

IN THE SUPREME COURT OF FLORIDA

IN RE: RULES GOVERNING CAPITAL  
POSTCONVICTION ACTION;  
AMENDMENT TO FLA. RULE OF  
CRIMINAL PROCEDURE 3.851

CASES NO.: SC00-113  
NO.: SC00-154

**AMICUS BRIEF OF JOHN E. THRASHER IN SUPPORT OF THE  
CONSTITUTIONALITY OF SECTIONS 6 AND 7 OF CHAPTER 2000-3,  
LAWS OF FLORIDA**

**I. PRELIMINARY STATEMENT**

On February 7, 2000, this Court entered an Order in the above captioned Rulemaking matter, Case No. SC00-242, temporarily readopting rules repealed in Death Penalty Reform Act, 2000 Fla. Laws ch 2000-3 (the DPRA), and setting oral arguments for March 14, 2000, in this matter and in two original actions, Allen et al., v. Butterworth, Case No. SC00-113 and Asay et al., v. Butterworth, Case No. SC00-154, that challenge the constitutionality of the DPRA (the “CCRC challenge cases”). In the February 7 Order, the Court also set for hearing Case No. 96,646, relating to the rules proposal of the Morris Committee. On February 8, 2000, this Court requested certain Public Defenders’ offices to file motions relating to this matter, thereby consolidating certain claims challenging portions of the DPRA which had been raised in other pending cases, and has set such motions for oral argument on March 14, 2000.

The DPRA reforms certain administrative matters in the executive branch agencies relating

to the management of legal services provided for prosecution of capital postconviction cases. DPRA s. 1-4, 11-16. The act provides legislative intent that postconviction claims should be prosecuted contemporaneously with direct appeals in capital cases (the “dual track” policy). DPRA, s. 5. It establishes statutes of limitations for various categories of capital postconviction claims, DPRA s. 6-7 and 19. It provided certain procedural guidelines for the judicial management of capital postconviction cases, DPRA, s. 8-9 (superceded and thereby voided by this Court’s Order in In Re: Rules Governing Capital Postconviction Action; Amendment to Fla. Rule Of Criminal Procedure, No. SC00-242, February 7, 2000 (the “February 7 Order)). The act repealed certain Court Rules, DPRA, s. 10 (negated by the February 7 Order). It further recommended, without mandate, certain improvements in judicial management of postconviction cases, DPRA, s. 17 and 20. The Speaker defers to the pleadings of the State of Florida for further relevant analysis of the provisions of DPRA.

Attacks on the DPRA range from specific challenges to a particular provision<sup>1</sup> to broad assertions that the DPRA violates state constitutional provisions involving separation of powers, suspension of habeas corpus and due process. Many of the claims relate to the duties of inmates’ attorneys or particular aspects of the postconviction claims. The petitioners in the CCRC challenge cases do not directly challenge the statutes of limitation.<sup>2</sup> The challengers indirectly

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<sup>1</sup> Motion in Farina v. Florida, No. SC00-410 (questioning s. 27.51(5), F.S. as amended in DPRA, s. 12) (the Motion was filed in No. SC93-907, moved to No. SC00-242 by agreement pursuant to this Court’s Order dated February 8, 2000, and moved again and consolidated for oral arguments with the CCRC challenge cases by Order dated March 2, 2000).

<sup>2</sup> The clients of the offices of CCRC whose Rule 3.850 motions are pending are unaffected by the statutes of limitations. Their statutory clients whose time under the old limitation began to run before January 8, 2000, are not affected because the old limitation applies pursuant to newly created s. 924.057. Chapter 7, DPRA. The statutory clients of the offices of

attack the enforceability of the limitations periods through arguments that the provisions of the DPRA are not severable and that the perceived constitutional defects should void the entire DPRA. See, Petitions in Allen et al., v. Butterworth, Case No. SC00-113 and Asay et al., v. Butterworth, Case No. SC00-154. The Speaker defers to the State of Florida’s responsive briefs which soundly refute each of those specific constitutional claims. However, the position of the State of Florida in these related matters indicates that there is no immediate need in any pending case to determine the constitutionality of the limitations periods enacted in the DPRA.

