to expedite evidentiary hearings to avoid scheduling conflicts with out-of-town witnesses. However, there are several practical and substantive problems created by the rule.

Video conferencing can compromise a court's efforts to meet the requirement that it assess and make findings relating to the credibility of witnesses. In fact, the reason this Court defers to the factual findings and credibility findings of lower, evidence-taking courts is that those courts are able to observe first hand the demeanor and nature of witnesses. "We recognize and honor the trial court's superior vantage point in assessing the credibility of witnesses" *Stephens v. State*, 748 So. 2d 1028, 1034 (Fla. 1999). This rule reduces the justification for that deference and limits the vantage point of judges when taking testimony. No matter the technology, there is no substitute for the actual presence of an individual when trying to appreciate the nature of that individual.

Further, despite a State argument during warrant litigation that a defendant may attempt to delay an execution by claiming falsely that a witness was unavailable to testify in a hearing, this Court found an abuse of discretion for failing to grant a continuance in order to accommodate in-court witness testimony. *See Provenzano v. State*, 750 So. 2d 597, 600-01 (Fla. 1999); *see also and compare Jones v. Butterworth*, 695 So. 2d 679 (Fla. 2014) and *Jones v.*

Butterworth, 691 So. 2d 481 (1997). Thus, this Court’s case law recognizes the need for capital postconviction counsel to be permitted to present live witness testimony, even in the face of delaying a scheduled execution.

Beyond substantive considerations, there are practical considerations which must be taken into account in making a determination as to whether it is appropriate to take testimony via video conference, depending on the nature of the testimony and the geographical location of the witness. These include the following:

(1) *Time lapse issues*. While the rule provides for “contemporaneous” video conferencing, in reality there is no such thing. There is always a time lapse between a question from an attorney in the courtroom and the remote witness. There is also a time lapse between an objection and the remote witness. While the proposed rule provides for “appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony so the court may stop the communication to accommodate objections or to prevent prejudice,” in practice, this is not usually possible. In reality, attorneys end up talking over witnesses with the inevitable consequence of a less accurate record of the proceedings.

(2) *Video conference facilities*. Depending on the time zone of the remote witness, it may not be possible for them to be present at an appropriate video conferencing facility during normal working hours in that location. And while it is theoretically possible for witnesses to testify from computers via such means as Skype, it would, for example, produce a chilling effect on a witness’s testimony if she were required to testify in the middle of the night in her location. The rule does not address this issue. Counsel have experienced testimony via Skype in which the quality of the picture and sound was lamentable.

(3) *Attorney presence*. In some situations attorney presence would not be required at the

remote location. However, in many circumstances it is necessary for the examining attorney to be present in the room with the remote witness. This is particularly the case with expert witnesses who are required to review and testify about exhibits and other documents shown by the attorney. Counsel have experienced this situation on a number of occasions. In such circumstances, one team member has been required to fly to the remote location while the other attorney is in the Florida courtroom. While this may be possible if a separate bifurcated time is set aside from the remainder of the evidentiary hearing, it is not practicable if the trial court is intent on hearing all witnesses during the same time period.

For the above reasons, the Offices of the Capital Collateral Regional Counsels would recommend that the proposed rule be amended to permit video conferencing upon motion of the parties and at the discretion of the court.

Rule 3.851(f)(5)(F)(6) Expert Reports

This proposed rule requires that all expert witnesses must submit written reports which shall be disclosed to opposing counsel pursuant to Rule(f)(5)(A). This change therefore requires counsel to commission expert reports prior to case management conferences and before the circuit court has even ruled on whether an evidentiary hearing is to be granted on any issue to which the expert evidence might pertain.

In the experience of counsel, it is currently routine practice for the State to request and be granted depositions of defense expert witnesses prior to testimony. The proposed rule is silent as to whether the intention is to streamline the discovery process or to allow an additional form of discovery early in the proceeding, but there is simply no basis in the law to create a mandatory report requirement, in addition to the existing discovery rules, despite counsels' determinations as to the best method of presenting evidence on behalf of their clients.

Moreover the proposed rule does not address the extra cost incurred in this change. A thorough expert will take some hours to compose a written report. To require such reports to be commissioned even before the circuit court has ruled on whether an evidentiary hearing should be granted puts an undue fiscal burden on Offices of the Capital Collateral Regional Counsels and the State. Both parties will have to increase the funds dedicated to securing expert testimony in capital postconviction proceedings, and the State of Florida, which funds both sides of the litigation, will ultimately bear the costs of that additional and unneeded burden.

