

IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,646

**IN RE: AMENDMENT TO
FLA. R. CRIM. P. 3.851**

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

**COMES NOW THE OFFICE OF THE CAPITAL COLLATERAL
REGIONAL COUNSEL-- SOUTH**, through the undersigned attorneys, and herein
submit the following comments in the above-captioned case.

1. The Office of the Capital Collateral Regional Counsel--South [CCRC-South] is a state agency charged with the statutory obligation to represent death-sentenced inmates in their state and federal collateral litigation.

2. In light of the upcoming oral argument on March 14, 2000, in the above-captioned case, CCRC-South respectfully submits the attached comments to the proposed rule submitted by Judge Morris and the Committee on Postconviction Relief in Capital Cases.

The attached comments consist of previously-submitted letter to both Judge Morris

and the Committee on Postconviction Relief in Capital Cases (Attachment A),¹ as well as Chief Justice Harding's invitation for comments on the Committee's final product (Attachment B).

3. As an addendum to the attached comments, CCRC-South would adopt herein the arguments set forth in its Emergency Petition in Allen et. al. v. Butterworth, et. al, No. SC-00-113 (Attachment C), and the Reply to the response thereto (Attachment D). While some of the arguments contained in these documents are not pertinent to the issues in the above-captioned case, *i.e.*, the separation of powers arguments, the remainder of the due process, equal protection, and issues relating to the encroachment on the effective representation of collateral counsel, equally apply to the rule proposed by the Committee on Postconviction Relief in Capital Cases.

4. CCRC-South would also briefly note, in addendum to the attached comments, the following matters. As further demonstration of the unfairness of the proposed rules forbidding "acquisition of public records to encroach on the one-year time period for filing the [Rule 3.851] motion" (Letter of Judge Morris at 3), CCRC-South would note this Court's recent decision in State v. Reichmann, 2000 WL 205094 (Fla. Feb. 24, 2000), wherein the Court affirmed the granting of a resentencing based on, *inter alia*, the discovery through Chapter 119 litigation that the prosecution had

¹These comments had been submitted pursuant to the invitation of Judge Morris for written comments to Chief Justice Harding's Administrative Order entered on March 31, 1999.

drafted the sentencing order following an impermissible *ex parte* communication with the trial judge.² The importance of the public records process and the concomitant need for fairness when, through no fault of the defense, records are not disclosed in a timely fashion, must be addressed in any rule promulgated by the Court. Given the wealth of cases addressing the public records issue where the Court has found that public records issues were not properly disclosed,³ as well as the ever-

²As a matter of fact, based on the evidentiary hearing testimony in Riechman, the State Attorney's Office for the Eleventh Judicial Circuit agreed to a negotiated settlement of two capital postconviction cases, Mauricio Beltran-Lopez and Henry Espinosa, where the same prosecutor as in Riechman drafted the sentencing orders in the Beltran-Lopez and Espinosa cases. At the time this information came to light, Mr. Beltran-Lopez's case was already on appeal to this Court from the summary denial of his Rule 3.851 motion; Mr. Espinosa had not yet filed his Rule 3.851 motion due to problems associated with paying conflict counsel after the demise of the Volunteer Lawyers' Resource Center. Under the Committee's proposed rule, it does not appear that Mr. Beltran-Lopez would have been authorized to file a successive motion for postconviction relief, as the due process violation did not address innocence of the underlying offense or that no reasonable factfinder would have "recommended or imposed the death penalty." Proposed R. 3.851 (g). Under the Death Penalty Reform Act of 2000, the claim clearly could not have been entertained in a successive motion because it did not go to innocence of the underlying offense. This anecdotal information demonstrates the continuing need for the safety net that the current rules do provide as well as some flexibility of deadlines and time frames.

³See, e.g. Fotopolous v. State, No. 91,227, appeal dismissed at 741 So. 2d 1135 (Fla. 1999) (unpublished order remanding case to circuit court to allow amendment to postconviction motion "in an attempt to properly administer justice" and allowing defendant "to proceed with his public records requests" and to "include any claims arising from those public records in his amended Rule 3.850 motion"); Peede v. State, 24 FLA. L. Weekly S391 (Fla. 1999) ("we remand without prejudice for Peede to again present this [public records] claim to the trial court, recognizing that Peede retains the burden of sufficiently alleging and establishing his entitlement to public records or other discovery in accord with the rules applicable to postconviction proceedings"); Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994) ("Reed should be allowed a reasonable time to obtain any records to which he is entitled and allowed a reasonable time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents"); Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1993) ("Hoffman may seek the relevant public records . . . and within a reasonable time shall be permitted to amend his petition under rule 3.850, raising any new ground brought to light by the disclosure of the public records"); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993) ("Should the trial court determine that Walton is entitled to disclosure of the records at issue, we direct that Walton be granted an additional thirty days from the rendition of that ruling in which to amend his rule 3.850 motion to permit additional claims or facts