Section 6 of the DPRA establishes statutes of limitation governing postconviction claims arising after the effective date of the Act.<sup>3</sup> Section 7 provides a period for claims existing on the effective date of the act, saving all such claims until January 8, 2001, unless they would have been barred earlier under prior law. The enactment and enforceability of these new limitations periods created an urgency respecting the implementation, by all affected agencies of state government, of the provisions of the DPRA designed to facilitate preparation and prosecution of capital postconviction claims during the prosecution of direct appeals (“dual track”). Moreover, new rules of procedure ought to be expedited to facilitate prosecution of these time limited claims in a fair and efficient manner. The Court should, therefore, review and uphold the constitutionality

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CCRC whose direct appeals were not completed before the effective date of the DPRA are very much affected by the statutes of limitation in section 7, but no such clients appear to have been named as petitioners in the CCRC challenge cases. See, s. 27.702, Fla. Stat. (CCRC to represent “each person convicted and sentenced to death”). It appears that CCRC counsel should be actively engaged in representation of all clients affected by the new limitations. These offices should not neglect to either begin such representation, or to file motions to withdraw, triggering the appointment of substitute counsel pursuant to amended s. 27.703(1), DPRA, s. 13, or newly created s. 27.710(5)(a), DPRA, s. 11.

<sup>3</sup>References to Statute of Limitations in Section 6 of the DPRA should be treated as particularly referring to newly created s. 924.056(3)(4) and (5).

and enforceability of the limitations periods before considering the adoption or continued application of rules which are incompatible with the enforcement of the limitations, or if it would strike down any part of the DPRA.<sup>4</sup> The Speaker defers to the attorneys for the State of Florida as to every question raised in respect to the DPRA but not addressed in this Brief.

## II. THE STATUTES OF LIMITATION IN THE DPRA ARE CONSTITUTIONAL

The DPRA is a constitutional exercise of unquestionable legislative authority:

“A state’s interest in regulating the work load of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it **legislative** jurisdiction to control the remedies available in its courts by imposing statutes of limitation.”

Whiddon v. Dugger, 894 F.2d 1266, 1266-67 (11th Cir. 1990) (quoting Sun Oil Co. v. Wortman, 486 U.S. 717, 108 S.Ct. 2117, 100 L.Ed.2d 743 (1988)) (emphasis added).

The Speaker recognizes that the limitations periods could be attacked on a number of grounds. It might be argued that the limitations: 1) violate the constitutional rulemaking authority of this Court contained in Art. V, section 2(a), Fla. Const.; 2) violate the separation of powers doctrine, codified in Art. II, section 3, Fla. Const.; 3) violate the Habeas Corpus provision of Art. I, section 13, Fla. Const.; 4) violate the access to courts provision contained in Art. I, section 21, Fla. Const.; and, 5) violate the due process clause found in Art. I, section 9, Fla. Const. The Speaker will not argue the constitutionality of the limitations under the federal constitution because the federal courts apply both state and federal statutes of limitation to postconviction

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<sup>4</sup> If the Court grants the relief requested by some challengers, striking all provisions of the act as not severable, without addressing the constitutionality of Sections 6 and 7, the Legislature would be left to act in the future without the benefit of this Court’s understanding of the Legislature’s particular authority that the Speaker defends herein.

claims raised in federal proceedings.<sup>5</sup>

### **Article V, Section 2(a), Supreme Court Rulemaking Power**

Statutes of limitations do not violate the constitutional rulemaking power of this Court. Williams v. Law, 368 So.2d 1285 (Fla. 1979). Following the example of provisions in Ch. 95, Fl. Stat., the DPRA sets a time bar on a particular class of civil action. Compare DPRA, Section 6(3)(a) (“all capital postconviction actions shall be barred unless they are commenced within...”) with F.S., s. 95.011 (“A civil action...shall be barred unless begun within the time prescribed in this chapter”). An action<sup>6</sup> on postconviction claims is a civil action collaterally challenging the enforceability of a judgment. These claims arise when the sentence is imposed. See, Fla. R. Crim. Pro. 3.851(a) (rule applicable to all individuals in custody who have been sentenced to death). The public policy behind all statutes of limitation supports setting a reasonable time within which to initiate postconviction claims. A holding that the Court’s rulemaking authority negates legislative power to establish limitations periods for various claims would throw criminal and civil law into disarray, flooding Florida Courts with stale claims, and requiring thousands of residents, and countless private entities and governmental agencies to defend such claims. A holding that the single class of claims raised in postconviction litigation is outside the Legislature’s authority to enact limitations would be made in the absence of constitutional authority specifically restricting the legislative branch with respect to this one class of claims.

