

March 2, 2000

Debbie Casseaux
Acting Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, FL 32399-1927

Re: Comments regarding Amendment to Florida Rule of Criminal Procedure 3.851 (Collateral Relief after Death Sentence has been Imposed), Case No. 96,646.

Dear Ms. Casseaux:

I write these comments in response to the proposed new Rule of Criminal Procedure 3.851. This letter also includes some comments about the newly adopted Death Penalty Reform Act of 2000 (“DPRA”), because it is inextricably entwined with the proposed changes to Rule 3.851.

I. The appellate portions of the new proposed rule should be changed and placed in the appellate rules.

Presently, the rules relating to review in this court of death penalty proceedings are scattered in three different places: Most of these rules are in Rule 9.140(b)(6). A rule relating to status conferences for record preparation is in Rule 2.050(h), however, and a rule relating to petitions for extraordinary relief is in Rule 3.851(b)(2). Now, the Committee on Postconviction Relief in Capital Cases (“Committee”) has proposed adding more appellate provisions to Rule 3.851. The provisions in subparagraphs (c)(2), (h), and (i) of the proposed rule all deal exclusively with review in this Court, rather than proceedings in the trial court. If the Committee had chosen to address this Court’s question relating to procedures for raising ineffective assistance of appellate counsel, then even more appellate rules would have been placed in rule 3.851.

I think the appellate rules relating to death penalty proceedings in this Court should be in one place, rather than scattered throughout the rule books. When the rules are not in one place, confusion results. A prime example of this confusion is the legislature’s failure to repeal rule 9.140(b)(6)(E), even though this

rule is inconsistent with DPRA § 6 (§ 924.056(4)), and even though the legislature did repeal old rule 3.851(b)(2). The Committee similarly failed to notice rule 9.140(b)(6)(E), and its proposed rule 3.851(c)(2) is inconsistent with this appellate rule.

Logically, just as the rules relating to criminal appeals in non-capital cases are in rule 9.140, so also the rules relating to criminal appeals in capital cases should be in the appellate rules. I think the appellate rules are where most people would look first. In any event, relatively few persons would look in three different places, which is the current undesirable state of affairs to be exacerbated by the Committee's proposal.

In addition, I disagree with some of the appellate provisions in the new proposed rule. With respect to subparagraph (c)(2) I fail to see the purpose of requiring the filing of all petitions for extraordinary relief in this Court within 120 days of appointment of collateral counsel, rather than at the same time as the appeal from the order denying postconviction relief, as the current rule provides. Because this Court in any event cannot proceed further until the trial court has ruled on the postconviction motion, requiring immediate filing of a habeas petition challenging appellate counsel's performance will not hasten the case in any way. Moreover, I presume this Court would prefer efficiently to resolve both the appeal and the habeas petition at the same time.

The third and fourth sentences in subparagraph (h)(1) relating to rehearing and to serving a copy of the final order do not belong in the appellate section. The second sentence in (h)(1) forbidding interlocutory appeals is either superfluous or incorrect. Defendants in criminal cases never get interlocutory appeals, and, if the trial court orders a new trial for the defendant or finds the defendant to be incompetent, the state can certainly appeal these interlocutory orders under rule 9.140(c)(1).

Subparagraph (h)(2) refers to the summary procedures of rule 9.140(i), but the Appellate Rules Committee during this cycle is proposing moving this rule into a new rule 9.141. If this Court approves this change to the appellate rules, then any reference in rule 3.851 to rule 9.140(i) should also be corrected.

Rule 9.140(i) states that answer briefs are not required and that the appellant's brief must be filed within 15 days of filing the notice of appeal. This short time frame seems to me to be impossible to satisfy in a death case. Moreover, answer briefs would normally be necessary. The last sentence of subparagraph (h)(2) states that the record should be supplemented with the hearing transcript, if this Court has ordered an evidentiary hearing. The record, however, should also be supplemented with all other documents that were submitted to the trial court in connection with the evidentiary hearing.

Subparagraph (h)(3) requires this Court to rule on appeals from post-conviction motions in 180 days. Whatever the desirability of this rule, it should not be placed in the criminal rules or appellate rules. It seems more appropriate for the Court's internal operating procedures.

