

## **PROPOSED AMENDMENTS BY MORRIS COMMITTEE**

### **Rule 3.851. Collateral Relief After Death Sentence Has Been Imposed And Affirmed On Direct Appeal**

#### **(a) Scope and Purpose.**

This rule shall apply to all motions and petitions for any type of postconviction or collateral relief brought by defendants in state custody who have been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. A defendant under sentence of death imposed by a court established by the laws of Florida claiming the right to be released on the ground that the judgment was entered or that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, that the court was without jurisdiction to enter the judgment or to impose the sentence, that any plea was given involuntarily, or that the judgment or sentence is otherwise subject to collateral attack may move, in the court that entered the judgment or imposed the sentence, to vacate, set aside, or correct the judgment or sentence. The purpose of this rule is to provide the means by which a defendant under sentence of death can raise claims of error which were unavailable at the time of trial or direct appeal. Unless otherwise provided herein, a defendant who had postconviction counsel appointed prior to the effective date of this rule shall proceed in accordance with the rules in effect at the time counsel was appointed.

#### **(b) Appointment of Postconviction Counsel.**

(1) Within 15 days after sentencing a defendant to death, the sentencing court shall issue an order appointing the appropriate office of the Capital Collateral Regional Counsel.

(2) In cases in which the death sentence has been imposed prior to the effective date of this rule but postconviction counsel has not been appointed, the chief judge of the circuit court in which the defendant was sentenced shall appoint the appropriate office of the Capital Collateral Regional Counsel by within 30 days after the effective date of this rule.

(3) Within 30 days from the appointment, the Capital Collateral Regional Counsel shall file a notice of appearance in the trial court or a motion to withdraw

based on a conflict of interest or some other legal ground. A copy of the motion to withdraw shall be served upon the assigned judge.<sup>1</sup>

(4) Within 15 days after the Capital Collateral Regional Council files a motion to withdraw, the chief judge or assigned judge shall ~~appoint new postconviction counsel.~~ rule on the motion or hold a hearing and enter an appropriate order within 5 days after the hearing.<sup>2</sup>

**(c) Preliminary Procedures.**

(1) Judicial Assignment. Upon appointment of postconviction counsel, the chief judge shall assign the case to the judge who presided over the defendant's capital trial if that judge is active and otherwise available to serve or a trial judge qualified to conduct capital proceedings under the Rules of Judicial Administration.

(2) Status Conferences. The assigned judge shall conduct a status hearing not later than ~~90~~ 180 days after the assignment, and shall hold status conferences at least every ~~90~~ 180 days thereafter until the judgment and sentence becomes final. ~~Thereafter, the assigned judge shall hold a status conference at least every 90 days until the evidentiary hearing has been completed or the motion has been ruled on without a hearing.~~ The attorneys may appear by telephone at such status conferences, with leave of the trial court. Such requests shall be liberally granted. Pending motions, except those requiring the presence of the defendant, ~~and disputes involving public records,~~ shall be heard at the status conferences, unless otherwise ordered by the court.<sup>3</sup>

(3) Trial Record. The clerk of the trial court shall serve copies of the trial record on postconviction counsel, the state attorney, and the ~~attorney general~~ assigned judge at the time the clerk serves copies of the record pursuant to rule 9.140(e)(4).<sup>4</sup>

(4) Duties of Defense Counsel and Prosecuting Attorney. Within 15 days of appointment of postconviction counsel, the defendant's trial counsel shall provide to postconviction counsel all information pertaining to the defendant's capital case which was obtained during the representation of the defendant. Postconviction counsel shall maintain the confidentiality of all confidential information received. Within 15 days of appointment of postconviction counsel, the state attorney's office that prosecuted the defendant shall provide to postconviction counsel copies of all pretrial and trial discovery and all contents of the state's file, except for information that the prosecuting attorney has a legal right under state or federal law to withhold from disclosure.

(5) Defendant's Presence Not Required. The defendant's presence shall not be required except at the an evidentiary hearing. ~~on the merits of any claim and at any hearing involving conflict with or removal of collateral counsel.~~<sup>5</sup>

**(d) Time Limitations.**

(1) Initial Postconviction Motions. A motion filed under this rule is an initial postconviction motion if no court has previously ruled on a postconviction motion challenging the same judgment and sentence.

