IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,646

IN RE: AMENDMENT TO
FLA. R. CRIM. P. 3.851
_____/

SUPPLEMENTAL COMMENTS OF THE OFFICE OF THE CAPITAL COLLATERAL COUNSEL - NORTHERN REGION

COMES NOW THE OFFICE OF THE CAPITAL COLLATERAL COUNSEL - NORTHERN REGION, through the undersigned attorneys, and submits the following supplemental comments in the above-captioned case.

I. INTRODUCTION

The Capital Collateral Counsel - Northern Region (CCC-NR), respectfully submits the following supplemental comments to the proposed rule submitted by Judge Morris and the Committee on Postconviction Relief in Capital Cases (hereinafter the Committee). These comments are intended to supplement those previously submitted in a letter to Judge Morris and the Committee on Postconviction Relief in Capital Cases, and CCC-NR's letter to Justice Harding regarding the Committee's final product (Attachment A). In addition, CCC-NR referred to the Committee's recommendations in the Petition and Reply filed in *Asay, et. al. v. Butterworth, et. al*, No. SC00-154. The comments and arguments made in those papers are incorporated into this pleading by specific reference. Since these arguments were made, CCC-NR has been provided the comments of the Florida Public Defender Association, Inc. ("PDA"), and the Capital Collateral Regional Counsel - South ("CCRC-S"). Unless otherwise noted herein, CCC-NR concurs in those comments. The following remarks respond to the comments of the PDA and CCRC-S, and to the Amicus Curiae Brief of John E. Thrasher, filed on March 7, 2000, which asks this Court to adopt rules that would

secure the denial of habeas corpus review intended by the pleading and bar rules of the Death Penalty Reform Act of 2000 ("DPRA").

II. COMMENTS

A. The Bar on Extensions and Amendments Should Not Be Adopted

1. The Committee failed to consider why skeletal motions are necessary

The Morris Committee recommends a rule which would bar extensions of time and amendment of pleadings. CCC-NR concurs in the comments of the Public Defender Association and those of the CCRC-South regarding this issue. Some additional background is needed, however, to resolve the Committee's misunderstanding of skeletal motions, and hopefully to dispel the Committee's hostility or at least redirect it toward the appropriate party. The Committee premised its proposed rules on this "Court's concern with dilatory practices of counsel." (Letter of Judge Morris at 5). "Counsel," in the Committee's view, is reasonably interpreted to mean defense counsel since the proposed rule severely disadvantages people sentenced to death by abolishing many of the procedural and substantive due process protections which this Court has adopted. At the same time, the Committee's proposal rewards the State with a litigation windfall by providing for automatic discovery in every case, unlimited time to respond to a motion, and by providing a mechanism for the concealment of evidence material to claims a defendant might raise. Full consideration of the genesis and history of skeletal motions is in order.

As noted in the Reply filed in *Asay v. Butterworth*, widespread filing of skeletal motions was the brainchild of Richard Martell, not capital post-conviction lawyers. Mr. Martell's suggestion was well-founded insofar as he relied upon this Court's decision in *Ventura v. State*, 673 So.2d 479 (Fla.

1996), for the proposition that incomplete motions "can be filed in such a way that there would be a tolling of the federal time limits." *Transcript of Temporary Restraining Order Hearing*, *Hill v. Butterworth*, No. 4:96-CV-288-MMP at 37 (N.D. Fla. July 18, 1996), appended hereto as Attachment B.

Mr. Martell was arguing that under *Ventura* a skeletal motion is a "properly filed application for State post-conviction or other collateral review" for purposes of section 2244 of the United States Judicial Code, and would therefore toll the 1-year statute of limitations for filing applications for federal habeas corpus relief. 28 U.S.C. § 2244(d)(1)(D). Recently distributed materials prepared by Judge Padovano, a member of the Morris Committee, indicate that Judge Padovano and the Committee were unaware of the federal statute of limitations created by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. 104-132, 110 Stat. 1217. As Justice Anstead recently remarked, AEDPA has made thorough, searching, and careful state habeas corpus review more important than ever. *Arbelaez v. Butterworth*, 738 So.2d 326, 331 (Fla. 1999) (Anstead, J., concurring). The Committee's recommendations, made without consideration of this critical information, should be viewed with extreme skepticism.[1]