3.851(f)(5)(E) Procedures After an Evidentiary Hearing

The current provision of this rule requires transcripts to be filed within thirty days after the evidentiary hearing and the circuit court to render its written order within thirty days after the transcripts are filed. The subcommittee recognized that, in practice, the parties have been permitted to file written closing arguments or post-hearing memoranda in cases throughout the state. The proposed rule essentially codifies this existing practice by explicitly stating that the “trial judge may permit written closing arguments instead of oral closing arguments.” This provision was added in recognition of the fact that trial judges find written closing arguments helpful in that they tend to improve the overall quality of the final order rendered by the court.

However, the proposed amendment also imposes additional time constraints and burdens on those parties who may choose to avail themselves of the right to submit written closings.

First, the proposed amendments require that real-time transcripts be filed within ten days after the evidentiary hearing. This means that there will be less overall time before the due date of the closing arguments. In the past, it has generally taken an average of thirty days before the transcripts are filed, giving the parties at least one month to begin work on the closing prior to the receipt of the transcripts. That extra time is necessary given that evidentiary hearings can take

up to two weeks, keeping the attorneys, both state and defense, from working on their other cases during that period.

Further, the proposed amendments provide:

If the trial court permits the parties to submit written closing arguments, the arguments shall be filed by both parties within 20 days of the filing of the transcript of the hearing. No answer or reply arguments shall be allowed. Written arguments shall be in compliance with the requirements for briefs in rule 9.210(a)(1) and (a)(2), shall not exceed 40 pages, and shall include proposed finding of facts and conclusions of law, with citations to authority and to appropriate portions of the transcripts of the hearing.

As the adage goes, “the shorter the letter, the longer it takes to write.” The limited timeframes provided in which to submit a “concise” forty-page brief may only serve to thwart what the subcommittee seeks to achieve in having the parties assist the trial courts through the submission of proposed findings of fact and conclusions of law. In practice, most courts have allowed up to at least thirty days in which to submit written closings that may be, in the court’s discretion, anywhere from fifty to one hundred pages in length. With the additional requirement that the parties actually write proposed findings of fact and conclusions of law, it seems that more pages would be necessary if closings are meant to be useful to the trial court. Given the strict application of procedural bars in both state and federal court, the new constraints and limitations may result in defense counsel choosing not to submit written closing arguments at all, instead, relying on the record.

Finally, the requirement that the written closing briefs include proposed findings of fact and conclusions of law may result in the denial of due process, especially where the trial court must make credibility findings. Given that the proposed amendment contemplates no opportunity for a reply, the trial court’s adoption of the State’s proposed order would run afoul of this Court’s case law. *See Rose v. State*, 601 So. 2d 1181, 1182 (Fla. 1992); *see also Huff v. State*, 622 So. 2d

982, 983 (Fla. 1993).

The Offices of the Capital Collateral Regional Counsels submit that the proposed rule should include the explicit right to file written closing arguments but that discretion in terms of length, content, and due dates should remain within the sound discretion of the individual judges.

Rule 3.851(f)(7) Rehearing

The proposed rule would remove the requirement that the trial courts issue formal orders regarding rehearing. Although the amendment may ease nominally the case management responsibilities of the trial courts, it could also create an issue whereby a trial court could be unable to rule within the thirty-day time period due to excessive caseloads, trial schedules, or other responsibilities, and the court's failure to respond would unintentionally be deemed a denial.

Additionally, the new lapse provision would create problems when determining when a notice of appeal must be filed. Florida Rule of Appellate Procedure 9.110(b) provides that counsel must file a notice of appeal with the Florida Supreme Court "within 30 days of the order to be reviewed." Without the issuance of a formal order from the trial court regarding rehearing, the finality date for purposes of appeal would be unclear. The confusion that would result from the proposed lapse provision would likely result in more frequent petitions for belated appeals. *See* Florida Rule of Appellate Procedure 9.142(b)(3)(B). The proposed amendment, rather than achieving the desired effect of streamlining the appeals process, would instead cause unnecessary confusion regarding timetables for filing appeals, inundating the Florida Supreme Court with filings and resulting in further delays.