changing processes attendant to the production of public records in capital cases,⁴ it

discovered as a result of the disclosure to be raised before the trial court"); Anderson v. State, 627 So. 2d 1170, 1172 (Fla. 1993) ("The various state agencies must either comply with Anderson's requests or object pursuant to the procedures set forth by this Court and under chapter 119. We direct that Anderson be granted thirty days to amend his motion, computed from the date the various state agencies deliver to Anderson the records to which he is entitled"); Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1994) ("Therefore, we direct the state attorney's office to tender to the trial court the portions of its records that it sealed for an in camera inspection of those documents. . . . If those documents reveal any new claims, i.e., claims other than those raised in the instant motion and petition, Lopez will have thirty days from the date of access to file an amended postconviction motion raising those new claims"); Provenzano v. Dugger, 561 So. 2d 541, 547 (Fla. 1990) ("[W]here a defendant's prior request for the state attorney's file has been denied, we believe that it is appropriate for such a request to be made as part of a motion for postconviction relief. . . . In the event that a disclosure is ordered, the defendant will then have an opportunity to amend his motion to allege any Brady claims which might be exposed"); Mendyk v. State, 592 So. 2d 1076, 1082 (Fla. 1991) ("Having found merit to Mendyk's claim under chapter 119, Florida Statutes (1989), we extend the two-year time limitation of Florida Rule of Criminal Procedure 3.850 for sixty days from the date of disclosure solely for the purpose of providing Mendyk the opportunity to file a new motion for post-conviction relief predicated upon any new claims arising from the disclosure"); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991) ("[T]he state attorney shall disclose to Engle's attorney those portions of his file covered by chapter 119, Florida Statutes (1987), as interpreted in State v. Kokal, 562 So. 2d 324 (Fla. 1990). The two-year time limitation of Florida Rule of Criminal Procedure 3.850 shall be extended for sixty days from the date of such disclosure solely for the purpose of providing Engle with the opportunity to file a new postconviction motion relief predicated upon any claims under Brady v. Maryland, 373 U.S. 83 (1963), arising from the disclosure of such files. In this manner, Engle will be placed in the same position as he would have been if such files had been disclosed when they were first requested"); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993) ("Muehleman has sixty days from the date he receives the records to which he is entitled or from the date of this opinion, whichever is later, to amend his 3.850 petition to include any facts or claims contained in the sheriff's records").

⁴In Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), the Court recognized that "it is appropriate for such a request [for public records pursuant to Chapter 119] to be made as a part of a motion for postconviction relief" and rejected the necessity of filing separate civil litigation to "avoid the necessity of two separate actions." Id. at 547. In Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), the Court, addressing the State's argument that "Provenzano should be limited solely to the state attorney's file and that defendants seeking disclosure from other state agencies must pursue their requests through civil action" held that it "declin[ed] to so limit Provenzano." Id. at 1081. Later that year, in Hoffman v. State, 613 So. 2d 405 (Fla. 1992), the Court ruled that for those agencies outside the judicial circuit in which the case arose, "requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes" and receded from Mendyk "to the extent that it suggested a different procedure." Id. at 406. In October of 1996, the Court promulgated Fla. R. Crim. P. 3.852. See In Re: Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 683 So. 2d 475 (Fla. 1996). Among the rules' provisions was the fact that the circuit court where the criminal case arose did have jurisdiction to handle records requests made to out-of-county agencies, superseding

is simply insufficient at this point in time to point the finger at the alleged "dilatatory practices of counsel" (Letter of Judge Morris at 5), as a reason to forever prohibit a capital defendant from amending a postconviction motion with newly-acquired public records.

WHEREFORE, CCRC-South files the above comments in this cause.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to all parties of record on March 2, 2000.

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Hoffman. The Rule was then tolled following the break-up of the Capital Collateral Representative by the Florida legislature. In Re: Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 700 So. 2d 680 (Fla. 1997). The Rule was subsequently additional times by the Court. In Re: Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 708 So. 2d 913 (Fla. 1998); In Re: Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 719 So. 2d 869 (Fla. 1998). Subsequently, the Florida legislature repealed Rule 3.852. The Court then promulgated an emergency rule, In Re: Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 723 So. 2d 163 (Fla. 1998), which was later modified and promulgated in July, 1998. In Re: Amendment to Florida Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 24 Fla. L. Weekly S328 (Fla. July 1, 1999). In January, 2000, the Florida legislature repealed the new Rule 3.852 with the passage of the Death Penalty Reform Act.

Litigation Director
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By: _____
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cc:

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The Honorable Joseph P. Farina
The Honorable Toni Jennings
The Honorable Brad King
The Honorable John P. Kuder
The Honorable Elliott C. Metcalfe, Jr.
The Honorable Charles Miner, Jr.
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