

TGEGKGF."5B24236"38<75<7; .Lqj p"C0Vqo culpq. 'Engtm'Uwr tgo g'Eqrwv

APPENDIX D

**Capital Postconviction Proceedings Subcommittee
The Honorable Kevin M. Emas, Chair
March 10, 2014**



CHARLES A. DAVIS, JR.
CHIEF JUDGE
CHRIS W. ALTENBERND
STEVEN T. NORTHCUTT
DARRYL C. CASANUEVA
MORRIS SILBERMAN
PATRICIA J. KELLY
CRAIG C. VILLANTI
DOUGLAS A. WALLACE
EDWARD C. LAROSE
NELLY N. KHOZAM
MARVA L. CRENSHAW
ROBERT J. MORRIS, JR.
ANTHONY K. BLACK
DANIEL H. SLEET
JUDGES

DISTRICT COURT OF APPEAL
SECOND DISTRICT
1005 E. MEMORIAL BOULEVARD
LAKELAND, FLORIDA 33801-0327

JAMES BIRKHOLO
CLERK
JACINDA (JO) HAYNES
MARSHAL

PLEASE REPLY TO:
☐ P.O. BOX 327
LAKELAND, FL 33802-0327
(863) 499-2290
☐ 1700 N. TAMPA ST. #300
TAMPA, FL 33602-2653
(813) 272-3430

January 17, 2014

Hon. Kevin Emas, Chair, Criminal Steering Committee
Third District Court of Appeal
2001 SW 117th Avenue
Miami, FL 33175

Eduardo I. Sanchez, Chair, Appellate Court Rules

Melanie L. Casper, Chair, Criminal Procedure Rules

Re: The "deemed denied" Language in Florida Rule of Criminal Procedure 3.850(j) and the Current Proposal to Amend Rule 3.851, as well as in Rule 3.800(c),

Dear Members of the Affected Committees:

First, let me apologize for not catching the issue in Rule 3.850 sooner. I should have seen this last spring when the court approved the amendments to Rule 3.850. The language that concerns me was not part of the proposal that Judge Hankinson's committee submitted to the court. I am not quite certain how this language was added to the rule.

In rule 3.850(j) a motion for rehearing is deemed denied if not ruled upon within 40 days. The proposed amendment to rule 3.851 is similar to the new language in rule 3.850. In rule 3.800(c), a motion to reduce or modify a sentence is now "deemed denied" if the trial court does not rule within 90 days.

I believe I know the origin of this language because I think I wrote it. When rule 3.800(b) was added in 1996 to allow for correction or preservation of "unpreservable" errors in sentencing documents, Justice Pariente was properly concerned that delay in these motions could delay appeals. We expected, and it has proven to be the case, that most motions under rule 3.800(b) would be filed while cases were pending on appeal. The motion automatically extends times within the appeal. See Fla. R. Crim. P.

Hon. Kevin Emas
Eduardo I. Sanchez
Melanie L. Casper
Page Two

3.800(b)(2). Thus, to prevent delays in appeals, if a trial judge does not rule on a motion to correct sentencing error, the motion is "deemed denied." This results in the error being preserved for appeal and for the appeal to proceed. The key fact to understand is that the notice of appeal has already been filed and the timing of the appeal is not affected by this rule. Admittedly, the rule as written could theoretically create confusion if the motion to correct sentencing error were filed before the notice of appeal--but that almost never happens.

The effect of the "deemed denied" is quite different in rule 3.850 and rule 3.851.

In rule 3.850, if a prisoner files a motion for rehearing within fifteen days (by delivering the motion to a prison guard under the mailbox rule), and the trial judge does nothing, the prisoner's appeal will be untimely unless it is filed on or before the 70th day after he gives the motion to the guard. This is the combined total of the 40 days to "deemed denied" and the 30 days to appeal. Nothing in the rule informs that prisoner of this; he or she simply has to be able to do the math and understand that rendition occurs under this rule without the filing of anything. I doubt most lawyers could understand this, and I am certain that most prisoners will not.

The situation under proposed rule 3.851 is comparable, except that the prisoner apparently will always be assisted by a lawyer.

My analysis assumes that the "deemed denial" is intended to trigger rendition. I believe that must be the intent of the committee. Otherwise, the motion would be deemed denied, but it would not be appealable because no document had been filed in the court file to activate rendition. At least in my mind, there is a conflict between the concept of a deemed denial in rule 3.850 and the requirement for a "signed, written order" in Florida Rule of Appellate Procedure 9.020(h)(1)

I have not given great thought to a solution. Simply making trial courts rule on motions for rehearing might be the simplest solution. But if we are to have deemed denials, but perhaps the clerk should be required to file and serve a notice of a deemed denial when the judge does not act. The notice would explain that the challenged order was rendered for purposes of appeal by the notice and that the prisoner needed to file any appeal within 30 days of the notice. Rule 9.020(h) might need adjustment to allow for this.

Hon. Kevin Emas
Eduardo I. Sanchez
Melanie L. Casper
Page Three

It is useful to remember that Rule 3.850 has a requirement that all final orders inform the defendant of his or her 30-day time to appeal. See 3.850(k). The "deemed denied" language--assuming I am correct that it triggers rendition--is inconsistent with the policy to inform prisoners of the appeal time. It may not violate due process but it seems a little unfair.

