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DATE: April 14, 1998

**HOUSE OF REPRESENTATIVES
COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: SB 898

RELATING TO: Repeal of Rule 3.852, Florida Rules of Criminal Procedure

SPONSOR(S): Senator Burt

COMPANION BILL(S): SB 874 (compare)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CIVIL JUSTICE & CLAIMS YEAS 9 NAYS 0
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I. SUMMARY:

This bill repeals Rule 3.852, Florida Rules of Criminal Procedure. This rule was adopted by the Florida Supreme Court in October 1996. Rule 3.852 is a "rule of discovery" applicable to capital postconviction defendants requesting public records under chapter 119, Florida Statutes, for collateral proceedings.

This bill shall take effect on July 1, 1998. It shall take effect only if enacted by the affirmative vote of two-thirds of the membership of each house of the legislature. Art. V, § 2(a), Fla. Const.

This bill repeals Rule 3.852 of the Florida Rules of Criminal Procedure.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

1. Overview of Death Penalty Proceedings.

After a defendant has been sentenced to death, he or she is entitled to challenge the conviction and sentence in three distinct stages. First, the public defender or private counsel is required to file a *direct appeal* to the Florida Supreme Court. Review of the Florida Supreme Court's decision is to the United States Supreme Court by petition for certiorari.

Second, after the direct appeal concludes, *state postconviction* proceedings or *collateral review*, begins. The Capital Collateral Regional Counsel (CCRC) represents defendants in postconviction proceedings. State postconviction proceedings are controlled by Rules 3.850 and 3.851, Florida Rules of Criminal Procedure. Unlike a direct appeal which challenges the legal errors apparent from the trial transcripts or record on appeal, a postconviction proceeding is designed to raise claims which are collateral to what transpired in the trial court. Consequently, postconviction proceedings usually involve three categories of claims: (1) ineffective assistance of trial counsel; (2) *Brady* violations, *i.e.*, a due process denial by the prosecution's suppression of material, exculpatory evidence; and (3) newly discovered evidence, for example, post-trial recantation by a principal witness. Since these claims require new fact-finding, Rules 3.850 & 3.851 motions are filed in the trial court which sentenced the defendant to death. Appeals from Rules 3.850 & 3.851 motions are to the Florida Supreme Court. (At this point, CCRC usually will raise the claim of ineffective assistance of appellate counsel by writ of habeas corpus.)

The third and what is intended to be the final stage is federal habeas corpus, a proceeding controlled by 28 U.S.C. § 2254 (a). Federal habeas allows a defendant to petition the federal district court to review whether the conviction or sentence violates or was obtained in violation of federal law. Federal habeas is limited to consideration of claims previously asserted in direct appeal or in state postconviction proceedings. Review of habeas is to the Circuit Court of Appeals and then to the United States Supreme Court.

Under current practice, the Governor will not sign a death warrant until the conclusion of the state post-conviction proceedings and federal habeas review. However, once the Governor signs a death warrant, a defendant will typically file a second 3.850 motion and a second federal habeas petition along with motions to stay the execution.

2. Overview of Public Records Provisions.

Article I, Section 24(a), Florida Constitution, provides that "[e]very person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state ... except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." Article I, Section 24(c) provides that the legislature may exempt certain records and meetings from the requirements of subsection (a) by general law, providing that such a law must "state with specificity the public necessity justifying the exemption and shall be no broader than necessary to accomplish the stated purpose of the law."

Section 119.011(1), F.S., defines "public records" to include: all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material; regardless of the physical form, characteristics, or means of transmission; made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

Section 119.07(1), F.S., states that "[e]very person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at any reasonable time, [and] under reasonable conditions...."

Subsection (3) of section 119.07, F.S., contains numerous exemptions from the provisions of both s. 119.07(1), F.S., and Art. I, s. 24(a), of the Florida Constitution. Several exemptions relate to the criminal justice system. Section 119.07(3)(b), F.S., exempts "[a]ny active criminal intelligence information and active criminal investigative information" (see also ss. 119.07(3)(c), (e), (f), (g), (h), and (k), F.S.). The term "active criminal intelligence information" is defined in s. 119.011(3)(d), F.S., as information "relat[ing] to intelligence gathering conducted with a reasonable, good faith belief that it will lead to detection of ongoing or reasonably anticipated criminal activities." The term "active criminal investigative information" is defined in s. 119.011(3)(d), F.S., as information "relat[ing] to an ongoing investigation which is continuing with a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future."

Further, section 119.07(3)(l), F.S., contains an exemption for attorney work-product, defined as a public record which "reflects the mental impression, conclusion, litigation strategy, or legal theory of the attorney or the agency, and which was prepared exclusively for civil or criminal litigation...." The exemption exists until the conclusion of the litigation. The exception contains a provision related to capital collateral proceedings, as follows:

For purposes of capital collateral litigation as set forth in s. 27.2001, the Attorney General's Office is entitled to claim this exemption for those public records prepared for direct appeal as well as for all capital collateral litigation after direct appeal until execution of sentence or imposition of a life sentence.