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[1] Counsel would also note that Judge Padovano's description of *state* collateral review is extraordinarily narrow and omits mention of many cognizable claims. For example, Judge Padovano apparently does not consider claims arising under *United States v. Henry*, 447 U.S. 264 (1980), and *Massiah v. United States*, 377 U.S. 201 (1964), to be cognizable under rule 3.850, although they clearly are. *See Milton v. Wainwright*, 407 U.S. 371 (1992). Claims related to the bias or partiality of judges and jurors are not mentioned. *See Porter v. State*, 723 So.2d 191 (Fla. 1998); *see also*, *Bracy v. Gramley*, 520 U.S. 899 (1996)(judicial bias); *Smith v. Phillips*, 455 U.S. 209 (1982) (federal habeas corpus case addressing claim of jury tampering). . Critical sentencing issues such as the principles announced in *Johnson v. Mississippi*, 486 U.S. 578 (1988), are missing. The handout incorrectly states that violations of the Sixth Amendment under *United States v. Cronic*, 466 U.S. 648 (1984), have a state-action requirement. *See Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997), *cert. denied*, 118 S.Ct. 1826 (1998). These are just a few of the

Finally, with the advent of Registry and Repository, incomplete motions subject to amendment take on greater importance. Given the shocking frequency with which novice capital postconviction lawyers have filed no motions at all before the expiration of state and/or federal filing dates, incomplete motions may serve as the only hope a de facto pro se petitioner has of tolling the time limits. Even in cases where counsel do everything according rule 3.852, where state agencies fully comply with the letter and spirit of the law, and where trial courts promptly conduct hearings, the margin for error is paper thin. If everything goes perfectly under rule 3.852, the best a person sentenced to death can hope for is that she will have 60 days to prepare and file her application for relief after records are disclosed. That ideal scenario has yet to be seen in practice. Unavoidable events like shipping delays, breakdowns of copiers or scanners, or bureaucratic glitches would lead to the complete loss of claims.

2. "No Man May Take Advantage of His Wrong"[2] – Unless He Wrongly Withholds Evidence in a Florida Capital Habeas Corpus Case

Ventura is important for another reason. The opinion, and in particular the concurring opinion of Justice Wells, reflects the frustration engendered by the refusal of law enforcement agencies to obey the public records laws and court orders enforcing them.[3] *See Ventura*, 673 So.2d

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many claims that could be raised in post-conviction proceedings where counsel have had an opportunity to investigate and adequately present them.

[2] *Glus v. Brooklyn Eastern District Terminal,* 359 U.S. 231, 232 (1959) ("Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.") (footnotes omitted).

[3] The Court found that both sides in that case were responsible for delays. *Ventura*, 673 So.2d at 480.

at 482 (Wells, J., concurring) (calling for a rule prescribing "the time in which documents from *all* governmental agencies must either be produced or objection made") (emphasis in original). Peter Ventura made his public records requests three months before his motion was filed and *eleven* months before it was due,[4] *id.*, 673 So.2d at 479-80, but law enforcement agencies neither produced records nor claimed exemptions before the due date. Even after the circuit court entered an order requiring law enforcement agencies to produce records (they had not yet claimed exemptions), the agencies withheld them. *Ventura*, 673 So.2d at 480. More than ten months after Ventura sought an "order compelling compliance with the previously entered order compelling production," law enforcement still had not met their constitutional and statutory obligations to either produce records *or* claim exemptions, and they sought *more time* to do so. *Ibid.*

This Court's cases had made it very clear long before *Ventura* that state agencies were required to comply with public records requests of people sentenced to death. *See Ventura*, 673 So.2d at 481, and cases cited therein. Before *Ventura*, this Court had also held that a death-sentenced habeas corpus petitioner was entitled to additional time to amend his petition after wrongly withheld evidence was produced. *Id.* Thus, the State was aware at the time it was obstructing Peter Ventura's access to evidence that its conduct was unlawful and that it was guaranteed to produce delay.