Subparagraph (i) states that claims of ineffective assistance of appellate counsel should be raised by filing a petition for habeas corpus. Other defendants, however, now raise this issue by petition under Rule 9.140(j), and death penalty defendants should be able to use largely the same procedure. (Rule 9.140(j) will likely be transferred to Rule 9.141 during this cycle.) Subparagraph (i) also forbids the filing of habeas petitions in this Court for any other reason. Rule 3.850(h), however, continues to allow habeas petitions if “remedy by motion is inadequate or ineffective.” The Committee does not explain why death penalty defendants should not have a similar escape hatch.

With these comments in mind, I suggest as a proposal for discussion that the appellate portions of the Committee’s proposed rule 3.851 should be combined with Rule 2050(h) and Rule 9.140(b)(6) and placed in a new rule 9.142 as outlined below. I do not intend this proposal to be a final product.

9.142 Review Proceedings in Death Penalty Cases

(a) Applicability. Review proceedings in death penalty cases shall be as in rules 9.140 and 9.141, except as modified by this rule.

(b) Record.

(1) When the notice of appeal is filed in the supreme court, the chief justice will direct the appropriate chief judge of the circuit court to monitor the preparation of the complete record for timely filing in the supreme court.

(2) The circuit judge assigned to the case shall take such action as may be necessary to ensure that a complete record on appeal has been properly prepared. To that end, the judge shall convene a status conference with all counsel of record as soon as possible after the record has been prepared but before the record has been transmitted. The purpose of the status conference shall be to ensure that the record is complete.

(3) Upon rendition of a sentence of death, the court reporters shall immediately begin transcribing all proceedings in the lower tribunal. The trial transcripts shall include every transcript in the proceeding and should be consecutively numbered throughout.

(4) In direct appeals from a sentence of death, the record shall contain a complete transcript of every proceeding in the lower tribunal as well as all documents, exhibits, and physical evidence filed in the lower tribunal, except those exhibits and evidence not reasonably susceptible to being copied. The record should indicate which evidence and exhibits have not been copied.

(5) The clerk of the lower tribunal shall have 20 days after the filing of transcripts to prepare and transmit the record on appeal to the parties and the court. The record should have a master index in the first volume and an individual index for each remaining volume.

(6) Seven months after transmitting the record, the clerk shall transmit to the court all evidentiary exhibits, except exhibits not susceptible to being mailed. The clerk should send a master index of the exhibits, and any exhibits not mailed should be noted as retained in the trial court.

(c) Briefs.

(1) After the record is filed, the clerk will promptly establish a briefing schedule. In direct appeals, initial briefs shall be served within 120 days of service of the record, the answer brief shall be served 90 days after service of the initial brief, and the reply brief shall be served 60 days after service of the answer brief.

(2) Because the times for filing briefs has already been extended, the court will grant motions to extend the time for filing briefs only for a medical emergency. If any brief is delinquent, an order to show cause may issue under Florida Rule of Criminal Procedure 3.840, and sanctions may be imposed.

(3) The initial brief and answer brief shall not exceed 100 pages. The reply brief shall not exceed 35 pages. The court will not entertain motions to file enlarged briefs.

(4) In appeals from orders ruling on applications for relief under Florida Rule of Criminal Procedure 3.851 or orders in resentencing cases, the briefing schedules and page limits set forth in rules 9.140 and 9.210 shall control.

(d) Oral Arguments. The court will schedule oral arguments after the filing of the reply brief.

(e) Appeal from Order Granting or Denying Relief under Florida Rule of Criminal Procedure 3.851.

(1) Appeals shall be taken within 15 days from the entry of a final order on a motion under Florida Rule of Criminal Procedure 3.851.