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<sup>5</sup> See, e.g., Webster v. Moore, 199 F.3d 1256 (11th Cir. 2000), applying 28 U.S.C. s. 2244(d) and the two year limitation period in Fla. R. Crim. Proc. 3.850(b).

<sup>6</sup> The DPRA uses the term “action” to describe what is recently in Florida prosecuted as a motion under Fla. R. Crim Pro. 3.850 and 3.851. The Legislature used the term to acknowledge the discretion of this Court to determine the mode of proceeding, i.e., whether by motion, petition, complaint or otherwise.

Although statutes of limitations have been described as “procedural in nature,” 35 Fla Jur 2d, Limitations and Laches, s. 2, they balance and regulate substantive rights and have always been enforceable legislative prerogatives in Florida. Thus, this Court has unanimously held that Art. V, section 2(a), Fla. Const., does not restrict legislative authority to enact statutes of limitation. Williams v. Law. In Williams, Justice Sundberg held for the Court:

The determination of the circuit court that the sixty-day time limit on filing an original action to challenge a tax assessment is in violation of article V, section 2(a), Florida Constitution, is necessarily erroneous....The sixty-day limit ... constitutes a statute of limitations governing the time for filing an original action to challenge such decision. **Since the legislature clearly has the authority to establish such limitations, no constitutional violation exists.**

368 So.2d at 1287-88 (citations omitted) (emphasis added).

### **Article II, Section 3, Separation of Powers**

Florida’s express separation of powers provision prohibits members of one branch of government from exercising “any powers appertaining to either of the other branches unless expressly provided herein.” Art. II, section 3, Fla. Const. To apply this provision to questions of legislative jurisdiction raised by the DPRA, however, would be mistaken. Under our constitutional model, which separates legislative, executive, and judicial powers, rulemaking is inherently legislative. The legislative power defines and balances rights. The executive power enforces and executes the laws. The judicial power resolves actual cases and controversies. Because it is not adjudication, rulemaking constitutes positive policy-making in the inherent

cognizance of the legislative power.<sup>7 8</sup> Neither Article I nor Article III of the United States Constitution, the preeminent model for Florida’s constitutional separation of powers, assigns any power to enact rules of judicial procedure. The Congress, however, has continually asserted the authority to regulate civil and criminal procedure, or to delegate such regulation to the various courts.<sup>9</sup> Thus, the judicial power does not inherently include general rulemaking power, procedural or otherwise.

Instead, the rulemaking provision in Art. V, section 2(a), Fla. Const., constitutes an express exception to the general separation of powers as allowed in Art. II, section 3, Fla. Const. But for that express delegation to this Court, judicial procedure would be exclusively legislative. Regardless of the actual scope of that delegation, statutes of limitations are not included within it.

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<sup>7</sup> Fla. Stat. Ann., Fla. Const., Art. 5, section 2, (West 2000) Commentary, referring to the creation of section 2(a), states: “The amendment provided a statewide uniformity of procedures in all state, county, and municipal courts and allowed the supreme court a great measure of **legislative** power.” (Emphasis added.)

<sup>8</sup> Of course, a judge is near absolute sovereign inside her own courtroom. The Speaker does not question the power of a court to regulate the behavior of litigants over whom the court has obtained personal jurisdiction in a case properly instituted. Nor the inherent judicial power to adopt court rules standardizing such regulation. The matter before this Court, however, is the ability of the Legislature to condition the substantive rights that parties assert when they invoke a court’s jurisdiction. All claims and affirmative defenses constitute or regulate substantive rights under the cognizance of the legislative power, whether or not they constitute procedural regulation as well.

<sup>9</sup> 28 U.S.C. s. 2071 (1999) provides in part:  
The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072 of this title.  
See also 28 U.S.C. s. 2072. (1999) The United States Supreme Court recognizes that its power to regulate the practice and procedure of federal courts has been delegated by and from Congress. Sibbach v. Wilson & Co., 312 U.S. 655 (1941); Grand Bahama Petroleum Co., Ltd. v. Canadian Transp. Agencies, Ltd., 450 F.Supp. 447(D.C. Wash 1978).