The problem under rule 3.800(c) is different, and perhaps the committee actually intends the outcome that I see as a problem. Once upon a time, the trial court had 60 days to modify a sentence under this rule. (This rule was identified as 3.800(b) for most of that period.) As a result, a prisoner could file a motion on day 5 and the trial court could sit on the motion for 56 days and then deny it as "untimely."

Orders under rule 3.800(c) are essentially non-appealable. See Spaulding v. State, 93 So.3d 473 (Fla. 2d DCA 2012). The abuse described in the preceding paragraph led to cases granting certiorari to encourage trial judges to extend the time to rule on a motion filed within the sixty days. See Moya v. State, 668 So.2d 279 (Fla. 2d DCA 1996). That was a cobbled solution at best. Accordingly, the supreme court required that the rule be changed to provide the defendant with 60 days to "file" the motion. Problem solved. Except some judges simply did not rule on these motions or delayed ruling for many months.

To force the judges to rule, a mandatory period of 90 days was created about two years ago. At the same time, however, the rule was amended to state that the motion is deemed denied if it is not ruled upon in the 90 days. Because the motion does not result in an appealable order, there was no need to create a deemed denial to allow for timely appeal. Frankly, I am not certain why the committee concluded that these motions should be deemed denied. The result of this amendment returns us to the problem in the early 1990s; when a trial court ignores these timely filed motions, the time expires and the motion is arbitrarily denied without a remedy on appeal.

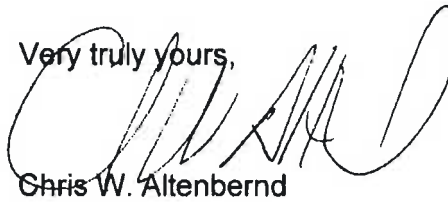
I honestly think most circuit court judges are diligent and will continue to give timely rulings on these motions, but the truth is that a lesser judge can use the "deemed denied" language to eviscerate this rule. If a judge ignores these motions, it is the same as if the rule does not exist. I doubt that we could fashion a suitable remedy to this problem by allowing some extraordinary writ in the district courts.

Hon. Kevin Emas
Eduardo I. Sanchez
Melanie L. Casper
Page Four

Again, I have not fully thought through the solution. I am loath to create another situation where prisoners file petitions for writ of mandamus to compel rulings. But in the absence of a better solution, I would suggest that the committee simply remove the "deemed denied" sentence from rule 3.800(c), and allow prisoners to file for mandamus if they do not receive a timely ruling.

I thank you for your attention to this matter, and I would be happy to talk to anyone about the issue.

Very truly yours,

A handwritten signature in black ink, appearing to be "Chris W. Altenbernd", written over the closing "Very truly yours,".

Chris W. Altenbernd

Cc: Kristin Ann Norse
Samantha Lee Ward

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,¹ 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".

¹ 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,

PAMELA JO BONDI
ATTORNEY GENERAL

/s/ Carolyn M. Snurkowski
CAROLYN M. SNURKOWSKI
Associate Deputy Attorney General
Florida Bar No. 158541

OFFICE OF THE ATTORNEY GENERAL
The Capitol
Tallahassee, Florida 32399-1050
Telephone: (850) 414-3300
Facsimile: (850) 487-0997
capapp@myfloridalegal.com
carolyn.snurkowski@myfloridalegal.com

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
Chair, Criminal Court Steering Committee
Third District Court of Appeal
201 S.W. 117th Avenue
Miami, Florida 33175
emask@flcourts.org

Mr. Bart Schneider
Office of the General Counsel
500 S. Duval Street
Tallahassee, Florida 32399
schneidb@flcourts.org

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

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.¹

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

¹ 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.

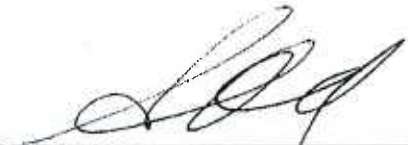
CERTIFICATE OF SERVICE

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. 117th Avenue
Miami, FL 33175
emask@flcourts.org


Mr. Bart Schneider
Office of the General Counsel
500 S. Duval Street
Tallahassee, FL 32399
schneidb@flcourts.org

Mr. John F. Harkness, Jr.
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399
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(1).


SUSAN ODZER HUGENTUGLER
Chair, Criminal Law Section

IN THE SUPREME COURT OF FLORIDA

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

CASE NO: 13-2381

COMMENT OF THE CRIMINAL PROCEDURE RULES COMMITTEE

Melanie L. Casper, Chair, Criminal Procedure Rules Committee (“Committee”), and John F. Harkness, Jr., Executive Director, The Florida Bar, file this Comment on the proposed Rule amendments in this case. The Criminal Procedure Rules Committee voted 27-1 in favor of this Comment via an email vote which concluded on February 3, 2014.

The January 15, 2014, edition of the Florida Bar News included notice of Rules amendments proposed by the Supreme Court’s Subcommittee on Capital Postconviction Proceedings, now filed as Supreme Court Case No. SC13-2381. The Criminal Procedure Rules Committee reviewed the proposal. Although there was no vote on specific issues at the January 24, 2014 Rules Committee meeting, questions were raised about various issues.

