



**FLORIDA RULES OF CRIMINAL PROCEDURE
SECTION XVII
[ALL-IN-ONE DOCUMENT]**

POSTCONVICTION RELIEF

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FLORIDA RULES OF CRIMINAL PROCEDURE

XVII POSTCONVICTION RELIEF

RULES: 3.850 through 3.853



RULE 3.850 | MOTION TO VACATE, SET ASIDE, OR CORRECT SENTENCE

(a) Grounds for Motion. The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida:

- (1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.
- (2) The court did not have jurisdiction to enter the judgment.
- (3) The court did not have jurisdiction to impose the sentence.
- (4) The sentence exceeded the maximum authorized by law.
- (5) The plea was involuntary.
- (6) The judgment or sentence is otherwise subject to collateral attack.

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that

- (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, and the claim is made within 2 years of the time the new facts were or could have been discovered with the exercise of due diligence, or
- (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity, or
- (3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion. A claim based on this exception shall not be filed more than 2 years after the expiration of the time for filing a motion for postconviction relief.



(c) Contents of Motion. The motion must be under oath stating that the defendant has read the motion or that it has been read to him or her, that the defendant understands its content, and that all of the facts stated therein are true and correct. The motion must also include an explanation of:

- (1) the judgment or sentence under attack and the court that rendered the same;
- (2) whether the judgment resulted from a plea or a trial;
- (3) whether there was an appeal from the judgment or sentence and the disposition thereof;
- (4) whether a previous postconviction motion has been filed, and if so, how many;
- (5) if a previous motion or motions have been filed, the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;
- (6) the nature of the relief sought; and
- (7) a brief statement of the facts and other conditions relied on in support of the motion.

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. If the defendant is filing a newly discovered evidence claim based on recanted trial testimony or on a newly discovered witness, the defendant shall include an affidavit from that person as an attachment to his or her motion. For all other newly discovered evidence claims, the defendant shall attach an affidavit from any person whose testimony is necessary to factually support the defendant's claim for relief. If the affidavit is not attached to the motion, the defendant shall provide an explanation why the required affidavit could not be obtained.

(d) Form of Motion. Motions shall be typewritten or handwritten in legible printed lettering, in blue or black ink, double-spaced, with margins no less than 1 inch on white 8 1/2-by-11 inch paper. No motion, including any memorandum of law, shall exceed 50 pages without leave of the court upon a showing of good cause.



(e) Amendments to Motion. When the court has entered an order under subdivision (f) (2) or (f) (3), granting the defendant an opportunity to amend the motion, any amendment to the motion must be served within 60 days. A motion may otherwise be amended at any time prior to either the entry of an order disposing of the motion or the entry of an order pursuant to subdivision (f) (5) or directing that an answer to the motion be filed pursuant to (f) (6), whichever occurs first. Leave of court is required for the filing of an amendment after the entry of an order pursuant to subdivision (f) (5) or (f) (6). Notwithstanding the timeliness of an amendment, the court need not consider new factual assertions contained in an amendment unless the amendment is under oath. New claims for relief contained in an amendment need not be considered by the court unless the amendment is filed within the time frame specified in subdivision (b).

(f) Procedure; Evidentiary Hearing; Disposition. On filing of a motion under this rule, the clerk shall forward the motion and file to the court. Disposition of the motion shall be in accordance with the following procedures, which are intended to result in a single, final, appealable order that disposes of all claims raised in the motion.

(1) Untimely and Insufficient Motions. If the motion is insufficient on its face, and the time to file a motion under this rule has expired prior to the filing of the motion, the court shall enter a final appealable order summarily denying the motion with prejudice.

(2) Timely but Insufficient Motions. If the motion is insufficient on its face, and the motion is timely filed under this rule, the court shall enter a nonfinal, nonappealable order allowing the defendant 60 days to amend the motion. If the amended motion is still insufficient or if the defendant fails to file an amended motion within the time allowed for such amendment, the court, in its discretion, may permit the defendant an additional opportunity to amend the motion or may enter a final, appealable order summarily denying the motion with prejudice.

(3) Timely Motions Containing Some Insufficient Claims. If the motion sufficiently states one or more claims for relief and it also attempts but fails to state additional claims, and the motion is timely filed under this rule,

the court shall enter a nonappealable order granting the defendant 60 days to amend the motion to sufficiently state additional claims for relief. Any claim for which the insufficiency has not been cured within the time allowed for such amendment shall be summarily denied in an order that is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.

(4) Motions Partially Disposed of by the Court Record.

If the motion sufficiently states one or more claims for relief but the files and records in the case conclusively show that the defendant is not entitled to relief as to one or more claims, the claims that are conclusively refuted shall be summarily denied on the merits without a hearing. A copy of that portion of the files and records in the case that conclusively shows that the defendant is not entitled to relief as to one or more claims shall be attached to the order summarily denying these claims. The files and records in the case are the documents and exhibits previously filed in the case and those portions of the other proceedings in the case that can be transcribed. An order that does not resolve all the claims is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.

(5) Motions Conclusively Resolved by the Court Record.

If the motion is legally sufficient but all grounds in the motion can be conclusively resolved either as a matter of law or by reliance upon the records in the case, the motion shall be denied without a hearing by the entry of a final order. If the denial is based on the records in the case, a copy of that portion of the files and records that conclusively shows that the defendant is entitled to no relief shall be attached to the final order.

(6) Motions Requiring a Response from the State Attorney.

Unless the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, the court shall order the state attorney to file, within the time fixed by the court, an answer to the motion. The answer shall respond to the allegations contained in the defendant's sufficiently pleaded claims, describe any matters in avoidance of the



sufficiently pleaded claims, state whether the defendant has used any other available state postconviction remedies including any other motion under this rule, and state whether the defendant has previously been afforded an evidentiary hearing.

(7) Appointment of Counsel. The court may appoint counsel to represent the defendant under this rule. The factors to be considered by the court in making this determination include: the adversary nature of the proceeding, the complexity of the proceeding, the complexity of the claims presented, the defendant's apparent level of intelligence and education, the need for an evidentiary hearing, and the need for substantial legal research.

(8) Disposition by Evidentiary Hearing.

(A) If an evidentiary hearing is required, the court shall grant a prompt hearing and shall cause notice to be served on the state attorney and the defendant or defendant's counsel, and shall determine the issues, and make findings of fact and conclusions of law with respect thereto.

(B) At an evidentiary hearing, the defendant shall have the burden of presenting evidence and the burden of proof in support of his or her motion, unless otherwise provided by law.

(C) 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.

(g) Defendant's Presence Not Required. The defendant's presence shall not be required at any hearing or conference held under this rule except at the evidentiary hearing on the merits of any claim.

(h) Successive Motions.

(1) A second or successive motion must be titled: "Second or Successive Motion for Postconviction Relief."