E.g., Williams, *supra*. Therefore, the separation of powers clause does not restrict the Legislature’s authority to enact the statutes of limitation in sections 6 and 7 of the DPRA.<sup>10</sup>

### **Article I, Section 13, Habeas Corpus**

The United States Supreme Court describes the Great Writ as “the highest safeguard of liberty.” *See, Lonchar v. Thomas*, 517 U.S. 314, 116 S.Ct. 1293, 134 L.Ed.2d 440 (1996). That Court, however, has recently addressed the applicability of statutes of limitation to the claims cognizable in habeas corpus proceedings. *See, e.g., Lonchar*. In *Lonchar*, the court of appeals vacated a stay of execution in a late-filed habeas proceeding when the petition could not be dismissed on the merits, basing the decision upon “generalized equitable reasons.” 517 U.S. at 321, 116 S.Ct. at 1295. The majority carefully reviewed the historical principles applicable to judicially barring a meritorious habeas corpus petition, concluding that:

These legal principles are embodied in **statutes**, rules, precedents, and practices that control the writ’s exercise. Within constitutional constraints they reflect a **balancing of objectives (sometimes controversial), which is normally for Congress to make**, but which courts will make when Congress has not resolved the question.

517 U.S. at 323, 116 S.Ct. at 1297 (citations omitted)(emphasis added). Indisputably, then, the legislative power is not impotent in regulating uses and abuses of habeas corpus. Clearly, neither the Constitutional preservation nor the common law application of the writ excludes all applications of legislative power.

Although the challenge petitions demonstrate an honest dispute over the extent to which legislative authority should be exercised in regulation of postconviction remedies in Florida, there

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<sup>10</sup> The constitutional delegation of rulemaking power expressly “including the time for seeking appellate review” does not expressly include the time to initiate actions. *See*, Art. V, section 2(a).

should be no doubt about the legislative power to regulate habeas corpus claims through statutes of limitation. The U.S. Supreme Court establishes in Lonchar that the limitations issue in Habeas matters specifically is one of legislative preeminence:

“Despite many attempts in recent years, Congress has yet to create a statute of limitations for federal habeas corpus actions. We should not lightly create a new judicial rule ... to achieve the same end”

517 U.S. at 328, 116 S.Ct. at 1301 (quoting Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)).<sup>11</sup> In further addressing the specific debate over the need for firm time limitations, the Court added:

But, to debate the present Rule’s effectiveness is to affirm, not to deny, its applicability. Moreover, that debate’s focus upon Congress also reveals the institutional inappropriateness of amending the Rule, in effect, through an ad hoc judicial exception, rather than through congressional legislation or through the formal rulemaking process.

517 U.S. at 328, 116 S.Ct. at 1301. Thus, in deciding the authority of a court to equitably bar late-filed postconviction claims, the United States Supreme Court appreciated Congress’ legislative authority in this regard and has shown extreme reluctance to encroach on that authority by judicial rulemaking.

The Florida protection for the Great Writ differs from the federal constitution in one important respect. The federal limitation appears in the legislative article, Article I. See, U.S. Const., Art. I, section 9. Yet Congress retains the power to establish a time bar to habeas corpus claims, without violating the federal prohibition of suspending the Great Writ. In contrast, Florida’s constitutional habeas corpus provision is found in the Declaration of Rights, Art. I, Fla.

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<sup>11</sup> Congress has now set a statute of limitations on habeas proceedings. 28 U.S.C. s. 2244(d)(1), 28 U.S.C. s. 2555.

Const., not in Article III which regulates the Legislature. Thus, the Florida provision limits the power of all three branches of state government. See, e.g., Boynton v. State, 64 So.2d 536 at 552 (Fla. 1953) (the Declaration of Rights enacted “for the protection of the people against arbitrary power from whatever source it may emanate.”) Yet, this Court has, since January 1, 1985, enforced its own common law time bar on postconviction claims through Fla. R. Crim. Pro. 3.850 and 3.851. See, The Florida Bar re Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984). This limitation is recognized as a statute of limitations by the Eleventh Circuit, U.S. Court of Appeals.<sup>12</sup> If Art. I, section 13, Fla. Const., does not prohibit this Court from barring postconviction claims based upon the passage of time, it cannot operate to prohibit the Legislature from establishing limitations on those claims by general law.