(A) Time for Filing. An initial motion to vacate judgment of conviction and sentence of death shall be filed by a defendant who is sentenced to death on or after the effective date of this rule within ~~180 days~~ 1 year after the judgment and sentence become final. A defendant who was sentenced to death and did not have postconviction counsel appointed before the effective date of this rule shall file an initial postconviction motion within ~~180 days~~ 1 year after the judgment and sentence become final or one year of the appointment of postconviction counsel under subdivision (b)(2), whichever occurs last. An initial motion shall not be filed or considered beyond the time limitation of this subdivision unless an extension has been granted by the trial judge or the motion alleges that:

(i) the facts on which the claim is predicated were unknown to the defendant or the defendant's attorney and could not have been ascertained by the exercise of due diligence;

(ii) the fundamental constitutional right asserted was not established within the period provided for by this rule and has been held to apply retroactively; or

(iii) the defendant retained counsel to timely file a 3.851 motion and counsel, through neglect, failed to file the motion.

(B) Finality. For the purposes of this rule, a judgment is final when the Florida Supreme Court issues a mandate affirming the judgment and sentence of death on direct appeal. The availability of or the filing of a petition for writ of certiorari in the United States Supreme Court shall not affect the finality of the judgment and sentence. However, if the United States Supreme Court accepts certiorari, then the judgment and sentence is final upon disposition of the petition for writ of certiorari by the United States Supreme Court.

(C) Extensions. An extension of time to file an initial postconviction motion may be granted by the circuit court only upon a showing that a manifest injustice would result absent such relief and that counsel's inability to timely file the motion is not the result of lack of cooperation by the defendant or lack of due diligence on the part of counsel.

(2) Extraordinary Remedies. Any petition for habeas corpus claiming ineffective assistance of appellate counsel shall be filed in the Supreme Court of Florida simultaneously with the initial brief filed on behalf of the death-sentenced defendant in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

(3) The time limitations in this subdivision are established with the understanding that each defendant sentenced to death will have counsel appointed and available to begin addressing the defendant's postconviction issues within the time periods provided in subdivision (b) of this rule.

**(e) Contents of Motion.**

A motion filed under this rule shall not exceed 50 pages exclusive of attachments, including the judgment and sentence and exhibits. The motion shall be under oath and shall include:

(1) the judgment and sentence under attack and the court which rendered the same;

(2) a statement of each issue raised on appeal and the disposition thereof;

~~(3) if a previous postconviction motion has been filed, the disposition of all previous claims raised in postconviction litigation and the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;<sup>6</sup>~~

~~(4)~~ (3) the nature of the relief sought;

~~(5)~~ (4) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; and

~~(6)~~ (5) a detailed allegation as to the basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim

could not or was not raised on direct appeal.

The motion shall be accompanied by a separate memorandum of law not to exceed 25 pages as to the applicable case law supporting the granting of relief as to each separately-pled claim. As to claims that were raised on appeal or should have or could have been raised on appeal, the memorandum shall contain a brief statement as to why these claims are being raised on postconviction relief.

**(f) Procedure; Evidentiary Hearing; Disposition.**

(1) Filing and Service. All pleadings in the postconviction proceeding shall be filed with the clerk of the court and served on the assigned judge, opposing party and the attorney general. Upon the filing of any original court paper in the postconviction proceeding, the clerk of the court shall determine that the assigned judge has received a copy. All motions other than the postconviction motion itself shall be accompanied by a notice of hearing.

(2) Duty of Clerk. Upon the filing of a motion for postconviction relief, the clerk of court shall immediately forward a copy of the motion and file to the assigned judge.<sup>7</sup>

(3) Answer. Within 45 days of the filing of an initial motion, the state shall file its answer. The answer shall not exceed 50 pages exclusive of attachments and exhibits and may include a memorandum of law not to exceed 25 pages as to the applicable case law supporting the denial of relief as to each separately pled claim. The answer shall address the legal insufficiency of any claim in the motion, respond to the allegations of the motion and address any procedural bars. As to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.

(4) Amendments. An initial motion filed under this rule may be amended up to 30 days prior to the evidentiary hearing upon motion and good cause shown. The trial court may in its discretion grant a motion to amend provided that the motion sets forth the reason the claim was not set forth earlier and attaches a copy of the claim sought to be added. Granting a motion under this subdivision shall not be a basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the amended motion is filed.

(5) Case Management Conference. Within 30 days after the state files its answer to an initial motion, the trial court shall hold a case management conference. At the case management conference, both parties shall disclose all documentary exhibits they intend to offer at the evidentiary hearing; provide an exhibit list that includes all such exhibits; and exchange a witness list with the names and addresses of any potential witnesses. All expert witnesses shall be so designated with copies of all expert reports attached. The trial court also shall:

(A) review the witness and exhibit lists with the parties;

(B) schedule an evidentiary hearing, ~~to be held~~ within 90 days, ~~on claims listed by the defendant as requiring a factual determination; and~~ which assert ineffective assistance of counsel, a Brady claim, or other newly discovered evidence, or other legally cognizable claims which allege an ultimate factual basis.<sup>8</sup>

(C) hear argument on any purely legal claims not based on disputed facts.