(2) If the trial court denies the original motion or successor motion without an evidentiary hearing either on the ground that it is facially insufficient or on the ground that the attached files and records conclusively refute the defendant's claims, the appeal will be governed by the summary procedures in rule 9.141. The defendant shall have 45 days after filing the notice of appeal to file the initial brief. On appeal, the court shall initially review the order to determine whether the trial court correctly resolved the claims without an evidentiary hearing. A decision to remand for an evidentiary hearing may be made by order without opinion. Jurisdiction shall be relinquished to the trial court for a specified period for the purpose of conducting an evidentiary hearing on the issue or issues identified in the order. Thereafter, the record shall be supplemented with the hearing transcript and any documents submitted in the lower tribunal in connection with the hearing.

(f) Petitions for Extraordinary Relief. All petitions for extraordinary relief over which the supreme court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief in the appeal from the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.851. Petitions alleging ineffective assistance of appellate counsel shall follow the procedures identified in rule 9.141.

If this Court agrees that the appellate rules relating to the death penalty should be placed in the appellate rules rather than throughout the rule books, then I suggest that this Court refer this matter to the Appellate Rules Committee. The Committee should be able to provide a recommendation after its September meeting.

II. The proposed rule and the new legislation violate the equal protection doctrine.

I object to the proposed rule 3.851 and the DPRA because they violate the equal protection doctrine by imposing on death penalty defendants several onerous requirements which similarly situated defendants need not face. A rich defendant who receives a death sentence (“death defendant”) and a rich defendant who receives a sentence of life in prison for first degree murder (“life defendant”) are in many respects almost identically situated. Nevertheless, the rich life defendant will have substantially greater rights than the rich death defendant will have if this Court adopts the proposed rule or if it upholds the validity of the DPRA. If anything, however, the person suffering the greater penalty should have more, not fewer, rights. Accordingly, I believe that the proposed rule and the DPRA violate the equal protection doctrine.

I will not attempt to list every requirement in rule 3.851 and the DPRA which is more burdensome on death defendants than on life defendants, but even a casual review of the rule and the statutes reveal numerous requirements which are significantly more demanding on death defendants. For example, the provisions in both rule 3.851 and the DPRA on successive postconviction motions are substantially stricter than those in rule 3.850(f). Newly created section 924.056(5) of the DPRA even goes so far as to bar all successive motions unless they establish “that, but for constitutional error, no reasonable fact finder would have found the defendant guilty of the underlying offense.” A life defendant would not be subject to this standard, which in most cases will be impossible to meet. This standard also appears to preclude successive motions that allege newly discovered evidence of actual innocence, which are permitted for life defendants under Jones v. State, 591 So. 2d 922 (Fla. 1991).

DPRA requires death defendants to pursue their postconviction remedies simultaneously with their direct appeal to this Court, while rule 3.851 would require motions for postconviction relief to be filed within one year of this Court’s mandate, notwithstanding the possibility of review by the United States Supreme Court. By contrast, life defendants have two years after their petition for writ of certiorari to the United States Supreme Court is denied. Huff v. State, 569 So. 2d 1247 (Fla. 1990). Life defendants therefore have a substantially longer period of time to find witnesses and evidence for their postconviction motion or to wait for a change in the law that might help them.

The requirement in DPRA for simultaneous pursuit of both the direct appeal and the postconviction motion is particularly egregious, because it directly impacts defendants’ rights to testify on their behalf and present a basis for habeas corpus relief. Plainly, defendants will be loathe to testify or to waive the attorney-client privilege in their post conviction motions, if their testimony or their counsel’s testimony might be used against them during their direct appeal. For example, the defendants might want to assert that trial counsel was ineffective for not using an entrapment defense rather than a mistaken identity defense. Making this argument during the postconviction proceedings and thereby admitting that the defendants committed the act could obviously have a dramatic impact on the direct appeal that would be pending at the same time

under the DPRA. The state would immediately ask this Court during the direct appeal to take notice of the postconviction proceedings in the trial court. By contrast, life defendants need not make this choice between their appellate and habeas rights.