(2) A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court finds that it fails to



allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion. When a motion is dismissed under this subdivision, a copy of that portion of the files and records necessary to support the court's ruling shall accompany the order denying the motion.

(i) Service on Parties. The clerk of the court shall promptly serve on the parties a copy of any order entered under this rule, noting thereon the date of service by an appropriate certificate of service.

(j) Rehearing. Any party may file a motion for rehearing of any order addressing a motion under this rule within 15 days of the date of service of the order. A motion for rehearing is not required to preserve any issue for review in the appellate court. A motion for rehearing must be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling. A response may be filed within 10 days of service of the motion. The trial court's order disposing of the motion for rehearing shall be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought.

(k) Appeals. An appeal may be taken to the appropriate appellate court only from the final order disposing of the motion. All final orders denying motions for postconviction relief shall include a statement that the defendant has the right to appeal within 30 days of the rendition of the order. All nonfinal, nonappealable orders entered pursuant to subdivision (f) should include a statement that the defendant has no right to appeal the order until entry of the final order.

(l) Belated Appeals and Discretionary Review. Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.141, a defendant may seek a belated appeal or discretionary review.



(m) Habeas Corpus. An application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court that sentenced the applicant or that the court has denied the applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the applicant's detention.

(n) Certification of Defendant; Sanctions. No motion may be filed pursuant to this rule unless it is filed in good faith and with a reasonable belief that it is timely, has potential merit, and does not duplicate previous motions that have been disposed of by the court.

(1) By signing a motion pursuant to this rule, the defendant certifies that: the defendant has read the motion or that it has been read to the defendant and that the defendant understands its content; the motion is filed in good faith and with a reasonable belief that it is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court; and, the facts contained in the motion are true and correct.

(2) The defendant shall either certify that the defendant can understand English or, if the defendant cannot understand English, that the defendant has had the motion translated completely into a language that the defendant understands. The motion shall contain the name and address of the person who translated the motion and that person shall certify that he or she provided an accurate and complete translation to the defendant. Failure to include this information and certification in a motion shall be grounds for the entry of an order dismissing the motion pursuant to subdivision (f)(1), (f)(2), or (f)(3).

(3) Conduct prohibited under this rule includes, but is not limited to, the following: the filing of frivolous or malicious claims; the filing of any motion in bad faith or with reckless disregard for the truth; the filing of an application for habeas corpus subject to dismissal pursuant to subdivision (m); the willful violation of any provision of this rule; and the abuse of the legal process or procedures governed by this rule.



The court, upon its own motion or on the motion of a party, may determine whether a motion has been filed in violation of this rule. The court shall issue an order setting forth the facts indicating that the defendant has or may have engaged in prohibited conduct. The order shall direct the defendant to show cause, within a reasonable time limit set by the court, why the court should not find that the defendant has engaged in prohibited conduct under this rule and impose an appropriate sanction. Following the issuance of the order to show cause and the filing of any response by the defendant, and after such further hearing as the court may deem appropriate, the court shall make a final determination of whether the defendant engaged in prohibited conduct under this subsection.

(4) If the court finds by the greater weight of the evidence that the defendant has engaged in prohibited conduct under this rule, the court may impose one or more sanctions, including:

(A) contempt as otherwise provided by law;

(B) assessing the costs of the proceeding against the defendant;

(C) dismissal with prejudice of the defendant's motion;

(D) prohibiting the filing of further pro se motions under this rule and directing the clerk of court to summarily reject any further pro se motion under this rule;

(E) requiring that any further motions under this rule be signed by a member in good standing of The Florida Bar, who shall certify that there is a good faith basis for each claim asserted in the motion; and/or

(F) if the defendant is a prisoner, a certified copy of the order be forwarded to the appropriate institution or facility for consideration of disciplinary action against the defendant, including forfeiture of gain time pursuant to Chapter 944, Florida Statutes.



(5) If the court determines there is probable cause to believe that a sworn motion contains a false statement of fact constituting perjury, the court may refer the matter to the state attorney.

Committee Notes

1972 Amendment. Same as prior rule. Former rule 3.860, previously deleted, now found in article 18, The Florida Bar Integration Rules.

1977 Amendment. Nothing has been taken from proposed rule 3.850. Additions have been made. The committee proceeded on the theory that generally the motions coming under the purview of the rule were filed by prisoners and will be considered ex parte.

The proposed amendment contemplates that in those cases where the trial court found the movant entitled to some relief, the state attorney would be noticed and given an opportunity to be heard. The rule further contemplates that if the appellate court reverses, it would do so with directions to conduct a hearing with notice to all parties.

(a), (b), (c), (d), (e)

The committee was of the opinion that the motion should contain the minimum prerequisites indicated in the lettered portions to permit the trial court to quickly ascertain whether or not the motion was entitled to consideration and, if not, provide for its return to the movant as unacceptable. This procedure is similar to federal rules dealing with postconviction motions.

The committee perceives that denial of a motion will either be based on the insufficiency of the motion itself or on the basis of the file or record which the trial court will have before it. The proposal provides for a simplified expeditious disposition of appeals in such cases. It is to be noted, however, that in those cases where the record is relied on as a basis for denial of the motion, it may in exceptional cases involve a substantial record, but the advantages of this procedure seem to justify coping with the unusual or exceptional case. It is the opinion of the committee that, in any order of denial based on the insufficiency of the motion or on the face of the record, trial courts will set forth specifically the basis of the court's ruling with sufficient specificity to delineate the issue for the benefit of appellate courts.

The committee thought that the provision permitting ex parte denial of a motion based on the face of the record was appropriate inasmuch as the movant was granted an opportunity for rehearing in which to point out any errors the court may have made, thus providing sufficient safeguards to ensure consideration of the prisoner's contentions.

The prisoner or movant's motion for rehearing will be a part of the record on appeal, thereby alerting the appellate court to the movant's dissatisfaction with the trial court's ruling.



1984 Amendment. The committee felt that provisions should be added to allow the court to consider why a subsequent motion was being filed and whether it was properly filed, similar to Federal Rule of Criminal Procedure 9(b) or 35.

The committee also felt that the court should have the authority to order the state to respond to a 3.850 motion by answer or other pleading as the court may direct.

The committee felt that even if a motion filed under rule 3.850 does not substantially comply with the requirements of the rule, the motion should still be filed and ruled on by the court. Hence the former provision authorizing the court to refuse to receive such a nonconforming motion has been removed and words allowing the presiding judge to summarily deny a noncomplying motion have been satisfied.

1992 Amendment. Pursuant to *State v. District Court of Appeal of Florida, First District*, 569 So.2d 439 (Fla. 1990), motions seeking a belated direct appeal based on the ineffective assistance of counsel should be filed in the trial court under rule 3.850. Also, see rule 3.111(e) regarding trial counsel's duties before withdrawal after judgment and sentence.