(6) Amendment of Witness or Exhibit Lists. Prior to the evidentiary hearing, the trial court may grant leave of either party to amend the exhibit or witness list upon a showing of good cause.

(7) Mental Health Expert. If the defendant intends to offer expert testimony of his or her mental status, the state shall be entitled to have the defendant examined by its own mental health expert. If the defendant fails to cooperate with the state's expert the court may, in its discretion, proceed as provided in rule 3.202(e). Reports provided by any expert witness shall be disclosed to opposing counsel upon receipt.

(8) Transcript and Final Order. Immediately following the evidentiary hearing, the court shall order a transcript of the hearing which shall be filed within 30 days. Within ~~30~~ 60 days of receipt of the transcript, the court shall render its order, ruling on each claim considered at the evidentiary hearing and all other claims raised in the motion making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review.<sup>9</sup> The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal. The clerk of the court shall promptly serve upon all parties a copy of the final order, with a certificate of service.

(12) Rehearing. No motion for rehearing shall be permitted.

**(g) Successive Motions.** This subdivision applies to all successive postconviction motions filed after the effective date of this rule. A motion filed under this rule is successive if a court has previously ruled on a postconviction motion challenging the same judgment and sentence. Successive motions pending on (the effective date) are governed by the rules in effect prior to that date.

(1) Contents of Motion. A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include all of the pleading requirements of an initial motion as well as a statement of the nature and disposition of all previous claims raised and the reason why the successive claim was not raised in a former motion.<sup>10</sup> If based on newly discovered evidence, Brady, or Giglio, the successive motion also must contain the following:

(A) the names, addresses and telephone numbers of all witnesses supporting the claim together with any affidavits obtained by defendant from such witnesses;

(B) a statement that the witness will be available to testify under oath to the facts alleged in the motion or affidavit;

(C) if evidentiary support is in the form of documents, copies of all documents shall be attached; and

(D) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available.

(2) Time for filing successive motions. Successive motions must be filed within 30 days after discovery, through due diligence, of new grounds which form the basis for a successive claim for relief.<sup>11</sup>

~~(2)~~ (3) Answer. Within 10 days of the filing of a successive motion, the state shall file its answer. The answer shall not exceed 25 pages exclusive of attachments and exhibits. The answer shall specifically respond to each claim in the motion and state the reason(s) that an evidentiary hearing is or is not required.

(4) Hearing. The trial court shall expedite disposition of successive motions and may shorten any time provision contained in this rule for that purpose.<sup>12</sup>

**(h) Appeals.**

An appeal may be taken to the Supreme Court of Florida within 30 days from the entry of a final order on a motion for postconviction relief.

1. The present proposal requires action by the assigned judge within 15 days but does not provide for a copy of the motion to be served on the assigned judge.
2. The present proposal does not allow the assigned judge to determine the merits of the motion to withdraw. Nor does it allow the court to rule on the merits of the motion without a hearing. Hearings are unnecessary in cases of obvious conflict, e.g., such as simultaneous representation of codefendants.
3. Lengthening the time from 90 to 180 days reflects the Supreme Court's latest amendment which extends the time to file the motion for postconviction relief. Also, disputes involving public records do not always require inspection of the records and may be considered at a status conference hearing if the actual presence of the attorneys and the records are unnecessary.
4. Rule 9.140(e)(4) already provides for the Attorney General to receive a copy of the record.
5. A motion to withdraw filed by CCRC that alleges lack of funding or resources may not require an evidentiary hearing nor the presence of the defendant.
6. This provision has been moved to the section on successive motions (g).
7. These files are usually boxed in several volumes and there is no need for the trial judge to review the entire record at this stage of the proceedings. The Clerk should maintain the case file until the trial judge requests it.
8. See, Mordenti v. State, 711 So.2d 30, 33 (Wells, J., concurring). This change is necessary because, as written, the rule does not provide sufficient guidance to the trial judge. An evidentiary hearing is mandated on the matters listed in this portion of the rule.
9. The committee does not believe it is realistic to expect a judge to rearrange an already scheduled docket, arrange for senior judge assistance, and draft and redraft (often without the assistance of a law clerk) a well reasoned order within 30 days.
10. This provision is necessary in order to determine procedural defaults on the face of the successive motion.
11. The rule presently does not contain a time limitation for successive motions.

12. The rule presently does not contain any guidance to the trial judge on scheduling successive motions for hearing.