In other examples of disparate treatment, both rule 3.851(h)(1) and Section 9 of the DPRA preclude motions for rehearing in postconviction cases, unlike rule 3.850(g). Death defendants have only 120 days to allege ineffective assistance of appellate counsel under rule 3.851(c)(2) and only 45 days under Section 6 of the DPRA. By contrast, life defendants have two years. Fla. R. App. P. 9.140(j)(3)(B). Pursuant to Section 6 of the DPRA, death defendants cannot allege that a change in the law should have retroactive effect unless they can establish that no reasonable fact finder would have found them guilty if the changed law had been in effect at the time of trial. Life defendants are not subject to this restriction under rule 3.850(b). As these examples illustrate, the new rule and the DPRA adversely discriminate against death defendants in comparison to life defendants who are similarly situated.

When this Court in a four-to-three vote changed the time period for death defendants to file postconviction motions from two years to one year, Justice Kogan dissented as follows:

[T]he amendment adopted today most probably violates the rights to equal protection and due process. By the present amendment, the Court now says that persons sentenced to death shall have a shorter period of time to seek collateral relief than those suffering lesser penalties. This is an irrational distinction, since it assumes that the greater penalty is entitled to less due process than the lesser penalty. Contra art I, §§ 2, 9, Fla. Const.

Some have argued that capital cases are different because each death-sentenced defendant is entitled to representation by CCR, while noncapital defendants are not. The fact remains, however, that many noncapital defendants have lawyers to pursue collateral challenges, yet the rules change at issue here still leaves these defendants with a full two years to pursue their challenges. The distinction created by the amendment thus remains irrational.

In promulgating rules, this Court obviously does not pass on constitutional issues. But when the constitutional violation is plain, I see no reason why we should waste everyone's time by adopting the rule.

In re Rule of Criminal Procedure 3.851, 626 So. 2d 198, 202 (Fla. 1993) (Kogan, J., dissenting).

Perhaps in response to this dissent, this Court published the following commentary on the rule change:

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 counsel immediately available to represent him or her in a postconviction relief proceeding, while counsel is not provided or constitutionally required for noncapital defendants to whom the two-year period applies.

Id. at 199. For several reasons, this Court's response to Justice Kogan's dissent was incorrect and, in any event, does not control the equal protection issues with respect to the proposed rule 3.851 and the DPRA.

First, rich death defendants already have a lawyer and do not need state-paid counsel. The offer of a free lawyer makes no difference to these defendants. Rule 3.851 and the DPRA unmistakably discriminate against rich death defendants guilty of first degree murder who are identically situated to rich life defendants guilty of first degree murder.

Second, at best, trading a longer limitations period in return for a right to counsel constitutes a valid defense to an equal protection challenge only if the counsel obtained is competent. Both rule 3.851(a) and Section 6 of the DPRA, however, prohibit claims of ineffective assistance of collateral postconviction counsel. This Court has likewise agreed that such claims are impermissible. Lambrix v. State, 698 So. 2d 247, 248 (Fla. 1996) (“[C]laims of ineffective assistance of postconviction counsel do not present a valid basis for relief.”). Contra Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990) (“[T]his state has established a right to counsel in clemency proceedings for death penalty cases, and this statutory right necessarily carries with it the right to have effective assistance of counsel.”). Consequently, under both rule 3.851 and the DPRA, defendants will have no recourse if their state-paid counsel miss filing deadlines or file patently inadequate pleadings, as apparently has already occurred with disturbing frequency. Forcing death defendants to accept inept counsel in return for reduced postconviction and appellate rights is not a satisfactory or sufficient response to the equal protection problems inherent in rule 3.851 and the DPRA.

Third, although this Court accepted a one-year reduction in the limitations period in return for an offer of free counsel to all death defendants, Rule 3.851 and the DPRA impose several additional restrictions on death defendants for which the offer of free counsel is not necessarily sufficient compensation. The DPRA's reduction in time is much longer than one year, and Rule 3.851's reduction is also more than one year. The DPRA makes it more difficult for death defendants to make claims of

actual innocence based on newly discovered evidence. The DPRA forces some death defendants to choose between testifying on their behalf in their postconviction proceedings and preserving their rights on direct appeal. The DPRA and rule 3.851 eliminate motions for rehearing. Many of these changes are adverse to death defendants regardless of whether they have counsel. Consequently, the provision for free counsel does not sufficiently answer an equal protection challenge based on these additional restrictions that do not apply to life defendants.