As amended, Rule 3.851(e)(1) no longer requires the pleading be made under oath, nor even that it be signed by the movant. The Committee was concerned that this would permit more spurious claims. In addition, although it is seldom used, the amendment prevents prosecution for false sworn claims. In fact, it does not seem to prevent the filing of a pleading without the consent of the defendant, as long as counsel certifies his or her good faith. This act may even be contrary to the wishes of the defendant.

Rule 3.112(k), when read in conjunction with Rule 3.851(b)(4) raises questions as to how “lead” counsel would be defined. In capital postconviction proceedings there are often firms that enter a case on a *pro bono* basis, or even non-Florida counsel who became involved in such cases *pro hac vice*. Rule

3.851(b)(4) states that “no attorney” may enter on a limited basis; yet these *pro bono* or *pro hac vice* firms may not qualify as “lead” counsel. Are they precluded from assisting a death row defendant? How would the Court persuade a qualified “lead” counsel to monitor — and be ultimately responsible — for these counsel? How would conflicts of tactics be resolved between the “lead” and the other attorneys?

Rule 3.851(c)(4) has recently been addressed by the Criminal Procedure Rules Committee for inclusion in next year’s cycle report. This was based upon complaints by capital collateral counsel who raised issues involving the failure or refusal of original trial counsel to fully cooperate in the preparation of the collateral litigation. In its upcoming cycle report, the Committee will propose amendments to Rule 3.851(c)(4) that will require trial counsel to provide postconviction counsel copies of all documents, notes, correspondence, media and any other information that was obtained or generated during the representation of the defendant. Additionally, the amendments will require that trial counsel retain all original information. The amendments will further propose that postconviction counsel bear the cost of any copying. These changes would be consistent with Florida Rule of Criminal Procedure 3.852(f), as well as with the Court’s holding in *Long v. Dillinger*, 701 So. 2d 1168 (Fla. 1997). The proposed amendments were approved by a Committee vote of 31-0.

To explain, the Committee was concerned about the case where post conviction counsel took the entire trial file. First, this often prevented trial counsel from being prepared for any subsequent evidentiary hearing, since years may have passed, and the documents would not be available. If the claim is against the actions of trial counsel, this may even be a tactic to prevent accurate testimony. In addition, there were reports that even when access was granted, trial counsel complained that portions of their notes or even internal folders were missing. Copying and dual retention seems to solve this morass of issues.

Rule 3.851-(e)(1) discusses, but does not define, a “sub-claim.” Because the Rule makes these “sub-claims” prohibited, how can the trial court determine if a matter falls into this category, or is merely the next claim? What if a trial court were to dismiss a matter as a “sub-claim” only to have a higher court note that it was a claim that was never addressed below? A definition would be invaluable.

The Committee noted numerous smaller, somewhat grammatical issues. For example, “subdivision” is sometimes hyphenated and sometimes not. Rule

3.851(e)(2) is missing a space between “subdivision (d)(2)(A),” and “(B)”, or “(C)” in the last sentence.

In addition, it was suggested that the Committee members affiliated with defense, prosecutors, and judicial associations may have their own representative bodies determine if they could timely respond before the February 17, 2014 deadline set for comments.

Respectfully submitted February 17, 2014.

/s/ Melanie L. Casper

Melanie L. Casper

Chair

Criminal Procedure Rules Committee

401 S. Dixie Highway

West Palm Beach, FL

561/837-5156

Florida Bar No. 271070

mcasper@rc-4.com

/s/John F. Harkness, Jr.

John F. Harkness, Jr.

Executive Director

The Florida Bar

651 East Jefferson Street

Tallahassee, FL 32399-2300

850/561-5600

Florida Bar No. 123390

jharkness@flabar.org

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by e-mail, on February 17, 2014 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

Bart Schneider
Office of State Courts Administrator
General Counsel's Office
500 S. Duval Street
Tallahassee, FL 32399
schneidb@flcourts.org

The Honorable Jon Morgan, Chair
Rules of Judicial Administration
Committee
2 Courthouse Sq., Rm. 6420
Kissimmee, FL 34741-5487
ctjujm2@ocnjcc.org

Cathy Mitchell, Director
Legal Publications
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
cathymitchell@flabar.org
850/561-5706

Eduardo Sanchez
Appellate Court Rules Committee
99 N.E. 4th Street, Suite 800
Miami, FL 33132-2131
eduardo.i.sanchez@usdoj.gov
305/961-9057

Melanie L. Casper
Office of Regional Counsel
Region 4
401 S. Dixie Highway
West Palm Beach, Florida 33401
mcasper@rc-4.com
561/837-5423

/s/Cathy Mitchell

Cathy Mitchell
Director
Legal Publications
The Florida-Bar

651 E. Jefferson Street
Tallahassee, FL 32399-2300
cathymitchell@flabar.org
Florida Bar No. 771473
850/561-5706

CERTIFICATION OF COMPLIANCE

I certify that this report was prepared in compliance with the font requirements of Fla. R. App. P. 9.210(a)(2).