In conclusion, though the federal constitutional provision preserving the Great Writ applies to the legislative power, and despite intense policy debates and strong disagreements, the nation’s highest court yields to the **legislatively** established balance between the “important interest in human liberty” and “the State’s interests in ‘finality.’” See, Lonchar, 517 U.S. at 324, 116 S.Ct. at 1299.<sup>13</sup> Similarly, despite the intensity of the policy debates surrounding the passage

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<sup>12</sup> Webster v. Moore, 199 F.3d 1256 (11th Cir., 2000), explaining:  
This argument fails because Webster’s third 3.850 petition, which the state trial court dismissed as procedurally barred by **the two-year statute of limitations attached to Rule 3.850**...was not “properly filed” ....  
Id., at 1258 (emphasis added).

<sup>13</sup> The U.S. Supreme Court noted that “‘second and successive’ petitions...pose a greater threat to the State’s interests in ‘finality’ and are less likely to lead to the discovery of unconstitutional punishments....” 517 U.S. at 324, 116 S.Ct. at 1299. In the DPRA the Legislature expands the state’s efforts to provide early legal representation and access to important public records in order to facilitate the prosecution of postconviction claims, sets a time limitation carefully constructed fit the claims, permits successive petitions arising out of late discovered proof of innocence, and expresses a strong intent to otherwise restrict successive

of the DPRA, and surrounding other efforts to reform the management of capital postconviction claims, this Court should not stretch the state's constitutional protection of habeas corpus into a realm of judicial predominance beyond that which the United States Supreme Court asserts for itself. The Speaker urges this Court to accept the constitutionally supported decision of Legislature in the DPRA to impose earlier and stronger limitations on capital postconviction actions.

### **Article I, Section 21, Access to Courts**

Statutes of limitations have occasionally been attacked as intrusions upon the Florida constitutional right of access to courts, Art. I, section 21, Fla. Const. As discussed with respect to the state habeas corpus provision, supra at 9-10, Article I, Fla. Const., does not allow this Court any power to restrain liberty that Article I withholds from the Legislature. Therefore, the Speaker argues that the judicially created time bars in Fla. R. Crim. Proc. 3.850 and 3.851 implicitly establish that time bars on postconviction claims do not violate Art. I, section 21, Fla. Const..

Moreover, numerous statutes of limitation and statutes of repose have been upheld by this Court rejecting access to courts challenges. These cases provide that, when existing causes of action are allowed a reasonable opportunity for their prosecution, whether through merely prospective application or through a reasonable savings provision, then statutes limiting the time for prosecution of claims, even when reducing previous periods, do not violate the right of access to court. See, e.g., Blizzard v. W.H. Roof Co., Inc., 556 So.2d 1237 (Fla. 5th DCA 1990),

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motions or petitions. These policies are consistent with the values expressed in Lonchar.

approved, 573 So.2d 334 (Fla. 1991).<sup>14</sup>

The DPRA does limit any pre-existing claim prior to the earlier of the time the claim would have been limited by the law in effect prior to the enactment of the DPRA, or January 8, 2001. DPRA, s. 7. A one year savings provision has been respected as affording an adequate opportunity to prosecute a claim. See, Maiden v. Cogdill, 428 So.2d 376 (Fla. 5th DCA 1983). Moreover, because the Legislature actually provides the resources for prosecuting claims, through the establishment and funding of Capital Collateral Regional Counsel services, a one year period is clearly reasonable. See, Fla. R. Crim. Pro. 3.851, Court Commentary.<sup>15</sup> The Court must also note that one year constitutes the expected period of postconviction representation and investigation under the time limits set under Fla. R. Crim. Pro. 3.851. The Speaker defers to the attorneys representing the State of Florida for the applicability of the provisions of the limitations periods to particular claims. Nevertheless it would appear that no controversy over these limitations will likely arise before January 8, 2001. DPRA, s. 7.