This lawlessness of law enforcement agencies was certainly not an aberration when *Ventura* was decided, and it continues to this day. Three years before the *Ventura* decision, this Court decided *Walton v. Dugger*, 634 So.2d 1059 (Fla. 1993). In *Walton*, the State took the position in the

[4] This is roughly the same time which DPRA, and rule 3.852 provide for initiating the public records production process.

trial court and before this Court that public records issues were not cognizable in a rule 3.850 proceeding. *Walton*, 634 So.2d at 1061. That was more than a year *after* "this Court had expressly held that capital post-conviction defendants are entitled to chapter 119 records disclosure *and* that denial of such a request may be properly considered in rule 3.850 post-conviction relief proceedings." *Ibid*. (emphasis added), citing *State v. Kokal*, 562 So.2d 324 (Fla. 1994), and *Provenzano v. Dugger*, 561 So.2d 541 (Fla. 1990). Although *Walton* established a procedure for agencies to claim exemptions, and for circuit courts to review them, *Walton*, 634 S0.2d at 1062, by the time of *Ventura*, the State was not following this procedure.

Obstructionism such as this Court saw in *Ventura* and *Walton* existed under the previous version of rule 3.852 and persists under the present version. CCC-NR offers these examples (and could offer many more) in order to emphasize that rules do not solve problems where there is a will to defy them. If law enforcement agencies are willing to flout their constitutional, statutory, and court-imposed responsibilities, and courts do not sanction this conduct, neither rule 3.852, newly amended section 119.19, Florida Statutes, nor any other mechanism devised by this Court or the Legislature will bring about prompt disclosure of evidence. By institutionalizing and rationalizing the State's longstanding practice of delay and obstruction, the Capital Postconviction Public Records Repository exacerbates the problem. Inherently inefficient and time consuming, the Repository funneling scheme merely adds another layer of bureaucracy that is and will continue to be exploited by recalcitrant agencies. Like DPRA, the proposed rule rewards this recalcitrance by barring amendments, and imposing a new, inequitable, and unconstitutionally burdensome standard for granting successive applications for relief. Like DPRA, the proposed rule is a guarantor of injustice,

would violate due process and the equal protection rights of CCC-NR's clients, and should be rejected.

3. Death warrant case management – it's back

Another cause of confusion and delay involved in *Ventura* may once again be part of Florida's capital post-conviction system. Ventura was forced to file his motion before the expiration of the two-year filing deadline because the Governor was threatening to kill him if he did not. *See Ventura*, 673 So.2d at 479 n.1. With the adoption of rule 3.851, this practice ended. *SeeIn re Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence has been Imposed)*, 626 So.2d 198, 199 (Fla. 1993) (Supreme Court Committee on Postconviction Relief in Capital Cases "found that one of the major problems with the process was that the triggering mechanism to start or assure movement of the postconviction relief proceedings was the signing of a death warrant"). As Speaker Thrasher makes clear in his brief to this Court, section 4 of DPRA, which provides that death warrants will be signed if a person sentenced to death does not "pursue all possible collateral remedies within the limits provided by *statute*," relates "to the management of legal services provided for prosecution of capital postconviction cases." Brief of John E. Thrasher at 2. In other words, cases will be "managed" through the signing of death warrants. Unless this Court makes clear in its rules that stays of execution will be entered automatically in order to allow timely pursuit of *all* habeas corpus remedies in capital cases *according to this Court's rules* ***and*** *the time periods allowed by federal law*, all litigation in capital cases will again be done under death warrants.

This Court can stave off a repeat of what the Supreme Court Committee on Postconviction Relief found only by allowing people sentenced to death to make a good faith showing that they are pursuing collateral remedies, thereby tolling time.

B. Past Experience Counsels Against Radical Change to Florida's Capital Habeas Corpus System

Current proposals for reforming Florida's capital post-conviction system should be considered in their historical context. When capital cases were driven by repeated signing of death warrants, attorneys and courts were overburdened, attorneys quit working on capital cases, and in the end, the system as a whole was less efficient. When radically shorter time constraints were imposed on the work of capital habeas lawyers, without providing enough lawyers with adequate resources, reforms were stymied and projected efficiencies failed to materialize. When novel procedures were superimposed on existing practice, confusion, inefficiency, and frustration followed. Nothing has been done to prevent these same consequences from following the current reform proposals.