/s/ Heather S. Telfer

Heather Telfer, Staff Liaison
Criminal Procedure Rules Committee
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
Florida Bar No. 139149
htelfer@flabar.org

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 Counsels 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.

/s/ Neal A. Dupree

NEAL A. DUPREE

Capital Collateral Reg'l Counsel-South

Fla. Bar No. 311545

SUZANNE KEFFER

Chief Assistant CCRC

Fla Bar No. 0150177

One East Broward Blvd., Ste 444

Ft. Lauderdale, FL 33301

(954) 713-1284

dupreen@ccsr.state.fl.us

/s/ James V. Viggiano, Jr.

James V. Viggiano, Jr.

Fla. Bar No. 0715335

Capital Collateral Reg'l Counsel-

Middle

3801 Corporex Park Dr., Suite 210

Tampa, Florida 33619

(813) 740-3554

Viggiano@ccmr.state.fl.us

Support@ccmr.state.fl.us

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.

/s/ Neal A. Dupree

NEAL A. DUPREE
Capital Collateral Reg'l Counsel-South
Fla. Bar No. 311545
SUZANNE KEFFER
Chief Assistant CCRC
Fla Bar No. 0150177
One East Broward Blvd., Ste 444
Ft. Lauderdale, FL 33301
(954) 713-1284
dupreen@ccsr.state.fl.us

/s/ James V. Viggiano, Jr.

James V. Viggiano, Jr.
Fla. Bar No. 0715335
Capital Collateral Reg'l Counsel-
Middle
3801 Corporex Park Dr., Suite 210
Tampa, Florida 33619
(813) 740-3554
Viggiano@ccmr.state.fl.us
Support@ccmr.state.fl.us

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO CAPITAL
POST CONVICTION RULES

SC13-2381

COMMENTS OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to the Capital Post-Conviction Rules. The FPDA consists of nineteen elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for indigent criminal defendants in hundreds of capital cases every year, FPDA members are deeply interested in the rights of capital criminal defendants to due process, effective assistance of counsel, and to be protected from self-incrimination, rights all designed to ensure the fairness and accuracy of the capital criminal justice system.

As stated in *Allen v. Butterworth*, 756 So. 2d 52, 59 (Fla. 2000), this Court's primary responsibility is to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions. Death is different, requiring heightened constitutional due process protections:

"While all judicial proceedings require fair and deliberate

consideration by a trial judge, this is particularly important in a capital case because, as we have said, death is different.” *Crump v. State*, 654 So.2d 545, 547 (Fla.1995); *accord Walker v. State*, 707 So.2d 300, 319 (Fla.1997). The United States Supreme Court has also repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)(plurality opinion).

Allen v. Butterworth, 756 So. 2d at 59.

Given that context, the FPDA has issues with one of the Committee’s proposals, Rule 3.851(f)(6), Florida Rule of Criminal Procedure. The basis for the FPDA’s disagreement is as follows:

The proposed amendment to Rule 3.851(f)(6), would establish a new requirement that “[a]ll expert witnesses must submit written reports, which shall be disclosed to opposing counsel as provided in subdivision (f)(5)(A).” The FPDA has concerns about requiring written reports from all experts and the wording of the proposed change. Written reports, it is submitted, (1) should not be required of

all experts and (2) the amendment must be clarified to specifically state that such reports that do exist are required to be disclosed *only* if the capital defendant intends to call the witness to testify at an evidentiary hearing, especially in light of the recent decision of the Second District Court of Appeal in *Kidder v. State*, 117 So.3d 1166 (Fla. 2d DCA 2013).

Initially, the FPDA is opposed to the requirement of written reports from all expert witnesses. First, it is a strategy decision as to whether a party desires or needs a written report from an expert. An expert's opinion on a given issue may be fluid as the expert continues to think about and collate information from the time he arrives at his first opinion all the way up to testifying. Thus, requiring a report affects the attorney's trial preparation strategy.

Further, such a report should be considered work product, both of fact and opinion, and, for fact work product, should not be required to be disclosed absent undue hardship or unavailability to the opposing party. Since both sides have the opportunity to depose the other side's experts, normal discovery takes care of this issue and there is no need for this requirement of a written report to be provided to the opposition. As stated in *Smith v. State*, 873 So. 2d 585 (Fla. 3rd DCA 2004):

We cannot agree that this psycho-social report and addendum do not constitute opinion work product. Rule 3.220(d)(1)(B)(ii) requires the defendant to disclose any "[r]eports or statements of experts made in connection with the particular case, including results of physical or mental examinations and of scientific tests, experiments

or comparisons.” Clearly the report and addendum prepared by the defense do not fall under this category. On the other hand, rule 3.220(g)(1) provides:

(1) *Work Product*. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda, to the extent that they contain the opinions, theories, or conclusions of the prosecuting or defense attorney, or members of their legal staff.

We conclude that the summary and addendum clearly constitute work product. The only issue would be whether they constitute fact or opinion work product. The Florida Supreme Court explained the rationale for the rule and the distinction between the two in *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1384 (Fla.1994), as follows:

The rationale supporting the work product doctrine is that ‘one party is not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures.’ Fact work product traditionally protects that information which relates to the case and is gathered in anticipation of litigation. Opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions, and theories. Whereas fact work product is subject to discovery upon a showing of ‘need’ and ‘undue hardship,’ opinion work product generally remains protected from disclosure.