Claims which arise after the enactment of the DPRA are barred six months after the filing of the inmate's brief in the direct appeal of the judgment and sentence. This time would rarely be less than one year after sentencing, so it would typically allow more time than presently provided

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<sup>14</sup> In Blizzard, the 5th District Court of Appeals stated:  
We agree that under Florida law there is no constitutional violation where a statute merely shortens the time period during which an action may be brought, as opposed to a statute which operates as an absolute bar to bringing an action.  
556 So.2d at 1238 (citations omitted).

<sup>15</sup> The commentary relative to the 1993 adoption of Fla. R. Crim. Pro. 3.851 states:  
There is a justification for the reduction of the time period for a capital prisoner as distinguished from a noncapital prisoner, who has two years to file a postconviction relief proceeding. A capital prisoner will have a counsel immediately available to represent him or her in a postconviction relief proceeding

for investigation and prosecution of capital postconviction cases. Fla. R. Crim. Pro. 3.851. In the occasional case where the principal direct appeal brief is filed less than six months after sentencing, the Legislature may rationally allow a slightly shorter period than the current one year, because these claims will be prepared while the evidence and the inmate's and witnesses' memories are fresher. The time period was clearly designed, moreover, to recognize that the issues on appeal and the issues on postconviction relief do not overlap. See, Fla. R. Crim. Pro. 3.850© (“This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.”) Thus, the DPRA guarantees a period of time after the direct appeal is fully formed to allow the postconviction counsel to craft a motion or petition for postconviction relief which does not overlap the issues on direct appeal.<sup>16</sup>

In sum, the limitations periods remain approximately what they have been for most postconviction claims. By starting the clock at the time of filing the direct appeal brief, the new limitations reflect the Legislature's desire to see the separate direct appeal and collateral proceedings prosecuted contemporaneously. Rather than denying access to courts, the policy promotes speedy justice by adjudicating all meritorious claims sooner.

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<sup>16</sup> After no more than cursory analysis, it has been argued that running the limitation period from the filing of the mandatory direct appeal might violate equal protection principles. The previous limitation, however, runs from the **end** of the direct appeal creating an even greater inequality in results. The variations among actual briefing times are compounded by the additional variations in the time between briefing and mandate and the time in which certiorari petitions may be pending in the U.S. Supreme Court. Postconviction claims arise at judgment or sentencing. Because of the uncertainties in the timing of post trial activities, filing the brief in the direct appeal is the earliest practical time from which to compute a reasonable time limitation for postconviction relief. Starting the clock any earlier time could require pleading postconviction claims before the record is completed or the appeal is fully formed should filing the appellate brief be delayed for some legitimate reason.

## Article I, Section 9, Due Process

Statutes of limitations or repose have been declared to violate due process when they destroy existing causes of action, destroy actions before they are susceptible of enforcement, destroy actions before they arise, or fail to permit a reasonable time to prosecute claims, whether through retroactive or prospective application. These principles are subsumed in the stricter standards applicable to access to courts in Florida. See, discussion, supra. As shown above, the limitations in the DPRA satisfy the requirements of the access to courts provision and therefore satisfy the due process requirements.

The DPRA sets a time period for postconviction actions equal to the present time allowed by this Court. It merely starts the time earlier. At the same time, it promotes, for the first time, a direct appointment of counsel to assure immediate representation of collateral counsel when the claim arises. DPRA, Section 6 (s. 924.056(1)(a), Fla. Stat.). Consequently, the DPRA promotes, for the first time, the investigation and analysis of postconviction claims while the evidence is fresh. The Speaker asserts that this provides greater access to justice than the previous practice of waiting two or more years for the direct appeal to end.

It can be argued that the utmost seriousness of capital postconviction claims requires a perpetually open courthouse door. This philosophy would tend to the conclusion that due process can not co-exist with firm limitations on actions. The arguments above refute the specific constitutional claims which might legitimately give rise to such an argument, but this Brief would not be complete if it did not address the general argument.