Fourth, while, in the abstract, death defendants will usually be better off with the assistance of counsel even if their other rights are reduced, this result will not always be the case. In particular instances, defendants will prefer with the longer time periods even if they do not have counsel. For example, an event (such as a change in the law) might occur during the eighteenth month which, while not dispositive, is helpful to the defendant's position. Life defendants are able to take advantage of such changes, but death defendants, despite the assistance of their free counsel, could not under Rule 3.851 and the DPRA. As applied, the application of rule 3.851 and the DPRA to death defendants will sometimes result in unfair, disparate consequences that life defendants will not suffer, even though death defendants have counsel and life defendants do not.

Finally, and perhaps most importantly, both Justice Kogan and this Court in In re Rule of Criminal Procedure assumed that the rational basis test applied to the equal protection issue. Under this test, class-based distinctions are legitimate if they have some conceivable rational basis. I believe that this Court should instead apply the strict scrutiny or compelling state interest test to the classifications which Rule 3.851 and the DPRA make between death defendants and life defendants. These classifications cannot withstand this exacting test.

The strict scrutiny or compelling state interest test applies for several reasons. First, Article I, Section 2 of the Florida Constitution is entitled "Basic rights," and provides as follows (emphasis added):

All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and **defend life** and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property . .

This language is not in the federal constitution and is taken instead from the Declaration of Independence. ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.") Even the Declaration of Independence, however, does not contain Florida's emphasis on the right to "defend life." This fundamental and basic right that all Floridians have to defend their lives has existed since Florida's first constitution in 1838. ("That the great and essential principles of liberty and free government, may be recognized and established, we declare . . . [t]hat all freemen . . . are equal; and have certain

inherent and infeasible rights, among which are those of enjoying and defending life . . .” Art. I, § 1, Fla. Const. (1838)).

The text of Florida’s constitution thus expressly provides that all persons have an equal and basic right to defend their lives. To my knowledge, this Court has never considered the obvious application of this equality principle to the basic rights of persons on death row, perhaps because, until now, the legislature has not so clearly discriminated against persons on death row. In analogous circumstances, however, this Court considered another basic and fundamental right in Article I, Section 2 -- the right “to be rewarded for industry” -- and found that the legislation in question was subject to strict scrutiny that it could not withstand. “The classifier contained in [the statute] . . . involves the right to be rewarded for industry. Art. I, § 2, Fla. Const. It therefore is subject to strict judicial scrutiny under . . . article I, section 2 of the Florida Constitution.” De Ayala v. Florida Farm Bureau Cas. Ins. Co., 543 So.2d 204, 207 (Fla. 1989). By the same reasoning, strict scrutiny should apply to the legislature’s attempt to vitiate the right of death row defendants under Article I, Section 2, of the Florida Constitution to defend their lives.

Strict scrutiny is also necessary, because Rule 3.851 and the DPRA implicate numerous fundamental rights. The most important of these is the right to habeas corpus, protected under Article I, Section 13, of the Florida Constitution. See Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), aff’d 455 So. 2d 380 (Fla. 1984) (“The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.”). Other fundamental rights which Rule 3.851 and the DPRA impair include the right to access to the courts, Art I, § 21, Fla. Const., the rights to appeal to this Court and seek habeas relief in this Court, Art. V, §§ 3(b)(1) and 3(b)(9), the right to challenge the effective assistance of their counsel under the Sixth Amendment, and the right to discover evidence and testify “in person,” Art. I, § 16(a), Fla. Const., rather than waive the right to testify and present evidence at their postconviction hearing to avoid harming their direct appeal in this Court.

A classification is subject to strict scrutiny when it “impinges too greatly on fundamental constitutional rights flowing either from the federal or Florida Constitutions.” De Ayala, 543 So.2d at 206. This Court held that the right to bargain collectively in Article I, Section 6, was a fundamental right, and any legislative abridgement of that right was subject to strict scrutiny. “The right to bargain collectively is, as a part of the state constitution’s declaration of rights, a fundamental right. As such it is subject to official abridgement only upon a showing of a compelling state interest. This strict-scrutiny standard is one that is difficult to meet under any circumstance. . . .” Hillsborough County Governmental Employees Assoc. v. Hillsborough County Aviation Authority, 522 So. 2d 358, 362 (Fla. 1988). A similar strict-scrutiny standard applies to the abridgement of fundamental rights contained in the DPRA and Rule 3.851.