Smith v. State, 873 So. 2d at 587. Thus, as noted by this Court, the prosecution is

not entitled to prepare his case through the investigative work product of his adversary where the same or similar information is available through ordinary investigative techniques and discovery procedures. Surely, without a written report, the state may thoroughly depose an expert witness to discover his opinions and the bases for those opinions – a written report provides nothing that the state cannot obtain otherwise.

As further noted by this Court:

The concept underlying fairness in discovery is that each party should be able to discover from its adversary *what it cannot otherwise obtain*, in order to fully prepare.

However, each party at trial must be prepared to succeed or fail on the product of its own work. Absent overriding circumstances, as for example those disclosed in *Shell [v. State Rd. Dept., 135 So. 2d 857 (Fla. 1961)]*, *any party, including the State, in any case . . . has the responsibility of going to trial on its own preparation and work product, not that of the adversary or his experts.*

Pinellas County v. Carlson, 242 So. 2d 714, 719 (Fla. 1970) (emphasis added).

Not only is the report requirement, then, cumulative and duplicative of information easily available upon rudimentary oral deposition, but it is also “so

burdensome as to create the possibility of a chilling effect on litigants' ability to find experts to testify as witnesses." *Syken v. Elkins*, 644 So.2d 539, 547 (Fla. 3rd DCA 1994), *approved at* 672 So.2d 517 (Fla. 1996). Further, a party may not be required to produce documents which it does not have and which are not shown to exist. *Balzebre v. Anderson*, 294 So.2d 701, 702 (Fla. 3rd DCA 1974); *see also* *Syken v. Elkins*, 644 So.2d at 546, n.7 (there is "no authority to order the discovery of nonexistent records.")

Aside from the above legal considerations, expert witnesses involved in post-conviction capital litigation are often of the type that written reports are not helpful, conducive to their field, nor utilized. These include experts in areas of mental health, cultural, socio-economic, educational, and other related mitigating areas, which areas are often rather subjective. Additionally, the preparation of written reports will cost additional money, which resources are scarce, and, in this context, an unnecessary expense as noted above.

With regard to the requirement that existing written reports of experts are discoverable, while the proposal does include the word "witnesses" and makes reference to Rule 3.851(f)(5)(A) (which rule references witnesses and documents which the defendant "intends to offer at the evidentiary hearing," "all expert witnesses," and "all expert reports"), the FPDA is concerned that, without specific language limiting the rule to expert witnesses *the defendant intends to call at the*

evidentiary hearing, this rule change could be interpreted to require reports and disclosure of those reports from experts which the defendant has consulted but which it does not intend to call. If the rule stands as now written and is interpreted in such a manner, this rule, it is submitted, could pose serious Fifth and Sixth Amendment concerns.

In *Kidder v. State*, *supra*, the Second District Court of Appeal held, in the absence of limiting language stating that it applied only to witnesses the defense intended to call at trial, Rule 3.220(d)(1)(B)(ii), Florida Rules of Criminal Procedure, requires disclosure to the prosecution of *all* expert reports obtained by the defense, even if the defense did not intend to call the witness. There, while the court expressed concern about the “Catch-22” this requirement would place on defense counsel – whether to investigate an issue utilizing an expert and require disclosure to the state of adverse reports or, on the other hand, to not engage in reciprocal discovery, thereby hampering counsel’s effectiveness in preparing for the defendant’s case – the court rejected any Fifth or Sixth Amendment concerns in the context of *pre-trial* discovery, noting that the defendant could simply decline to participate in reciprocal discovery. The court also noted that any privileged communications or work product were not existent with regard to the specific expert report (blood testing) being challenged there.

However, in the context of capital post-conviction proceedings the *Kidder*

holding of no constitutional infirmity for the *pre*-trial disclosure of such reports should not apply. First, many of the reports which the defense may obtain could indeed include privileged communications and/or work product, where the defendant and counsel must disclose to the expert confidential matters personal to the defendant or containing work product, such as mental evaluations, educational and sociological reports, information about a defendant's background, and opinions and observations of counsel. The *Kidder* court does not hold that all expert reports are not privileged under work product, and, indeed, only held that the blood testing by an independent agency was not work product under the discovery rules. *Kidder v. State*, *supra* at 1171-1173. In *State v. Mingo*, 392 A.2d 590 (N.J. 1978), the New Jersey Court held that the privilege against self-incrimination and the attorney-client privilege include communications by the defendant or his counsel to scientific experts retained to aid in the presentation of the defense. This privilege is "indispensable to the fulfillment of the constitutional security against self-incrimination and the right to make defense with the aid of counsel skilled in the law." *Id.* at 592, quoting from *State v. Hunt*, 138 A.2d 1, 11 (N.J. 1958). *See also State v. Dunn*, 571 S.E.2d 650, 656-660 (N.C. App. 2002). Such required disclosure, if applied to non-testifying witnesses, would thus violate the Fifth Amendment.