If the current situation proves anything, it is that stacking one incompletely conceived reform program on top of another before any of the earlier ones have operated as planned does not work. CCC-NR offers the following excerpt from a previous pleading in an effort to illustrate where we have been and where we are likely to be again:

> The Office of the Capital Collateral Representative ("CCR") no longer exists as a result of the enactment of chapter 97-313, Laws of Florida (hereinafter the Act) effective June 16, 1997. In CCR's place the Act created three (3) separate and independent CCRCs. Only recently, due the appointment of two (2) of the CCRCs, has the office formerly known as CCR been in a position to implement the provisions of the Act. The Northern and Southern Regional CCRCs, having now been appointed are attempting to deal with the situation created by the Act. The Regional Offices have now been assigned their regional caseload.
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> Rule of Criminal Procedure 3.851 reduced the filing time for 3.850 motions from two (2) years to one (1) year effective January 1, 1994. CCR was underfunded even before the one-year limit of Rule

3.851 was enacted. Filing schedules on new cases were approved by this Court which allowed new cases to be assimilated at a rate which accorded with pre-Rule estimates of one (1) new case every two (2) weeks. These schedules were necessary because CCR was not fully funded when the Rule took effect, and the number of direct appeal affirmances by this Court in 1994 was the highest in its history.

On June 23, 1995, CCR filed a Motion for Relief in which it informed the Court that the Legislature had not appropriated the extra funds to compensate for that additional and unpredicted caseload and that as a result, CCR was unable to maintain new filings at the same rate as the influx of new cases. On September 22, 1995, this Court issued an order denying that Motion. On September 29, 1995, CCR sought reconsideration and clarification of that order.

Following the report of former Attorney General Robert Shevin, whose study of CCR found good cause under Rule 3.851(b)(4) for extending the counsel designation and filing dates, this Court again reset the dates. CCR sought reconsideration of the decisions establishing those dates and that request was denied on December 10, 1996. CCR began assigning counsel to postconviction defendants who had none in February 1996. This Court's Order denying reconsideration "specifically point[ed] out that the denial of CCR's motion is without prejudice to bring future grounds for relief to our attention." In re: Rule of Criminal Procedure 3.851 and Rule 3.850, No. 82,322 (Fla. Dec. 10, 1996)(emphasis added).

The new schedule then implemented by this Court required the former CCR office to designate counsel and prepare and file Rule 3.850 motions at a rate of four (4) per month. This schedule was established under the assumption that CCR would be adequately funded and staffed, including the funding and staffing of additional attorney positions. Id. By March of 1997, CCR had designated counsel on forty-seven (47) new cases. Rule 3.850 motions were due on March 24, 1997 in four (4) cases, and on four (4) more cases every month thereafter. However, by January 1, 1997, the funding provided to comply with that schedule was unavailable. By January 1997, funds were unavailable for any client with a Rule 3.850 due date in 1997 to obtain expert consultation and assistance. By April 25, 1997, the funding had run out completely and all CCR clients were without resources to investigate, prepare and litigate their cases.

The Northern CCRC respectfully requests that this Court amend its orders in the following cases directing designation of counsel and filing of 3.850 motions: Gary Whitton, Brett Bogle, Curtis Windom, Darryl Barwick, Mark Geralds, Donald Dillbeck, James Patrick Bonifay, Roderick Orme, Ronnie Ferrell and Eric Branch. With the exception of Brett Bogle, these individuals have either never had CCR or CCRC designated counsel or have lost their CCR designated counsel due to the reorganization of CCR or recent resignations.

The reorganization has had a very detrimental effect on the staffing of the Northern CCRC. The Northern CCRC presently has three (3) attorney vacancies and a fourth vacancy will exist on or about October 3, 1997 due to the recent resignation of the only experienced lead attorney in the Northern Region office. The Office will then be without three (3) of its lead attorneys, including the lead attorney who will be the new Chief Assistant CCRC. The Office is also without one (1) second chair attorney. There is an additional vacancy in an investigator position. After early October, the Northern CCRC will have only one (1) lead attorney, however that lead attorney was only promoted in early September and has no previous experience as a lead attorney.