1993 Amendment. This amendment is necessary to make this rule consistent with rule 3.851.

Court Commentary

1996 Court Commentary. Florida Rule of Judicial Administration 2.071(b) allows for telephonic and teleconferencing communication equipment to be utilized “for a motion hearing, a pretrial conference, or a status conference.” Teleconferencing sites have been established by the Department of Management Services, Division of Communications at various metropolitan locations in the state. The “Shevin Study”¹ examined, at this Court’s request, the issue of delays in capital postconviction relief proceedings and noted that travel problems of counsel cause part of those delays. The Court strongly encourages the use of the new telephonic and teleconferencing technology for postconviction relief proceedings that do not require evidentiary hearings.

2013 Amendment.

Rule 3.850 has been revised to address several issues identified by the Postconviction Rules Workgroup in 2006 and by the Criminal Court Steering Committee and the Subcommittee on Postconviction Relief in 2011.

Rule 3.850(d). New subdivision (d) is derived from the final two sentences formerly contained in subdivision (c).

Rule 3.850(e). Subdivision (e) was added to codify existing case law on amendments to postconviction motions and to comport with subdivision (f).

Rule 3.850(f). Subdivision (f) attempts to set out each of the different options that a trial judge has when considering a motion under this rule. It reflects the timeframe requirement of subdivision (b) and codifies existing case law regarding timely but facially insufficient motions,

partial orders of denial, and the appointment of counsel. See, e.g., *Spera v. State*, 971 So. 2d 754 (Fla. 2007).

Rule 3.850(g). Subdivision (g) was previously contained in subdivision (e), but the language is largely derived from rule 3.851(c)(3).

Rule 3.850(h). Subdivision (h), formerly rule 3.850(f), was substantially rewritten.

Rule 3.850(i). Subdivision (i) is substantially the same as former subdivision (g).

Rule 3.850(j). Subdivision (j) allows both the state and the defendant the right to rehearing and is intended to allow the court to correct an obvious error without the expense and delay of a state appeal. See *King v. State*, 870 So. 2d 69 (Fla. 2d DCA 2003). The statement regarding finality is consistent with Florida Rule of Appellate Procedure 9.020(i) and is intended to clarify the date of rendition of the final order disposing of any motion under this rule.

Rule 3.850(k). Subdivision (k), formerly rule 3.850(i), was substantially rewritten to simplify the review process in both the trial and appellate courts and to provide for the efficient disposition of all claims in both courts. The requirement of a statement indicating whether the order is a nonfinal or final order subject to appeal is intended to ensure that all claims will be disposed of by the trial court and addressed in a single appeal.

Rule 3.850(l). Subdivision (l), formerly rule 3.850(j), reflects the consolidation of the subdivision with former rule 3.850(k).

Rule 3.850(n). Subdivision (n) is a substantial rewrite of former subdivision (m).

¹ Letter from Robert L. Shevin “*Re: Study of the Capital Collateral Representative*” to Chief Justice Stephen H. Grimes (Feb. 26, 1996) (on file with the Supreme Court of Florida in No. 87,688).

RULE 3.851 | COLLATERAL RELIEF AFTER DEATH SENTENCE HAS BEEN IMPOSED AND AFFIRMED ON DIRECT APPEAL

(a) Scope. This rule shall apply to all postconviction proceedings that commence upon issuance of the appellate mandate affirming the death sentence to include all motions and petitions for any type of postconviction or collateral relief brought by a defendant in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after January 1, 2015, by defendants who are under sentence of death. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.

(b) Appointment of Postconviction Counsel.

(1) Upon the issuance of the mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida shall at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Justice Administrative Commission. The name of Registry Counsel shall be filed with the Supreme Court of Florida.

(2) Within 30 days of the issuance of the mandate, the Capital Collateral Regional Counsel or Registry Counsel shall file either a notice of appearance or a motion to withdraw in the trial court. Motions to withdraw filed more than 30 days after the issuance of the mandate shall not be entertained unless based on a conflict of interest as set forth in section 27.703, Florida Statutes.

(3) Within 15 days after Capital Collateral Regional Counsel or Registry Counsel files a motion to withdraw, the chief judge or assigned judge shall rule on the motion and appoint new postconviction counsel if necessary. The appointment of new collateral counsel shall be from the Registry of attorneys maintained by the Justice Administrative Commission unless the case is administratively transferred to another Capital Collateral Regional Counsel.



(4) In every capital postconviction case, one lawyer shall be designated as lead counsel for the defendant. The lead counsel shall be the defendant's primary lawyer in all state court litigation. No lead counsel shall be permitted to appear for a limited purpose on behalf of a defendant in a capital postconviction proceeding.

(5) After the filing of a notice of appearance, Capital Collateral Regional Counsel, Registry Counsel, or a private attorney shall represent the defendant in the state courts until a judge allows withdrawal or until the sentence is reversed, reduced, or carried out, regardless of whether another attorney represents the defendant in a federal court.

(6) A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only bases for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule.

(c) Preliminary Procedures.

(1) Judicial Assignment and Responsibilities. Within 30 days of the issuance of mandate affirming a judgment and sentence of death on direct appeal, the chief judge shall assign the case to a judge qualified under the Rules of Judicial Administration to conduct capital proceedings. The assigned judge is responsible for case management to ensure compliance with statutes, rules, and administrative orders that impose processing steps, time deadlines, and reporting requirements for capital postconviction litigation. From the time of assignment, the judge must issue case management orders for every step of the capital postconviction process, including at the conclusion of all hearings and conferences.

(2) Status Conferences. The assigned judge shall conduct a status conference not later than 90 days after the judicial assignment, and shall hold status conferences at least every 90 days thereafter until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. The attorneys, with leave of the trial court, may appear electronically at the status conferences. Requests to appear electronically shall be



liberally granted. Pending motions, disputes involving public records, or any other matters ordered by the court shall be heard at the status conferences.

(3) Defendant's Presence Not Required. The defendant's presence shall not be required at any hearing or conference held under this rule, except at the evidentiary hearing on the merits of any claim and at any hearing involving conflict with or removal of collateral counsel.

(4) Duties of Defense Counsel. Within 45 days of appointment of postconviction counsel, the defendant's trial counsel shall provide to postconviction counsel a copy of the original file including all work product not otherwise subject to a protective order and information pertaining to the defendant's capital case which was created and obtained during the representation of the defendant. Postconviction counsel shall maintain the confidentiality of all confidential information received. Postconviction counsel shall bear the costs of any copying. The defendant's trial counsel must retain the defendant's original file.

(5) Record on Appeal. The Clerk of the Supreme Court of Florida shall promptly deliver the record on appeal to the records repository after the appointment of postconviction counsel.

(d) Time Limitation.

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.



(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

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

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

(3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writs of habeas corpus, shall be filed 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.

(4) If the governor signs a death warrant before the expiration of the time limitation in subdivision (d)(1), the Supreme Court of Florida, on a defendant's request, will grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner.

