

**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**

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**SUPPLEMENTARY COMMENTS OF THE CAPITAL COLLATERAL  
REGIONAL COUNSEL-SOUTH**

When this Court created the Capital Postconviction Proceedings Subcommittee and directed it to undertake a review of the efficacy of Florida's capital postconviction procedure, it ordered the Subcommittee to "seek input from stakeholders including, but not limited to, . . . the Capital Collateral Regional Counsel . . . ." (Administrative Order SC13-11 at 1). To a considerable extent, the Subcommittee did that. It heard from CCRC during a meeting<sup>1</sup> and invited public comment on its proposed amendments 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 submitted joint comments, along with various other organizations, in appreciation and support of this Court's efforts to improve the efficacy of capital procedure in this State. On March 10, 2014, the Capital Postconviction Proceedings Subcommittee filed a response to the various comments, revising its proposed amendments to address issues raised.

However, the Subcommittee also made affirmative additions to its proposed amendments, beyond those initially provided for purposes of public comment, and, in at least one instance,

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directly opposite to the rule originally proposed. Such additions are not inline with the usual  
The Subcommittee met via two phone conferences and two in-person meetings. (Petition of the Subcommittee filed December 10, 2013, Case No. SC13-2381, at 5). The Subcommittee heard from CCRC at one meeting. After the meeting, the Subcommittee circulated and considered proposed rule amendments. (Petition at 7). The Subcommittee provided proposed rule amendments to the Steering Committee, which met on November 22, 2013 to consider the amendments. (Petition at 7-8). Subsequently, the Steering Committee and Subcommittee met jointly to consider the amendments. (Petition at 8).

decisions to retain or eliminate proposed language in response to public comments received as part of a rule proposal process, they are a return to the drawing board to create entirely new rules that will not be subject to public comment. There is a difference between, on the one hand, submitting proposed amendments for public comment and then retaining, adjusting or eliminating those proposed amendments based on the comments, and, on the other hand, submitting proposed amendments for public comment and then adopting an entirely new and diametrically opposite rule. Proposed amendments not included in the Subcommittee's notice to the public were not submitted for public comment and thus should be subject to comment after their publication. While Rule 2.140(a)(5) allows that "committees may accept or reject proposed amendments or may amend proposals," there is a fundamental difference between amending a proposal that is submitted for comment, and offering an untimely proposal, after the comment period, which has the affect of insulating that proposal from public scrutiny prior to adoption.

CCRC does not herein attempt to reargue matters related to the Subcommittee's proposals that it has already had an opportunity to address and declines to offer comments to rule amendments which, though newly developed in response to comments, are not outside the scope of the issues raised by the original proposed amendments. Herein, CCRC seeks only to comment on a particular rule proposal created after the comment period, pursuant to this Court's instruction that the Subcommittee must seek input from stakeholders like CCRC on proposed amendments that will affect their practice. Specifically, CCRC is concerned with the Subcommittee's treatment of Rule 3.851(c)(4).

The currently operative Rule 3.851(c)(4) requires trial defense attorneys to turn over to postconviction defense counsel trial files related to defendants CCRC will represent in postconviction proceedings but is silent on whether original files or copies of files must or may

be disclosed. That silence has led to litigation and differing rulings. For that reason, the Subcommittee was rightfully attentive to this issue. The Subcommittee initially proposed to amend Rule 3.851(c)(4) to require that trial defense attorneys shall provide to 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” (emphasis added). That is the proposal that was submitted to the public for comment. Because the Subcommittee proposed to require original files be turned over, CCRC had no reason to comment on whether an opposite rule would create problems. CCRC could not anticipate that the Subcommittee would completely reverse its position on this proposal without hearing from CCRC.

However, after the comment period had expired, the Subcommittee reversed its position and proposed a diametrically opposite rule, requiring that trial defense attorneys shall provide to postconviction counsel “*a copy* of the original file” and “retain the defendant’s original file” (emphasis added).

The amended rule would also require CCRC to “bear the costs of any copying.” Given that CCRC’s budget is limited, the proposed rule has the potential to create a significant expense.