A heightened scrutiny standard also must apply because the penalty imposed on the class of death penalty defendants is the ultimate penalty of death. Since State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), this

Court has viewed itself as having a special constitutional role in death penalty jurisprudence and as being an essential guarantor of the fairness of death penalty procedures. This Court has never reviewed legislative capital punishment enactments pursuant to a lenient rational basis standard, under which “a court should inquire only whether it is conceivable that the regulatory classification bears some rational relationship to a legitimate state purpose.” Florida High School Activities Ass’n v. Thomas, 434 So. 2d 306, 308 (Fla. 1983). In view of the ultimate nature of the penalty and the mandatory constitutional necessity for this Court to review all such penalties, this Court would abdicate its function in the death penalty process if it held the legislature to only a “conceivably rational” standard of review.

Neither Rule 3.851 nor the DPRA can withstand the strict scrutiny or compelling state interest test. “The compelling state interest or strict scrutiny standard imposes a heavy burden of justification upon the state to show an important societal need and the use of the least intrusive means to achieve that goal. . . . It is academic that an inextricable part of the compelling state interest test is that the legislation achieve its desired result in the least intrusive means possible.” Chiles v. State Employees Attorneys Guild, 734 So. 2d 1030, 1033 & n.2 (Fla. 1999).

The DPRA patently does not use the “least intrusive means” and instead takes a blunderbuss approach to the problem it perceives. Rule 3.851, while not as egregious as the DPRA, also does not take the least intrusive means possible. Instead, in comparison to similarly situated life defendants, it unjustifiably cuts off habeas corpus rights for death defendants, prohibits motions for rehearing, restricts amendments to postconviction motions, shortens the time periods for filing petitions alleging ineffective assistance of appellate counsel, and shortens by eighteen months or more the time in which death defendants may discover and marshal their evidence and arguments in defense of their life. These are not the least intrusive means of achieving the desired result.

The less intrusive and better approach is to enforce more strictly the rules that already exist. Nothing is wrong with these rules except the state’s unwillingness to commit the amount of financial resources needed to follow them. If sufficient resources were provided and these rules were monitored and carried out effectively, executions would occur much more speedily. The goals of Rule 3.851 and the DPRA would then be met without infringing on constitutional rights and discriminating against the right of persons on death row to defend their lives under Article 1, Section 2, of the Florida Constitution.

Although Mitchell v. State, 25 So. 2d 73 (Fla. 1946) was decided 54 years ago, it is strikingly on point. Under the legislation at issue in Mitchell, some persons guilty of second degree murder could only be prosecuted within a two-year statute of limitation, while other persons guilty of second degree murder were subject to a longer limitations period. Similarly under the DPRA and Rule 3.851, life defendants guilty of first degree murder have one limitations period, and death defendants guilty of first degree murder have a shorter limitations period. This Court invalidated the statute in Mitchell as violating the equal protection doctrine.

One guilty of murder in the second degree is guaranteed under Sec. 1 of our Declaration of Rights all the rights, privileges and immunities flowing from the law to any and everyone else under the like state of facts.

. . . .

[T]his man . . . is entitled to every benefit to which any one else can be entitled who is also only guilty of murder in the second degree. This right of equal protection may not be taken away by the State choosing to proceed with the prosecution by some method which will deprive him of the benefit of the statute of limitations while others guilty of like offense may have the benefit of the statute of limitations because the State has chosen to proceed with the prosecution by a different method.

So it is, we hold that [the statute] offends against Sec. 1 of our Declaration of Rights and also against the Fourteenth Amendment of the Federal Constitution.

Id at 125-26. An identical conclusion applies in the case at hand.

Sincerely,

Stephen Krosschell

cc: Judge Stan R. Morris