(5) An extension of time may be granted by the Supreme Court of Florida for the filing of postconviction pleadings if the defendant's counsel makes a showing that due to exceptional circumstances, counsel was unable to file the postconviction pleadings within the 1-year period established by this rule.

(e) Contents of Motion.

(1) Initial Motion. A motion filed under this rule is an initial postconviction motion if no state court has previously ruled on a postconviction motion challenging the same judgment and sentence. An initial motion and memorandum of law filed under this rule shall not exceed 75 pages exclusive of the attachments. Each claim or



subclaim shall be separately pled and shall be sequentially numbered beginning with claim number 1. If upon motion or upon the court's own motion, a judge determines that this portion of the rule has not been followed, the judge shall give the movant 30 days to amend. If no amended motion is filed, the judge shall deem the non-compliant claim, subclaim, and/or argument waived. Attachments shall include, but are not limited to, the judgment and sentence. The memorandum of law shall set forth the applicable case law supporting the granting of relief as to each separately pled claim. This rule does not authorize relief based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. If claims that were raised on appeal or should have or could have been raised on appeal are contained in the motion, the memorandum of law shall contain a brief statement explaining why these claims are being raised on postconviction relief. The motion need not be under oath or signed by the defendant but shall include:

- (A) a description of the judgment and sentence under attack and the court that rendered the same;
- (B) a statement of each issue raised on appeal and the disposition thereof;
- (C) the nature of the relief sought;
- (D) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought;
- (E) 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 have been or was not raised on direct appeal; and
- (F) a certification from the attorney that he or she has discussed the contents of the motion fully with the defendant, that he or she has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that the motion is filed in good faith.



(2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A claim raised in a successive motion shall be dismissed if the trial court finds that it fails to allege new or different grounds for relief and the prior determination was on the merits; or, if new and different grounds are alleged, the trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d) (2) (A), (d) (2) (B), or (d) (2) (C).

A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include:

(A) all of the pleading requirements of an initial motion under subdivision (e) (1);

(B) the disposition of all previous claims raised in postconviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions;

(C) if based upon newly discovered evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150 (1972), the following:

(i) the names, addresses, and telephone numbers of all witnesses supporting the claim;

(ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;

(iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and

(iv) 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.

(f) Procedure; Evidentiary Hearing; Disposition.

(1) Filing and Service. All pleadings in the postconviction proceeding shall be filed with the clerk of the trial court and served on the assigned judge, opposing party, and the attorney general. Upon the filing of any original court document in the postconviction proceeding, the clerk of the trial 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. A motion filed under this rule shall be immediately delivered to the chief judge or the assigned judge along with the court file.

(3) Answer.

(A) Answer to the Initial Motion. Within 60 days of the filing of an initial motion, the state shall file its answer. The answer and accompanying memorandum of law shall not exceed 75 pages, exclusive of attachments and exhibits. 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. The answer shall use the same claim numbering system contained in the defendant's initial motion. As to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.

(B) Answer to a Successive Motion. Within 20 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 use the same claim numbering system contained in the defendant's motion. 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) Amendments. A motion filed under this rule may not be amended unless good cause is shown. A copy of the claim sought to be added must be attached to the motion to amend. The trial court may in its discretion grant a motion to amend provided that the motion to amend was filed at least 45 days before the scheduled evidentiary hearing. 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 judge allows the motion to be amended.

(5) Case Management Conference; Evidentiary Hearing.

(A) Initial Postconviction Motion. No later than 90 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, the defendant shall disclose all documentary exhibits that he or she intends to offer at the evidentiary hearing and shall file and serve an exhibit list of all such exhibits and a witness list with the names and addresses of any potential witnesses. All expert witnesses shall be specifically designated on the witness list and copies of all expert reports shall be attached. Within 60 days after the case management conference, the state shall disclose all documentary exhibits that it intends to offer at the evidentiary hearing and shall file and serve an exhibit list of all such exhibits and a witness list with the names and addresses of any potential witnesses. All expert witnesses shall be specifically designated on the witness list and copies of all expert reports shall be attached. At the case management conference, the trial court shall:

- (i) schedule an evidentiary hearing, to be held within 150 days, on claims listed by the defendant as requiring a factual determination;
- (ii) hear argument on any purely legal claims not based on disputed facts; and



(iii) resolve disputes arising from the exchange of information under this subdivision.

(B) Successive Postconviction Motion. Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held within 90 days. If a death warrant has been signed, the trial court shall expedite these time periods in accordance with subdivision (h) of this rule.

(C) Extension of Time to Hold Evidentiary Hearing. The trial court also may for good cause extend the time for holding an evidentiary hearing for up to 90 days.

(D) Taking Testimony. Upon motion, or upon its own motion and without the consent of any party, the court may permit a witness to testify at the evidentiary hearing by contemporaneous video communication equipment that makes the witness visible to all parties during the testimony. There must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony so the court may stop the communication to accommodate objections or prevent prejudice. If testimony is taken through video communication equipment, there must be a notary public or other person authorized to administer oaths in the witness's jurisdiction who is present with the witness and who administers the oath consistent with the laws of the jurisdiction where the witness is located. The cost for the use

of video communication equipment is the responsibility of either the requesting party or, if upon its own motion, the court.

(E) Procedures After Evidentiary Hearing.

Immediately following an evidentiary hearing, the trial court shall order a transcript of the hearing, which shall be filed within 10 days if real-time transcription was utilized, or within 45 days if real-time transcription was not utilized. The trial judge may permit written closing arguments instead of oral closing arguments. If the trial court permits the parties to submit written closing arguments, the arguments shall be filed by both parties within 30 days of the filing of the transcript of the hearing. No answer or reply arguments shall be allowed. Written arguments shall be in compliance with the requirements for briefs in rule 9.210(a)(1) and (a)(2), shall not exceed 60 pages without leave of court, and shall include proposed findings of facts and conclusions of law, with citations to authority and to appropriate portions of the transcript of the hearing.

(F) Rendition of the Order. If the court does not permit written closing arguments, the court shall render its order within 30 days of the filing of the transcript of the hearing. If the court permits written closing arguments, the court shall render its order within 30 days of the filing of the last written closing argument and no later than 60 days from the filing of the transcript of the hearing. The court shall rule 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. 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 trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service.

(6) Experts and Other Witnesses. All expert witnesses who will testify at the evidentiary hearing must submit written reports, which shall be disclosed to opposing counsel as provided in subdivision (f)(5)(A). 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 trial court may, in its discretion, proceed as provided in rule 3.202(e).

(7) Rehearing. Motions for rehearing shall be filed within 15 days of the rendition of the trial court's order and a response thereto filed within 10 days thereafter. A motion for rehearing shall be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling. The trial court's order disposing of the motion for rehearing shall be rendered not later than 30 days from the filing of the motion for rehearing. If no order is filed within 30 days from the filing of the motion for rehearing, the motion is deemed denied. A motion for rehearing is not required to preserve any issue for review.