There is simply no need to change, in this particular circumstance, the process by which courts resolve cases. Courts issue rulings with reasoning to provide a basis for appellate review,

to provide clear dates to which filing rules and timeframes are applied, and to make clear the disposition of cases. With the common practice being to deny motions with one-page or one-line orders, there is simply no justification for changing the process in this circumstance.

3.852(f)(3) In Camera Inspection of Sealed Records

This proposed rule would require that “[c]ollateral counsel must file a motion for in camera inspection within 30 days of receipt of the notice of delivery of the sealed records to the central records repository, or the in camera inspection will be deemed waived.” This proposed change to the procedure for requesting in-camera inspection of records claimed to be exempt would further burden the court and defeat the purpose of expediting resolution of claims of exemption. Throughout public records production, from the initial production of records after being notified by the attorney general of the affirmance of the sentence, to the production of records under a death warrant, agencies produce records under seal for in-camera review. If counsel were required to file motions upon receipt of each notice, the court would be unnecessarily burdened with a multitude of requests and proposed orders and would be required to review claimed exemptions piecemeal. This not only creates more work for the court and the parties, it also increases the likelihood of confusion as to what has been reviewed and what has not.

In practice, it has proved more efficient and economical for the court to entertain a motion for in camera review at a dedicated exempt records hearing. This procedure greatly reduced both the number of motions required, the amount of time required to resolve claims of exemption, and the likelihood of error.

3.852(g)(3) Objections to Public Records Demands

This proposed rule would require that “[w]ithin 60 days of receipt of the written demand,

any person or agency may file with the trial court an objection to the written demand described in subdivision (g)(1). The trial court shall hear and rule on any objection no later than the next 90-day status conference after the filing of the objection, ordering a person or agency to produce additional public records if the court determines each of the following exists”

This proposed change, if implemented, would defeat the purpose of expediting collateral proceedings. In order for the court to hear and fairly adjudicate objections, the rule as revised would require that each and every status hearing be noticed and conducted as a full public records hearing. Given that public records hearing often involve multiple agencies and objections, it would be neither efficient nor practical for the court to notice every agency to appear at every status conference. This is particularly troublesome if the court were to require agencies to appear at every status conference as would be permitted by the proposed Rule 3.852(j)(4). CCRC suggests that a more efficient and economical procedure is to conduct a dedicated public records hearing at which the court hears objections, rather than piecemeal litigation of objections as they may arise.

3.112(k) Qualification of Lead Counsel

This proposed rule increases the requirements for who may serve as lead counsel in capital postconviction cases. The greater requirements of (k) for postconviction counsel are certainly needed and rightly added to the rule. With respect to the particular language and structure of this rule, there are two primary issues worth considering.

First, subsection (k)(2) requires three years of “experience in the field of postconviction litigation.” While extensive experience is certainly needed, this requirement seems too vague to create any kind of meaningful standard or real barrier to qualification. What activities and involvement in postconviction litigation will count as “experience,” and how is the timeframe of

three years measured? For instance, if someone files a single, ten-page 3.850 motion, which gets held up for procedural or other reasons for three years and does not involve evidentiary hearings or public records requests, has that attorney satisfied (k)(2), simply by virtue of having one motion pending in an inactive case?

Perhaps the lack of specificity in (k)(2) is addressed in the more specific requirements (k)(3), but, if that were the case, consolidation of those provisions to specify that the types of filings set out in (k)(3) are those that will satisfy the (k)(2) seems appropriate.

Second, while subsection (k)(3) ensures that the prior experience is capital in nature, there is an issue with federal habeas experience being only one of several ways to satisfy (k)(3), rather than its own freestanding requirement. An extremely common problem with inexperienced capital postconviction litigators is failing to properly prepare cases for federal court by preserving federal issues and satisfying the federal time limitation (which can run out unbeknownst to them even though state litigation is proceeding in a timely manner). Someone could easily have five capital trials, and three years of incidental state court postconviction experience, and have no familiarity with the pitfalls of federal litigation. A separate requirement of federal experience would help address that problem.

WHEREFORE, the Offices of the Capital Collateral Regional Counsels submit the above considerations for this Court's review in appreciation and support of this Court's efforts to improve the efficacy of capital procedure in this State.

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CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the Honorable Kevin Emas, Chair, Criminal Court Steering Committee, Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami, FL 33175, emask@flcourts.org, and Mr. Bart Schnieder, Office of the General Counsel, 500 S. Duval Street, Tallahassee, FL 32399, schneidb@flcourts.org, on this 17th day of February, 2014.

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