In *Hickman v. Taylor*, 329 U.S. 495, 508, 510 (1947), the Supreme Court

held that the petitioner's attempt "to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties" without a showing of necessity or justification, fell outside the area of proper discovery and "contravenes the public policy underlying the orderly prosecution and defense of legal claims." Additionally, in the criminal context, the Court also explained that "[t]he interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case." *United States v. Nobles*, 422 U.S. 225, 238 (1975).

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. *One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.*

Id., 422 U.S. at 238-239 (emphasis added). See also *People v. Spiezer*, 735 N.E.2d 1017, 1028 (Ill. 2nd Dist. 2000) (reports of non-testifying, consulting experts are work product, not subject to disclosure); *State v. Mingo*, 392 A.2d 590 (N.J. 1978) (reports of non-testifying, consulting experts are not discoverable by the prosecution as such would violate the attorney-client privilege, the right against

self-incrimination, and the right to counsel).

In *State v. Kociolek*, 129 A.2d 417 (N.J. 1957), the New Jersey Supreme Court reasoned that an expert psychiatrist was the agent of the attorney and therefore any communication by the defendant to the psychiatrist in the course of his examination was the equivalent of a communication by the defendant to the attorney himself and was thus privileged. Further, that same Court ruled in *State v. Hunt*, 138 A.2d 1, 11 (N.J. 1958), that the privilege includes “communications between the attorney and a scientific expert retained to aid in the presentation of the defense” See also *State v. Mingo*, *supra* at 592-594 (defendant’s rights against self-incrimination, to attorney-client privilege, and to effective assistance of counsel are “clearly subverted if an expert report obtained for defense purposes by defendant’s counsel is to be made discoverable to the State and utilizable by it, directly or indirectly, at trial, unless a defendant signifies his intention to use the expert evidence at trial or in fact does so.”

Further, in his concurring opinion in *Kidder v. State*, *supra*, Judge Wallace noted that the defense could avoid the disclosure requirement of Rule 3.220 and any potential constitutional concerns against self-incrimination and work product disclosure by requesting only an oral report of a bad result and to provide a written report only if the result is favorable to the defense. *Id.* at 1176. However, if this proposed amendment to Rule 3.851(f)(6) passes, that avenue would not be

available to defense counsel since the rule *requires* the expert to submit a written report, which report is then discoverable.

Secondly, the Second District Court in *Kidder*, explained that pre-trial disclosure of non-testifying witnesses did not violate the right to effective assistance of counsel because counsel could opt not to participate in reciprocal discovery. However, such option to opt-out of reciprocal discovery is not present in Rule 3.851, requiring that *all* expert witnesses must submit reports, which *shall* be disclosed to the prosecution. Thus, the requirement of those reports and disclosure of all such reports, even for non-testifying witnesses, would curtail defense counsel's ability to research his client's claims and prepare his post-conviction pleadings, adversely impinging on a capital defendant's Sixth Amendment rights.

The constitutional right to assistance of counsel comprehends the right to the effective assistance of counsel. "An attorney has a duty to make reasonable investigations in his or her cases." *Brown v. State*, 892 So.2d 1119, 1119 (Fla. 2d DCA 2004). To safeguard the ability of an attorney to provide effective assistance to his client it is essential that he be permitted full investigative latitude in attempting to develop a meritorious defense for his client. *State v. Mingo*, 392 A.2d 590 (N.J. 1978); *State v. Spencer*, 725 A.2d 106, 114-115 (N.J. Super. Ct. App. Div. 1999). That latitude is circumscribed if defense counsel must risk a potentially

crippling revelation to the State, by way of discovery, of information uncovered in the course of investigation which counsel does not intend to use at trial. *Id.*

Accordingly, a defense attorney must have the right to seek out expert evidence without risking its disclosure to the State if the expert's opinion turns out to be unfavorable to the defense. *Id.* Specifically, counsel in Florida may be ineffective for failing to obtain an expert witness. *See, e.g., Lee v. State*, 899 So.2d 348, 351 (Fla. 2d DCA 2005). Thus, as the New Jersey Superior Court ruled:

[T]he right to the effective assistance of counsel is clearly subverted if an expert report obtained for defense purposes by defense counsel is discovered by the State and utilized by it, either directly or indirectly, at trial, when the expert was not used by defendant at trial. [citing *State v. Mingo, supra.*] . . . The rule declaring reports of experts consulted by defendants in a criminal prosecution immune from discovery and testimony when the expert will not testify as a witness for the defense and whose report will not be utilized as evidence is designed to provide effective representation by affording counsel the utmost freedom in seeking the guidance of an expert without fear that any unfavorable material so obtained will be used against defendant. [citing *State v. Mingo, supra.*] . . . To hold otherwise might discourage counsel from seeking expert assistance. Accordingly, we conclude that the protection from the unwarranted disclosure or use of the report of an expert consulted by defense counsel which will not be used by defendant at trial is an indispensable element of defendant's constitutional right to the effective assistance of counsel.

State v. Spencer, 725 A.2d at 114-115. *See also State v. Mingo, supra* at 594.

Conclusion

In most cases, an effective capital post-conviction attorney will need to obtain expert opinion or independent testing of evidence not tested by defense counsel prior to trial in order to investigate any potential post-conviction claims. If the defense does not have a written report from the expert, the FPDA submits, no report should be required to be obtained.