(8) Appeals. Any party may appeal a final order entered on a defendant's motion for rule 3.851 relief by filing a notice of appeal with the clerk of the lower tribunal within 30 days of the rendition of the order to be reviewed. Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.142, a defendant under sentence of death may petition for a belated appeal.

(g) Incompetence to Proceed in Capital Collateral Proceedings.

(1) A death-sentenced defendant pursuing collateral relief under this rule who is found by the court to be mentally incompetent shall not be proceeded against if there are factual matters at issue, the development or resolution of which require the defendant's input. However, all collateral relief issues that involve only matters of record and claims that do not require the defendant's input shall proceed in collateral



proceedings notwithstanding the defendant's incompetency.

(2) Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced defendant is incompetent to proceed.

(3) If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the defendant's input, a judicial determination of incompetency is required.

(4) The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue and the reason that competent consultation with the defendant is necessary with respect to each factual matter specified. To the extent that it does not invade the lawyer-client privilege with collateral counsel, the motion shall contain a recital of the specific observations of, and conversations with, the death-sentenced defendant that have formed the basis of the motion.

(5) If the court finds that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed in a postconviction proceeding in which factual matters are at issue, the development or resolution of which require the defendant's input, the court shall order the defendant examined by no more than 3, nor fewer than 2, experts before setting the matter for a hearing. The court may seek input from the death-sentenced defendant's counsel and the state attorney before appointment of the experts.

(6) The order appointing experts shall:

(A) identify the purpose of the evaluation and specify the area of inquiry that should be addressed;

(B) specify the legal criteria to be applied; and



(C) specify the date by which the report shall be submitted and to whom it shall be submitted.

(7) Counsel for both the death-sentenced defendant and the state may be present at the examination, which shall be conducted at a date and time convenient for all parties and the Department of Corrections.

(8) On appointment by the court, the experts shall examine the death-sentenced defendant with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the defendant, and shall evaluate the defendant as ordered.

(A) The experts first shall consider factors related to the issue of whether the death-sentenced defendant meets the criteria for competence to proceed, that is, whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the pending collateral proceedings.

(B) In considering the issue of competence to proceed, the experts shall consider and include in their report:

(i) the defendant's capacity to understand the adversary nature of the legal process and the collateral proceedings;

(ii) the defendant's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue; and

(iii) any other factors considered relevant by the experts and the court as specified in the order appointing the experts.

(C) Any written report submitted by an expert shall:

(i) identify the specific matters referred for evaluation;



(ii) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each;

(iii) state the expert's clinical observations, findings, and opinions on each issue referred by the court for evaluation, and indicate specifically those issues, if any, on which the expert could not give an opinion; and

(iv) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

(9) If the experts find that the death-sentenced defendant is incompetent to proceed, the experts shall report on any recommended treatment for the defendant to attain competence to proceed. In considering the issues relating to treatment, the experts shall report on:

(A) the mental illness or intellectual disability causing the incompetence;

(B) the treatment or treatments appropriate for the mental illness or intellectual disability of the defendant and an explanation of each of the possible treatment alternatives in order of choices; and

(C) the likelihood of the defendant attaining competence under the treatment recommended, an assessment of the probable duration of the treatment required to restore competence, and the probability that the defendant will attain competence to proceed in the foreseeable future.

(10) Within 30 days after the experts have completed their examinations of the death-sentenced defendant, the court shall schedule a hearing on the issue of the defendant's competence to proceed.

(11) If, after a hearing, the court finds the defendant competent to proceed, or, after having found the defendant incompetent, finds that competency has been restored, the court shall enter its order so finding and



shall proceed with a postconviction motion. The defendant shall have 60 days to amend his or her rule 3.851 motion only as to those issues that the court found required factual consultation with counsel.

(12) If the court does not find the defendant incompetent, the order shall contain:

(A) findings of fact relating to the issues of competency;

(B) copies of the reports of the examining experts; and

(C) copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the death-sentenced defendant.

(13) If the court finds the defendant incompetent or finds the defendant competent subject to the continuation of appropriate treatment, the court shall follow the procedures set forth in rule 3.212(c), except that, to the extent practicable, any treatment shall take place at a custodial facility under the direct supervision of the Department of Corrections.

(h) After Death Warrant Signed.

(1) Judicial Assignment. The chief judge of the circuit shall assign the case to a judge qualified under the Rules of Judicial Administration to conduct capital cases as soon as notification of the death warrant is received.

(2) Calendar Advancement. Proceedings after a death warrant has been issued shall take precedence over all other cases. The assigned judge shall make every effort to resolve scheduling conflicts with other cases including cancellation or rescheduling of hearings or trials and requesting senior judge assistance.

(3) Schedule of Proceedings. The time limitations in this rule shall not apply after a death warrant has been signed. All motions shall be heard expeditiously considering the time limitations set by the date of execution and the time required for appellate review.



(4) Location of Hearings. The location of hearings after a death warrant is signed shall be determined by the trial judge considering the availability of witnesses or evidence, the security problems involved in the case, and any other factor determined by the trial court.

(5) Postconviction Motions. All motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e) (2) of this rule.

(6) Case Management Conference. The assigned judge shall schedule a case management conference as soon as reasonably possible after receiving notification that a death warrant has been signed. During the case management conference the court shall set a time for filing a postconviction motion and shall schedule a hearing to determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held as soon as reasonably possible considering the time limitations set by the date of execution and the time required for appellate review.

(7) Reporting. The assigned judge shall require the proceedings conducted under death warrant to be reported using the most advanced and accurate technology available in general use at the location of the hearing. The proceedings shall be transcribed expeditiously considering the time limitations set by the execution date.

(8) Procedures After Hearing. The court shall obtain a transcript of all proceedings and shall render its order as soon as possible after the hearing is concluded. A copy of the final order shall be electronically transmitted to the Supreme Court of Florida and to the attorneys of record.

(9) Transmittal of Record. The record shall be immediately delivered to the clerk of the Supreme Court

of Florida by the clerk of the trial court or as ordered by the assigned judge. The record shall also be electronically transmitted if the technology is available. A notice of appeal shall not be required to transmit the record.

(i) Dismissal of Postconviction Proceedings.

(1) This subdivision applies only when a defendant seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel.

(2) If the defendant files the motion pro se, the Clerk of the Court shall serve copies of the motion on counsel of record for both the defendant and the state. Counsel of record may file responses within 10 days.

(3) The trial judge shall review the motion and the responses and schedule a hearing. The defendant, collateral counsel, and the state shall be present at the hearing.

(4) The judge shall examine the defendant at the hearing and shall hear argument of the defendant, collateral counsel, and the state. No fewer than 2 or more than 3 qualified experts shall be appointed to examine the defendant if the judge concludes that there are reasonable grounds to believe the defendant is not mentally competent for purposes of this rule. The experts shall file reports with the court setting forth their findings. Thereafter, the court shall conduct an evidentiary hearing and enter an order setting forth findings of competency or incompetency.