CCRC was not afforded an opportunity to be heard on the many dangers and serious—even case-dispositive—issues that arise from trial defense attorneys being permitted to copy their files to postconviction counsel rather than turn over the original files. For that reason, CCRC submits the instant comments for the consideration of the Court and the Subcommittee, despite the expiration of the comment period applicable to the Subcommittee’s initial proposals.<sup>2</sup>

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<sup>2</sup> Florida Rule of Judicial Administration Rule 2.140(a)(1) permits “any person” to suggest to this Court “[p]roposals for the court rules, amendments to them, or abrogation of them . . . ,” such that CCRC’s suggestion as to Rule 3.851(c)(4) could be considered by this Court as itself a proposal rather than a comment, if the Court determined that it was not cognizable as a comment.

Before addressing the dangers of the Subcommittee's last minute rule proposal, it is noteworthy that the offices of the public defender that provided comments to the Subcommittee had no objection to a rule that would require them to turn over their original trial files to postconviction counsel. Rather, it was the Attorney General, the Criminal Law Section of the Florida Bar, and the Criminal Procedure Rules Committee that objected to this rule. To the extent that the objections of the Criminal Law Section of the Florida Bar and the Criminal Procedure Rules Committee were based on this Court's finding in *Long v. Dillinger* to the effect that a "public defender's file . . . is the property of the public defender, and [this Court] will not require that office to surrender its original file to [postconviction counsel]," 701 So. 2d 1168, 1169 (Fla. 1997), CCRC would note two important considerations.

First, *Long* involved a situation where CCR sought public defender files relating not to the capital case on which CCR represented the client, but to another case in which the public defender had represented the same client. *See id.* at 1168-69. While *Long* discusses ownership of files, it does so in an entirely different context than that to which the instant proposed rule would apply.

Second, the ownership of the files is not at issue here. A procedure could easily be added to the proposed rules under which original trial files would be returned to trial counsel at the termination of the representation by CCRC of the client. Ownership and ultimate possession is not the problem. To the extent that the Attorney General objects due to an interest in preventing CCRC from having access to original files, CCRC would note that there is no valid legal interest in preventing a party from reaching the full truth of a matter by viewing the full evidence. The Attorney General's interests, forwarded by the Subcommittee without input from CCRC, seem to be in taking advantage of a political superiority and the anti-defense momentum of the Timely

Justice Act (“TJA”) in order to further unlevel the playing field in its favor. This is particularly apparent where the rule is proposed despite being in clear conflict with statutory law, as if the existing law and those who support it are being entirely excluded from consideration. *See* Fla. Stat. § 27.51(5)(a) (“The public defender shall then forward all original files on the matter to the capital collateral regional counsel, retaining such copies for his or her files as may be desired.”); *see also* Fla. Stat. § 27.511(9) (“The office of criminal conflict and civil regional counsel shall forward all original files on the matter to the capital collateral regional counsel . . .”).

A rule requiring trial attorneys to retain their original file (meaning they cannot even turn it over if they chose to do so) and to disclose a copy of that file to postconviction counsel creates numerous and substantial problems. Claims of ineffective assistance of counsel are among the most commonly raised postconviction claims and those that most often result in relief being granted. Absolutely essential to those claims is the requirement that postconviction counsel demonstrate that trial counsel’s deficient actions were not attributable to a strategic decision. *See Occhicone v. State*, 768 So. 2d 1037, 1048 (Fla. 2000) (“[S]trategic decisions do not constitute ineffective assistance of counsel if alternative courses have been considered and rejected and counsel’s decision was reasonable under the norms of professional conduct.”). “The defendant carries the burden to ‘overcome the presumption that, under the circumstances, the challenged action ‘might’ be considered sound trial strategy.’” *Schoenwetter v. State*, 46 So. 3d 535, 553 (Fla. 2010). This Court characterizes that presumption as a “strong” one. *Id.* Preventing CCRC from taking possession of the trial attorneys’ original files serves to prevent CCRC from fully understanding and building evidence around trial counsel’s thinking at the time of trial. It hinders CCRC’s ability to overcome a strong presumption of strategy. The substantive law already weighs heavily against findings of ineffectiveness such that there is no need to tip the procedure

further against capital defendants.

Copying of trial attorney files is notoriously prone to error and incompleteness. It is common for attorneys to make notes in margins, on sticky notes, and on the backs of pages only printed on one side. Those notes often contain meaningful insights into counsel's thoughts at the time of the trial. They can often be on oddly folded or oddly sized papers. There may be spiral notebooks of handwritten material that cannot be fed into a scanner. There can be labeling of folders or boxes that is significant. Trial work is an organic process for many attorneys such that files rarely appear in tidy, orderly, standardized forms that lend themselves to accurate and simple reproduction. The only sure way of getting a complete sense for the trial attorney's work is by interacting with the original file itself.