Further, if the defense intends to rely on, at a post-conviction motion hearing, defense experts' opinions or experts who have conducted independent testing, and, if that expert has prepared a report, then the defense is required to disclose to the prosecution the experts' reports or statements. But if the defense does not intend to utilize a defense expert at a hearing, then the defense should not be required to obtain a report or to disclose to the prosecution any report or statement made by the expert. To require otherwise would amount to a violation of the defendant's Fifth and Sixth Amendment rights. The language of Rule 3.851(f)(6), should be changed and clarified to reflect this.

Respectfully submitted,

/S/

Honorable Julianne M. Holt
President, Florida Public Defender Association
PUBLIC DEFENDER, 13th JUDICIAL CIRCUIT
Hillsborough County
P.O. Box 172910
Tampa, FL 33672-0910
(813) 272-5980
jholt@pd13.state.fl.us

CERTIFICATES

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail to:

Eduardo I. Sanchez, Esq.
99 N.E. 4th Street, Suite 800
Miami, Florida 33132-2131
eduardo.i.sanchez@usdoj.gov

Heather Telfer
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
htefler@flabar.org

this 17th day of February, 2014.

I HEREBY CERTIFY that these comments were formatted in 14-point Times New Roman.

/s/ Julianne Holt
JULIANNE HOLT

IN THE SUPREME COURT OF FLORIDA

No. SC13-2381

**IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL
PROCEDURE – CAPITAL POSTCONVICTION RULES**

**COMMENTS OF THE FLORIDA PROSECUTING
ATTORNEYS ASSOCIATION, INC.**

COMES NOW, the **FLORIDA PROSECUTING ATTORNEYS ASSOCIATION, INC. (“FPAA”)**, by and through the undersigned counsel, and hereby files the instant comments to proposed amendments to Rules 3.851 and 3.852, Florida Rules of Criminal Procedure:

1. By administrative order, this Court created a subcommittee to amend Florida’s postconviction rules. *In re Subcommittee on Capital Postconviction Proceedings*, Fla. Admin. Order No. SC13-11 (March 22, 2013). This Court directed that the subcommittee’s recommendation be published to facilitate comments, due February 17, 2014. *See Committee recommends capital postconviction amendments in response to the Timely Justice Act*, 41 Fla. Bar News 2 (January 15, 2014).
2. The FPAA represents the 20 State Attorneys of Florida and their roughly 1,800 Assistant State Attorneys and is interested in the proposed amendments designed to expedite the postconviction process.
3. The FPAA supports this Court’s mission to improve the postconviction process and

submits these comments with concern over specific aspects of the amendments to Rule 3.852 Fla. R. Crim. P., and with concern on issues raised by the proposed amendments to Rules 3.851 Fla. R. Crim. P. [*hereinafter Am. Rule(s)*].

4. As to *Am. Rule 3.852*, FPAA is primarily concerned with the addition of ensuring public records production from other agencies. *Am. Rule 3.852(e)(1)* (“The state attorney shall ensure timely production of public records and a written notice of compliance by each law enforcement agency with a copy to the trial court”). Under the existing Fla. R. Crim. P. [*hereinafter Rule(s)*], the State Attorney notifies various agencies upon receipt of the mandate. *See Rule 3.852(e)*. By contrast, *Am. Rule 3.852* broadens the State Attorney’s responsibility from notifying agencies that each must produce public records to ensuring compliance for each agency receiving that notification.

5. The FPAA questions whether it is best suited to ensure public record production of other agencies. Under the amended rule, the incentive structure for ensuring production of public records is fundamentally inconsistent with the traditionally adversarial nature of public records production.

6. The FPAA submits that postconviction counsel, not the State Attorney, is best suited to determine whether agencies have complied with notification to produce public records. Further, the remainder of *Am. Rule 3.852* provides the framework for postconviction counsel to demand records, defines the appropriate scope of such demands, and provides status conferences as the forum for adjudicating anticipated public records disputes. *See Am. Rule 3.852(f)-(1)*; *See also, Comments to 2001 Amendment to Rule 3.851* (“These status conferences are intended to provide a forum for the timely resolution of public records issues and other preliminary

matters.”). Therefore, the postconviction counsel has the necessary tools to request and compel discovery.

7. The FPAA acknowledges the necessity of gathering public records expeditiously, but urges this Court to consider whether a state attorney is best suited for the additional burden of ensuring production and compliance by each agency.

8. Turning to the logistics of the public records production, the potential costs concern the FPAA. *Am. Rule 3.852* contains two key elements with respect to the flow of public records. First, the records are provided “in a current, nonproprietary technology format,” and second, an additional copy of the public records is sent to the trial court. *See Am. Rule 3.852*. The FPAA’s concern arises from the lack of direction as to what constitutes “a current, nonproprietary technology format.” The assumption is that the phrase refers scanning documents into Adobe PDF format. That process alone requires funding where the capacity for expensive scanning equipment and labor must be expanded. Costs will be substantial. And if the State Attorney is required to ensure compliance of other agencies, those costs would multiply in terms of labor, equipment and technology.