As a result of the loss of experienced personnel from transfers and resignations, the Northern CCRC is presently unable to assign lead counsel to twenty-five (25) of its fifty-three (53) cases. Many other cases are without complete litigation teams and in many cases there has been significant disruption to the litigation teams due to the loss of team members and the assignment of new team members who unfamiliar with the case. Virtually every case has seen a change in personnel. By October, the Northern CCRC will have thirty-five (35) cases with no lead attorney. Notices in the twenty-five (26) cases presently without lead counsel have been or will be filed. See Composite Exhibit A.

In the remaining eighteen (18) cases, the Northern CCRC will file a Notice of Appearance in an effort to provide courts with information about how the transition from CCR to three (3) CCRCs effects the cases on the courts' dockets. Notices of Appearance will be filed in the eighteen (18) cases in which a lead attorney has been assigned. It should be noted however that in fourteen (14) of those cases with a lead attorney remaining, that lead attorney is without

> prior experience as a lead attorney and in many of those cases significant disruption to the former litigation team has occurred.
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> As a result of the enactment of chapter 97-313, there has been, and for some time to come will be, some disruption to the postconviction representation of Florida's death-sentenced inmates. The enactment of chapter 97-313 by the State of Florida and the circumstances resulting therefrom cannot and should not be attributed to the individuals who depend on the State of Florida to provide their capital collateral representation.
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> The agency formerly known as CCR was required by § 27.702(2), Florida Statutes (Supp. 1996), to provide representation, and to bear the costs of obtaining experts, discovery, public records, and other evidence necessary for presenting a case for postconviction relief. § 27.705(3), Fla. Stat. (Supp. 1996). CCRC clients are entitled to the competent, effective assistance of their statutorily mandated counsel. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988); Spaziano v. State, 660 So. 2d 1363, 1370 (Fla. 1995). This right to meaningfully effective assistance of collateral counsel includes a requirement that counsel be adequately funded. See Hoffman v. Haddock, 695 So. 2d 682 (Fla. 1997)(Wells, J., concurring). In addition, collateral counsel have ethical obligations to CCRC clients and the courts that require counsel to conduct adequate preparation for cases and not to allow one client's interests to be subordinated to those of other clients. R. Regulating Fla. Bar 4-1.1 (thoroughness in preparation), 4-1.7(b) (avoid limitation on independent professional judgment), 4-3.1 (duty to investigate good faith bases for claims); see also In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130 (Fla. 1990); State of Florida ex rel. Escambia County v. Jack Behr, 354 So. 2d 974 (Fla. 1st DCA 1978), aff'd 384 So. 2d 147 (Fla. 1980).

Appendix D (footnotes omitted).

This Court granted the relief requested in the above-quoted pleading. In order to prevent future occurrences like those recounted here, the product of this Court's rulemaking should conclusively establish (1) the constitutional stature of the rules *and cases* governing habeas corpus relief in capital cases, and (2) that the right to capital habeas corpus representation in Florida is protected by the Florida Constitution as well.

III. CONCLUSION

The Capital Collateral Counsel for the Northern Region respectfully suggests that the recommendations of the Morris Committee be rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by United States Mail to Larry B. Henderson, Asst. Public Defender, 112 Orange Avenue, Suite C, Daytona Beach, FL 32114; Christina A. Spaulding, Asst. Public Defender, 1320 N.W. 14th Street, Miami, FL 33125; Michael Minerva, Public Defender, Leon County Courthouse, Tallahassee, FL 32301; Robert A. Butterworth, Attorney General, Richard B. Martell, Chief of Capital Appeals, Carolyn M. Snurkowski, Division Director, Tallahassee, FL 32399; Todd G. Scher, Litigation Director, Capital Collateral Counsel-Southern Region, 101 N.E. 3rd Avenue, Suite 400, Ft. Lauderdale, FL 33301; Eugene Zenobi, 325 Almeria Avenue, Coral Gables, FL 33134; Terence Lenamon, 1000 Ponce de Leon Blvd., Suite 208, Coral Gables, FL 33134; John W. Moser, Capital Collateral Counsel-Middle Region, 3801 Corporex Park Drive, Suite 201, Tampa, FL 33619; J. Rafael Rodriguez, 6367 Bird Road, Miami, FL 33155; and Tom Feeney, House of Representatives, The Capitol, Tallahassee, FL 32399, on this 10th day of March, 2000.

TIMOTHY P. SCHARDL

Copies provided to:

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