(5) If the defendant is found to be incompetent for purposes of this rule, the court shall deny the motion without prejudice.

(6) If the defendant is found to be competent for purposes of this rule, the court shall conduct a complete (Durocher/Faretta) inquiry to determine whether the defendant knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge collateral counsel.

(7) If the court determines that the defendant has made the decision to dismiss pending postconviction



proceedings and discharge collateral counsel knowingly, freely, and voluntarily, the court shall enter an order dismissing all pending postconviction proceedings and discharging collateral counsel. But if the court determines that the defendant has not made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely, and voluntarily, the court shall enter an order denying the motion without prejudice.

(8) If the court grants the motion:

(A) a copy of the motion, the order, and the transcript of the hearing or hearings conducted on the motion shall be forwarded to the Clerk of the Supreme Court of Florida within 30 days; and

(B) discharged counsel shall, within 10 days after issuance of the order, file with the clerk of the circuit court 2 copies of a notice seeking review in the Supreme Court of Florida, and shall, within 20 days after the filing of the transcript, serve an initial brief. Both the defendant and the state may serve responsive briefs. Briefs shall be served as prescribed by rule 9.210.

(9) If the court denies the motion, the defendant may seek review as prescribed by Florida Rule of Appellate Procedure 9.142(b).

(j) Attorney General Notification to Clerk. The Office of the Attorney General shall notify the clerk of the supreme court when it believes the defendant has completed his or her direct appeal, initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court. The Office of the Attorney General shall serve a copy of the notification on defendant's counsel of record.

Committee Notes

1993 Adoption. This rule is consistent with the recommendation of the Supreme Court Committee on Postconviction Relief in Capital Cases, which was created because of the substantial delays in the death penalty postconviction relief process. The committee was created because of the inability of the capital collateral representative to properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delays in those cases. That committee recognized that, to make the process work properly, each death row prisoner should have counsel available to represent him or her in postconviction relief proceedings. The committee



found that one of the major problems with the process was that the triggering mechanism to start or assure movement of the postconviction relief proceedings was the signing of a death warrant. In a number of instances, the courts were not aware of the problems concerning representation of a defendant until a death warrant was signed. In other instances, the committee found that, when postconviction relief motions had been filed, they clearly had not moved at an orderly pace and the signing of a death warrant was being used as a means to expedite the process. The committee recommended that specific named counsel should be designated to represent each prisoner not later than 30 days after the defendant's judgment and sentence of death becomes final. To assure that representation, the committee's report noted that it was essential that there be adequate funding of the capital collateral representative and sought temporary assistance from The Florida Bar in providing pro bono representation for some inmates.

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.

In the event the capital collateral representative is not fully funded and available to provide proper representation for all death penalty defendants, the reduction in the time period would not be justified and would necessarily have to be repealed, and this Court will forthwith entertain a petition for the repeal of the rule. In this context, it is important to emphasize that the governor agrees that absent the circumstance where a competent death-sentenced individual voluntarily requests that a death warrant be signed, no death warrants will be issued during the initial round of federal and state review, provided that counsel for death penalty defendants is proceeding in a timely and diligent manner. This Court agrees that the initial round of postconviction proceedings should proceed in a deliberate but timely manner without the pressure of a pending death warrant. Subdivision 3.851(b)(4) above addresses concerns of The Florida Bar and The Florida Bar Foundation.

The provisions of the present rule 3.851 providing for time periods where a 60-day warrant is signed by the governor are abolished because they are unnecessary if the guidelines are followed. The proceedings and grounds for postconviction relief remain as provided under Florida Rule of Criminal Procedure 3.850, which include, as one of the grounds, the opportunity for a defendant to present newly discovered evidence in accordance with *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), *Jones v. State*, 591 So. 2d 911 (Fla. 1991), and *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989).

1996 Amendment. Subdivision (c) is added to make the Court's decision in *Huff v. State*, 622 So. 2d 982 (Fla. 1993), applicable to all rule 3.850 motions filed by a prisoner who has been sentenced to death. Florida Rule of Judicial Administration 2.071(b) allows for telephonic and teleconferencing communication equipment to be utilized "for a motion hearing, pretrial conference, or a status conference." Teleconferencing sites have been established by the Department of Management Services, Division of Communications at various metropolitan locations in the state. The "Shevin Study" examined, at this Court's request, the issue of delays in

capital postconviction relief proceedings and noted that travel problems of counsel cause part of those delays. The Court strongly encourages the use of the new telephonic and teleconferencing technology for postconviction relief proceedings that do not require evidentiary hearings, such as the hearing required under subdivision (c) of this rule. Only the attorneys need be involved in a hearing held under subdivision (c) of this rule; attendance of the postconviction defendant is not required.

2001 Amendment. Several new procedures are added to rule 3.851. New subdivision (b), Appointment of Postconviction Counsel, is added to ensure appointment of postconviction counsel upon the Supreme Court of Florida's issuance of mandate on direct appeal. New subdivision (c), Preliminary Procedures, provides for, among other things, the assignment of a qualified judge within 30 days after mandate issues on direct appeal and status conferences every 90 days after the assignment until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. These status conferences are intended to provide a forum for the timely resolution of public records issues and other preliminary matters. New subdivision (f), Procedure; Evidentiary Hearing; Disposition, sets forth general procedures. Most significantly, that subdivision requires an evidentiary hearing on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital postconviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay. See *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993*, 772 So. 2d 488, 491 (Fla. 2000).

2006 Amendment. The amendments provide for the appointment of Registry Counsel in areas of the state that are not served by a Capital Collateral Regional Counsel. Counsel are allowed to appear at status conferences electronically to authorize both telephonic and video appearances.

2013 Amendment. Only minor amendments are made to rule 3.851.

Criminal Court Steering Committee Note

2014 Amendment. The rule was amended to comply with the "Timely Justice Act of 2013," chapter 2013-216, Laws of Florida, and to preclude extended postconviction litigation. Because the Sixth Amendment does not apply to postconviction proceedings, the Steering Committee concluded that a defendant has no constitutional right to self-representation in postconviction matters. The Steering Committee also concluded that the capital postconviction process would function more effectively if a defendant were represented by an attorney, unless the defendant seeks to dismiss postconviction proceedings and discharge counsel pursuant to subdivision (i). The Steering Committee concluded that the lead attorney should not be allowed to participate in capital postconviction litigation on a limited basis and that the lead attorney should remain in the case until the litigation is concluded or until the court allows withdrawal. The Steering Committee also determined that the postconviction process would not work efficiently unless the trial judge was responsible for case management. Case management orders are required throughout the postconviction process in order to maintain a capital postconviction computer database.