9. A related concern arises from the software and its uniformity. Assuming adobe PDF files are widely used for this purpose, only the proprietary version of Adobe allows for editing such as redacting. The FPAA acknowledges that “Exempt or Confidential Public Records” under *Am. Rule 3.852(f)* appears to allow for paper copies to avoid the possible dilemma.

10. For this reason, the FPAA proposes that if the issues outlined above cannot be reconciled or funded by the state, agencies be allowed a choice between furnishing electronic copies, as *Am. Rule 3.852* contemplates, and providing traditional hard copies.

11. Turning to Rule 3.851 Fla. R. Crim. P., the FPAA is in agreement with the comments submitted by the Office of the Attorney General. Particularly that the removal of the oath requirement found in Rule 3.851(e)(1) Fla. R. Crim. P. deserves this Court's consideration.

12. *Am. Rule 3.851(F)* states that *the attorney* sign a statement showing that the motion was filed in good faith. [*emphasis added*]. By contrast the Defendant's review and approval under the oath requirement is important for two reasons. First, it forces the Defendant to review and approve the motion drafted by the postconviction counsel, making the Defendant less likely to assert claims of ineffective assistance of postconviction counsel. Secondly, Judicial efficiency might be considered where a Defendant may voluntarily abandon certain claims for reasons not known to the postconviction counsel. *See Duroucher v. Singletary*, 623 So.2d 482 (Fla. 1993) (Florida Supreme Court affirmed defendant's argument that he did not want to pursue competency defense with postconviction counsel); *See also, Scott v. State*, 464 So.2d 1171 at 1172 (Fla. 1985) (citing the trial court with approval and stating, "It stated that this rule of requiring that the motion under consideration be under oath is the only effective way to prevent the use of false allegations in motions for post-conviction relief.").

WHEREFORE, the Florida Prosecuting Attorney's Association respectfully requests that this Court accept for its consideration the above comments to the proposed amendments to the postconviction rules for Fla. R. Crim. P. pertaining to capital postconviction public records production under Rule 3.852 Fla. R. Crim. P. and the removal of the Oath requirement in Rule 3.851 Fla. R. Crim. P..

CERTIFICATE OF SERVICE

 I HEREBY CERTIFY, that true and correct copies of the foregoing have been provided

via electronic mail this 17th Day of February, 2014, to the following:

Judge Kevin Emas

Third District Court of Appeal

2001 S.W. 117th Avenue

Miami 33175

emask@flcourts.org

Chair of the Criminal Court Steering Committee

Bart Schneider

Office of the General Counsel

500 S. Duval Street

Tallahassee 32399

schneidb@flcourts.org

*Staff to the Supreme Court's Capital
Postconviction Proceedings Subcommittee*

JACOBS, SCHOLZ & ASSOCIATES, LLC

/s/ Arthur I. Jacobs

Arthur I. Jacobs, Esq.

Fla. Bar No.: 108249

Tyler S. Stubbs, Esq.

Fla. Bar No.: 0107556

961687 Gateway Blvd., Suite 201-I

Fernandina Beach, FL 32034

(904) 261-3693

(904) 261-7978 Fax

Primary: jacobsscholzlaw@comcast.net

Secondary: tyler.stubbs@comcast.net

Attorneys for Florida Prosecuting

Attorneys Association

IN THE SUPREME COURT OF FLORIDA

No. SC13-2381

**IN RE: AMENDMENT TO FLORIDA RULES OF CRIMINAL
 PROCEDURE – CAPITAL POSTCONVICTION RULES**

**COMMENTS OF THE FLORIDA PROSECUTING
ATTORNEYS ASSOCIATION, INC.**

REQUEST FOR ORAL ARGUMENT

Pursuant to Florida Rule of Appellate Procedure 9.320, The Florida Prosecuting Attorneys Association, Inc. hereby requests oral argument.

Respectfully Submitted,

/s/ Arthur I. Jacobs

Arthur I. Jacobs, Esq.
Fla. Bar No.: 108249
*Attorney for Florida Prosecuting
Attorneys Association*

CERTIFICATE OF SERVICE

 I HEREBY CERTIFY, that true and correct copies of the foregoing have been provided via electronic mail this 17th Day of February, 2014, to the following:

Judge Kevin Emas
Third District Court of Appeal
2001 S.W. 117th Avenue
Miami 33175
emask@flcourts.org

Chair of the Criminal Court Steering Committee

Bart Schneider

Office of the General Counsel

500 S. Duval Street

Tallahassee 32399

schneidb@flcourts.org

Staff to the Supreme Court's Capital

Postconviction Proceedings Subcommittee

JACOBS, SCHOLZ & ASSOCIATES, LLC

/s/ Arthur I. Jacobs

Arthur I. Jacobs, Esq.

Fla. Bar No.: 108249

Tyler S. Stubbs, Esq.

Fla. Bar No.: 0107556

961687 Gateway Blvd., Suite 201-I

Fernandina Beach, FL 32034

(904) 261-3693

(904) 261-7978 Fax

Primary: jacobsscholzlaw@comcast.net

Secondary: tyler.stubbs@comcast.net

Attorneys for Florida Prosecuting

Attorneys Association