Not having the original file also can create evidentiary problems relating to the best evidence rule, authentication, and other matters of admissibility and exclusion that may prevent CCRC from entering evidence during the postconviction case that is essential to a claim of ineffective assistance. The State will not forgo evidentiary objections out of respect for the fact that CCRC is unable, as a matter of procedural law, to obtain original files. The State will take advantage of that fact and argue it as a matter of the judgment of this Court that CCRC should not be permitted to use that evidence. The Attorney General's objection to the rule requiring turning over original files furthers this effort. It is an attempt to tip the playing field as much as possible.

Further, this Court has ruled that a waiver of the attorney-client privilege as to trial counsel's strategy and files occurs once postconviction counsel files an ineffective assistance of counsel claim, and at that time the State gains access. *See Reed v. State*, 640 So. 2d 1094, 1097 (Fla. 1994) ("Under such circumstances, the State will ordinarily be entitled to examine the trial

attorney's entire file.”). A rule that requires trial attorneys to retain their original files in every case invites the State to sidestep this Court’s holding by going directly to the trial attorney prior to postconviction procedure calling for that action. The Attorney General’s objection furthers this interest. And, when put together with the TJA’s new sanction prohibiting capital practice of trial attorneys twice found ineffective,<sup>3</sup> Fla. Stat. § 27.7045, it becomes clear that the State sees an opportunity with the TJA and the present rule amendments, proposed in response to the TJA, to give trial attorneys a means to misrepresent their performance at trial.<sup>4</sup> They are subject to sanction if they are found ineffective and they do not have to provide CCRC with any original files that might prove that ineffectiveness.

The rule also requires CCRC to pay for copying but is silent on the means of copying. Must files be sent to a professional printer for an unbiased and thorough recreation of the original? Might a trial attorney simply have an assistant run whatever materials are not bound or

<sup>3</sup> This rule was included in the TJA in response to complaints from the State that trial attorneys were supposedly prone to falsely claiming that they were ineffective, contrary to the common circumstance of trial attorneys wanting to preserve their reputation and practice by not being found incompetent, and contrary to the State’s practice of characterizing themselves as “defending” trial attorneys who are being “sued” for ineffectiveness.

<sup>4</sup> This is one of many examples of the State taking advantage of the blurring of politics and the judiciary surrounding the TJA and rules proposed to accommodate the TJA. For instance, the TJA has given preference to the Attorney General to have input with the Clerk of this Court as to which defendants are subject to a death warrant, without input from postconviction defense counsel. During the oral arguments in *Abdool*, SC13-1123, the view was expressed that the Clerk is certainly able to determine which defendants have completed federal habeas proceedings. However, in its response to comments, this Court’s Subcommittee acknowledges that while “[o]ne provision of the Timely Justice Act requires the Clerk of the Florida Supreme Court to notify the governor when the clerk believes a person is warrant-eligible,” “the Clerk is generally not in a position to make this warrant-eligible determination unilaterally.” (Response at 31-32). Thus, in the death certification context, it seems that the Attorney General has successfully removed CCRC from a sentence-determinative process that this Court’s Subcommittee has acknowledged is not ministerial such that the Clerk could perform the task alone. There is judgment involved, and that judgment will come from the party to the litigation charged with seeing the sentence carried out. Again, this Court should not allow the State to further tip the playing field through the political processes surrounding the TJA and rules proposed to accommodate the TJA.

unscannable into an in-office copier? It is unclear the extent to which completeness or expense will result from this last-minute rule proposal.

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

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### **CERTIFICATE OF SERVICE**

I certify that a copy hereof has been furnished to the Honorable Kevin Emas, Chair, Criminal Court Steering Committee, Third District Court of Appeal, 2001 S.W. 117th Avenue, Miami, FL 33175, [emask@flcourts.org](mailto:emask@flcourts.org), and Mr. Bart Schnieder, Office of the General Counsel, 500 S. Duval Street, Tallahassee, FL 32399, [schneidb@flcourts.org](mailto:schneidb@flcourts.org), on this 11th day of April, 2014.

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