Under the amended rule, the clerk of the trial court is required to retain a copy of the record so that it will be available for postconviction litigation, especially following issuance of the death warrant. Additionally, the Steering Committee added provisions to the pleading requirements for motions and created a provision that allows for written closing argument memoranda, formalizing by rule a practice that is already utilized throughout the state in capital postconviction proceedings. In an effort to prevent delay, the amended rule requires written reports from experts who will testify at the evidentiary hearing, and allows for witnesses to testify via videoconferencing, even over the objections of the parties. Finally, the amended rule requires the Attorney General to inform the Clerk of the Florida Supreme Court and the defendant's counsel of record when a defendant has completed his or her litigation in order for the Clerk to report to the Governor pursuant to Florida Statute 922.052.



RULE 3.852 | CAPITAL POSTCONVICTION PUBLIC RECORDS PRODUCTION

(a) Applicability and Scope.

(1) This rule is applicable only to the production of public records for capital postconviction defendants and does not change or alter the time periods specified in Florida Rule of Criminal Procedure 3.851. Furthermore, this rule does not affect, expand, or limit the production of public records for any purposes other than use in a proceeding held pursuant to rule 3.850 or rule 3.851.

(2) This rule shall not be a basis for renewing requests that have been initiated previously or for relitigating issues pertaining to production of public records upon which a court has ruled prior to October 1, 1998.

(3) This rule is to be used in conjunction with the forms found at Florida Rule of Criminal Procedure 3.993.

(b) Definitions.

(1) "Public records" has the meaning set forth in section 119.011, Florida Statutes.

(2) "Trial court" means:

(A) the judge who entered the judgment and imposed the sentence of death; or

(B) the judge assigned by the chief judge.

(3) "Records repository" means the location designated by the secretary of state pursuant to section 27.7081, Florida Statutes, for archiving capital postconviction public records.

(4) "Collateral counsel" means a capital collateral regional counsel from one of the three regions in Florida; a private attorney who has been appointed to represent a capital defendant for postconviction litigation; or a private attorney who has been hired by the capital defendant or who has agreed to work pro bono for a capital defendant for postconviction litigation.



(5) "Agency" means an entity or individual as defined in section 119.011, Florida Statutes, that is subject to the requirements of producing public records for inspection under section 119.07, Florida Statutes.

(6) "Index" means a list of the public records included in each container of public records sent to the records repository.

(c) Filing and Service.

(1) The original of all notices, requests, or objections filed under this rule must be filed with the clerk of the trial court. Copies must be served on the trial court, the attorney general, the state attorney, collateral counsel, and any affected person or agency, unless otherwise required by this rule.

(2) Service shall be made pursuant to Florida Rule of Criminal Procedure 3.030.

(3) In all instances requiring written notification or request, the party who has the obligation of providing a notification or request shall provide proof of receipt.

(4) Persons and agencies receiving postconviction public records notifications or requests pursuant to this rule are not required to furnish records filed in a trial court prior to the receipt of the notice.

(d) Action Upon Issuance of Mandate.

(1) Within 15 days after receiving written notification of the Supreme Court of Florida's mandate affirming the sentence of death, the attorney general shall file with the trial court a written notice of the mandate and serve a copy of it upon the state attorney who prosecuted the case, the Department of Corrections, and the defendant's trial counsel. The notice to the state attorney shall direct the state attorney to submit public records to the records repository within 90 days after receipt of written notification and to notify each law enforcement agency involved in the investigation of the capital offense, with a copy to the trial court, to submit public records to the records repository within 90 days after receipt of written notification. The notice to the



Department of Corrections shall direct the department to submit public records to the records repository within 90 days after receipt of written notification. The attorney general shall make a good faith effort to assist in the timely production of public records and written notices of compliance by the state attorney and the Department of Corrections with copies to the trial court.

(2) Within 90 days after receiving written notification of issuance of the Supreme Court of Florida's mandate affirming a death sentence, the state attorney shall provide written notification to the attorney general and to the trial court of the name and address of any additional person or agency that has public records pertinent to the case.

(3) Within 90 days after receiving written notification of issuance of the Supreme Court of Florida's mandate affirming a death sentence, the defendant's trial counsel shall provide written notification to the attorney general and to the trial court of the name and address of any person or agency with information pertinent to the case which has not previously been provided to collateral counsel.

(4) Within 15 days after receiving written notification of any additional person or agency pursuant to subdivision (d)(2) or (d)(3) of this rule, the attorney general shall notify all persons or agencies identified pursuant to subdivisions (d)(2) or (d)(3), with a copy to the trial court, that these persons or agencies are required by law to copy, index, and deliver to the records repository all public records pertaining to the case that are in their possession. The person or agency shall bear the costs related to copying, indexing, and delivering the records. The attorney general shall make a good faith effort to assist in the timely production of public records and a written notice of compliance by each additional person or agency with a copy to the trial court.

(e) Action Upon Receipt of Notice of Mandate.

(1) Within 15 days after receipt of a written notice of the mandate from the attorney general, the state attorney shall provide written notification to each law enforcement agency involved in the specific case to submit public records to the records repository within 90 days after receipt of written notification. A copy of the notice shall be served upon the defendant's trial counsel and the trial court. The state attorney shall make a good faith effort to assist in the timely production of public records and a written notice of compliance by each law enforcement agency with a copy to the trial court.

(2) Within 90 days after receipt of a written notice of the mandate from the attorney general, the state attorney shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, that were produced in the state attorney's investigation or prosecution of the case. The state attorney shall bear the costs. The state attorney shall also provide written notification to the attorney general and the trial court of compliance with this section, including certifying that, to the best of the state attorney's knowledge or belief, all public records in the state attorney's possession have been copied, indexed, and delivered to the records repository as required by this rule.

(3) Within 90 days after receipt of written notification of the mandate from the attorney general, the Department of Corrections shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, determined by the department to be relevant to the subject matter of a proceeding under rule 3.851, unless such copying, indexing, and delivering would be unduly burdensome. To the extent that the records determined by the department to be relevant to the subject matter of a proceeding under rule 3.851 are the defendant's medical, psychological, substance abuse, or psychiatric records, upon receipt of express consent by the defendant or pursuant to the authority of a court of competent jurisdiction, the department shall provide a copy of the

defendant's medical, psychological, substance abuse, and psychiatric records to the defendant's counsel of record. The department shall bear the costs. The secretary of the department shall provide written notification to the attorney general and the trial court of compliance with this section certifying that, to the best of the secretary of the department's knowledge or belief, all such public records in the possession of the secretary of the department have been copied, indexed, and delivered to the records repository.

(4) Within 90 days after receipt of written notification of the mandate from the state attorney, a law enforcement agency shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, which were produced in the investigation or prosecution of the case. Each agency shall bear the costs. The chief law enforcement officer of each law enforcement agency shall provide written notification to the attorney general and the trial court of compliance with this section including certifying that, to the best of the chief law enforcement officer's knowledge or belief, all such public records in possession of the agency or in possession of any employee of the agency, have been copied, indexed, and delivered to the records repository.