The DPRA makes provision for late discovered evidence of actual innocence. DPRA, Section 6 (s. 924.057(5), Fla. Stat.). Thus, with respect to demonstrably innocent inmates, the

Legislature supported the strong moral argument, see, e.g., Swafford v. State, 679 So.2d 736, 741 (Fla. 1996) (“the reality of a lengthy postconviction process [does not justify] foreclosing meritorious claims of newly discovered evidence”). The Legislature was not deaf to the just cause of the innocent. In addition, the DPRA explicitly states that the limitations in Sections 6 and 7 are statutes of limitation, DPRA, s. 5, **not** statutes of repose.<sup>17</sup> The exception provided for cases of innocence affirms this characterization. The statute of limitations constitutes an affirmative defense, not an absolute destruction of a claim. Thus, the Legislature expressly limited its decision to provide the state with a right to summary dismissal of late filed claims. It left the executive branch the power to waive the defense in any case where justice and conscience compel it to acknowledge the merit of the claims raised.<sup>18</sup>

Finally, unlike the judiciary, which is free to limit the scope of its decisions to the just application of judicial power in a particular case, the Legislature must account for exercises of all

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<sup>17</sup> Although the State argues in its Response to the challenge petitions that the limitation “operate[s] as a statute of repose,” Response in Case No. SC00-154 at 24, the Speaker strongly objects to any interpretation of the limitation inconsistent with the explicitly stated intent of the Legislature. This Court should enforce Legislature’s label. A postconviction claim that the judgment and sentence are unenforceable because of the actual innocence of an inmate arises at sentencing. Newly created s. 924.056(5), Fla. Stat., tolls the time bar until 90 days after the discovery of clear and evidence proving that the defendant is not guilty, regardless of when the evidence is discovered. A statute can not revive a permanently barred claim, see, Agency for Health Care Administration v. Associate Industries of Florida, 678 So.2d 1239, 1254 (Fla. 1996) (citing Wiley v. Roof, 641 So.2d 66, 68 (Fla. 1994)). Therefore, the legislative scheme demonstrates that the bars are statutes of limitation, albeit without common tolling provisions, but subject to waiver by the state.

<sup>18</sup> It may ultimately be questioned whether a statute of limitations would have any affect in a postconviction case in which the challenged judgment was void on the face of the record. This would be a rare case which would not require an evidentiary proceeding, but merely a review of the record. Though such claims might not be barred by a statute of limitations, they should be raised early and barred by principles of res judicata, if raised and denied, or estoppel in circumstances involving an express waiver.

sovereign power. The Legislature may rationally consider the availability and viability of executive clemency in cases of possible injustice. It may weigh the value of that flexible and practical protection against expensive and endless judicial processes. Indeed, finality in imperfect judicial proceedings and actual justice for the innocent can be harmonized only through an external intervention like clemency.

The infamous case of Pitts and Lee, who were never released by the judiciary, is the most visible example of how clemency serves as a more effective moral safeguard than perpetual litigation. See, Pitts v. State, 307 So.2d 473 (Fla. 1st DCA 1975) (upholding second conviction after 12 years in custody), Executive Order No. 75049, Office of the Governor (September 9, 1975) (granting full pardons). Clemency can protect persons whom the rules of evidence and strictures of the law may condemn. E.g., Pitts, 307 So.2d at 476. Condemnation of the innocent and exoneration of the guilty are both unjust evils. A process that extremely delays judicial finality, also extremely denies the just condemnation of the guilty. Finality constitutes an essential attribute of a just court system. See, Witt v. State, 387 So.2d 922, 925 (Fla. 1980) (“[A]n absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole.”). Clemency, however, constitutes an essential moral accommodation to finality. And, the justice of the enactment of the Legislature, which is competent to recognize and evaluate an inmate’s access to relief outside the Florida Courts, should not be evaluated exclusively upon the availability of state judicial relief.

### **III. CONCLUSION**

The Speaker urges this Court to approve the constitutionality of the limitations enacted in sections 6 and 7 of the DPRA. He further urges this Court to recognize the viability of the statutes of limitation as severable aspects of the DPRA. He urges the judiciary to apply these laws according to their terms to all claims for postconviction relief in capital cases. And the Speaker recommends adoption of rules that ensure the enforcement of the limitations, earlier postconviction representation by offices of CCRC or substitute registry counsel, and timely disposition of these matters once instituted.

Respectfully submitted,

JOHN E. THRASHER, SPEAKER  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Motion and Brief have been furnished by U.S. Mail to:

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this 6th day of March, 2000.

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Tom Feeney  
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