(5) Within 90 days after receipt of written notification of the mandate from the attorney general, each additional person or agency identified pursuant to subdivision (d)(2) or (d)(3) of this rule shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, which were produced during the prosecution of the case. The person or agency shall bear the costs. The person or agency shall provide written notification to the attorney general and the trial court of compliance with this subdivision and shall certify, to the best of the person or agency's knowledge and belief, all such public records in the possession of the person or agency have been copied, indexed, and delivered to the records repository.

(f) Exempt or Confidential Public Records.

(1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07, Florida Statutes, or article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

(2) Upon the entry of an appropriate court order, sealed containers subject to an inspection by the trial court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.

(3) Collateral counsel must file a motion for in camera inspection within 30 days of receipt of the notice of delivery of the sealed records to the central records repository, or the in camera inspection will be deemed waived.

(g) Demand for Additional Public Records.

(1) Within 240 days after collateral counsel is appointed, retained, or appears pro bono, such counsel shall send a written demand for additional public records to each person or agency submitting public records or identified as having information pertinent to the case under subdivision (d) of this rule, with a copy to the trial court. However, if collateral counsel was appointed prior to October 1, 2001, then within 90 days after collateral counsel is appointed, retained, or appears pro bono, such counsel shall send a written demand for additional public records to each person or agency submitting public records or identified as having

information pertinent to the case under subdivision (d) of this rule.

(2) Within 90 days of receipt of the written demand, each person or agency notified under this subdivision shall deliver to the records repository any additional public records in the possession of the person or agency that pertain to the case and shall certify to the best of the person or agency's knowledge and belief that all additional public records have been delivered to the records repository or, if no additional public records are found, shall recertify that the public records previously delivered are complete. To the extent that the additional public records are the defendant's Department of Corrections' medical, psychological, substance abuse, or psychiatric records, upon receipt of express consent by the defendant or pursuant to the authority of a court of competent jurisdiction, the department shall provide a copy of the defendant's medical, psychological, substance abuse, and psychiatric records to the defendant's counsel of record. A copy of each person's or agency's certification shall be provided to the trial court.

(3) Within 60 days of receipt of the written demand, any person or agency may file with the trial court an objection to the written demand described in subdivision (g)(1). The trial court shall hear and rule on any objection no later than the next 90-day status conference after the filing of the objection, ordering a person or agency to produce additional public records if the court determines each of the following exists:

(A) Collateral counsel has made a timely and diligent search as provided in this rule.

(B) Collateral counsel's written demand identifies, with specificity, those additional public records that are not at the records repository.

(C) The additional public records sought are relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence.

(D) The additional public records request is not overly broad or unduly burdensome.

(h) Cases in Which Mandate was Issued Prior to Effective Date of Rule.

(1) If the mandate affirming a defendant's conviction and sentence of death was issued prior to October 1, 1998, and no initial public records requests have been made by collateral counsel by that date, the attorney general and the state attorney shall file notifications with the trial court as required by subdivisions (d) and (e) of this rule.

(2) If on October 1, 1998, a defendant is represented by collateral counsel and has initiated the public records process, collateral counsel shall, within 90 days after October 1, 1998, or within 90 days after the production of records which were requested prior to October 1, 1998, whichever is later, file with the trial court and serve a written demand for any additional public records that have not previously been the subject of a request for public records. The request for these records shall be treated the same as a request pursuant to subdivisions (d)(3) and (d)(4) of this rule, and the records shall be copied, indexed, and delivered to the repository as required in subdivision (e)(5) of this rule.

(3) Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:

(A) that was not previously the subject of an objection;

(B) that was received or produced since the previous request; or

(C) that was, for any reason, not produced previously.

The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the



person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been produced previously. A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.

(4) In all instances in subdivision (h) which require written notification the receiving party shall provide proof of receipt by return mail or other carrier.

(i) Limitation on Postproduction Request for Additional Records.

(1) In order to obtain public records in addition to those provided under subdivisions (e), (f), (g), and (h) of this rule, collateral counsel shall file an affidavit in the trial court which:

(A) attests that collateral counsel has made a timely and diligent search of the records repository; and

(B) identifies with specificity those public records not at the records repository; and

(C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and

(D) shall be served in accord with subdivision (c)(1) of this rule.

(2) Within 30 days after the affidavit of collateral counsel is filed, the trial court may order a person or agency to produce additional public records only upon finding each of the following:

(A) collateral counsel has made a timely and diligent search of the records repository;

(B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;



(C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and

(D) the additional records request is not overly broad or unduly burdensome.

(j) Authority of the Court. In proceedings under this rule the trial court may:

(1) compel or deny disclosure of records;

(2) conduct an in-camera inspection;

(3) extend the times in this rule upon a showing of good cause;

(4) require representatives from government agencies to appear at status conferences to address public records issues;

(5) impose sanctions upon any party, person, or agency affected by this rule including initiating contempt proceedings, taxing expenses, extending time, ordering facts to be established, and granting other relief; and

(6) resolve any dispute arising under this rule unless jurisdiction is in an appellate court.

(k) Scope of Production and Resolution of Production Issues.

(1) Unless otherwise limited, the scope of production under any part of this rule shall be that the public records sought are not privileged or immune from production and are either relevant to the subject matter of the proceeding under rule 3.851 or are reasonably calculated to lead to the discovery of admissible evidence.

(2) Any objections or motions to compel production of public records pursuant to this rule shall be filed within 30 days after the end of the production time period provided by this rule. Counsel for the party objecting or moving to compel shall file a copy of the objection or motion directly with the trial court. The trial court shall hold a hearing on the objection or motion on an expedited basis.



(1) Destruction of Records Repository Records. Sixty days after a capital sentence is carried out, after a defendant is released from incarceration following the granting of a pardon or reversal of the sentence, or after a defendant has been resentenced to a term of years, the attorney general shall provide written notification of this occurrence to the secretary of state with service in accord with subdivision (c)(1). After the expiration of the 60 days, the secretary of state may then destroy the copies of the records held by the records repository that pertain to that case, unless an objection to the destruction is filed in the trial court and served upon the secretary of state and in accord with subdivision (c)(1). If no objection has been served within the 60-day period, the records may then be destroyed. If an objection is served, the records shall not be destroyed until a final disposition of the objection.

Criminal Court Steering Committee Note

2014 Amendment. The rule is amended to require the state attorney and attorney general to manage compliance with the public records process.

RULE 3.853 | MOTION FOR POSTCONVICTION DNA TESTING

(a) Purpose. This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.

(b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) Procedure.

(1) Upon receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is facially insufficient. If the motion is facially



sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) Upon receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to section 27.52, Florida Statutes.

(5) The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that physical evidence that may contain DNA still exists.

(B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

(C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality



Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

(d) Time Limitations. The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(e) Rehearing. The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(f) Appeal. An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.



APPENDIX



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