3. Studies on Delays in the Proceedings and the Chapter 119 Problem.

A longstanding criticism of the death penalty proceedings is that the process takes far too much time due in large measure to unnecessary delays. In the 1990s, several groups studied the problem. In 1991, a committee chaired by Justice Overton was created to study the Capital Collateral Representative's (CCR) inability to "properly represent all death penalty inmates in postconviction relief cases and because of the resulting substantial delays in those cases." Rule 3.851 was a result of the Overton Committee's work. Rule 3.851 provides a one-year limitation for the initiation of postconviction proceedings in capital cases. Previously death-sentenced defendants had a two-year limitation under Rule 3.850.

In 1996, former Attorney General Robert Shevin submitted a report on CCR to Florida's Chief Justice. The Shevin Report identified what it called the "Chapter 119 problem." The Report stated:

One of the major problems confronting CCR attorneys is the absence of any formal discovery attendant to 3.850 motions. Discovery of certain documents, such as a prosecutor's files and the local police files, are obviously necessary for CCR to prepare a 3.850 motion.... Because there is no formal 3.850 discovery mechanism, CCR is required to seek documents through Chapter 119 public records requests.

As the report concluded, a major problem with chapter 119 requests was that the trial court that ultimately determined the 3.850 motion had no involvement administering the chapter 119 request; as a result, CCR was required to file "separate civil lawsuits to resolve chapter 119 disputes, resulting in significant delays and time consuming civil litigation." Mr. Shevin went on to recommend that the supreme court enact a "Rule of Discovery in 3.850 proceedings, with expedited time schedules for both requesting and providing public records, for the filing of objections, and for the resolution of disputes by the trial judge who eventually will rule on the 3.850 motion." The supreme court acted on this recommendation by promulgating Rule 3.852, see section "D" below.

In the Fall of 1996 and in early 1997, a commission chaired by former Justice McDonald also studied the problem. The commission's primary recommendation was to break up CCR into three separate and distinct regional representatives having offices in "Northern, Central and Southern Florida." The 1997 Legislature enacted this recommendation. The commission also reported that "[o]ne consistent criticism from the Attorney General, State Attorneys, and attorneys for state agencies is that CCR abuses [the] public records process leading to unwarranted delay." The commission recommended that CCR attorneys be required to sign public records requests, thereby vouching that the material requested is relevant, and that they provide notice to the agencies' legal counsel.

4. Supreme Court Promulgates Rule 3.852.

After the Shevin Report's release, the Florida Supreme Court, on its own initiative, proposed rule 3.852 in April 1996. *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production*, 673 So. 2d 483 (Fla. 1996). After considering comments and oral arguments from interested parties, the court amended and adopted Rule 3.852 in October 1996. *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production*, 683 So. 2d 475 (Fla. 1996). In adopting the rule, the court explained that it was promulgated in response to its own study of "problems with procedures pertaining to the production of public records in capital postconviction proceedings." *Id.*

The court rejected an argument, raised in the public comments, that the rule would unconstitutionally limit a capital postconviction defendant's constitutional and statutory rights to production of public records. *Id.* at 475-76. The court clarified that the rule was "a carefully tailored discovery rule for public records production ancillary to rule 3.850 or 3.851 proceedings." *Id.* at 476. The court stated:

The time requirements and waiver provisions of the rule pertain only to documents which are sought for use in these proceedings. The rule does not affect, expand, or limit the production of public records for any purpose other than use in a 3.850 or 3.851 proceeding. *Id.*

The court also stated that the rule was not a rule of evidence and that any public record offered by a postconviction defendant in a proceeding “shall be admitted on the basis of the applicable law of evidence.” *Id.*

The 1997 Legislature provided that all requests for records in capital postconviction proceedings must be made in accordance with Rule 3.852, and the request must be approved by the capital collateral regional counsel. § 27.708(3), F.S.

What follows is a summary of the main features of Rule 3.852.

- ▶ *Applicability.* It is a rule of discovery, applicable to all chapter 119 public records requests by postconviction defendants for use in postconviction proceedings.
- ▶ *Trial court hears requests/objections.* Requires that all requests and objections for production of public records be filed in the trial court which entered the death sentence or which is handling or will handle the postconviction motion. Allows trial court to consider complaints or a motion to compel production of a public record. Prior to the rule’s adoption, disputes over the production of public records were settled in a separate civil action when the request was of agencies outside the judicial circuit in which the case was tried or those within the circuit which had no connection to the state attorney. *See Hoffman v. State*, 613 So. 2d 405 (Fla. 1992); § 119.07, F.S.
- ▶ *Timetables.* Provides deadlines for filing requests for production of public records. A public records request of law enforcement and other affected agencies must be made within 30 days after counsel is designated; within 120 days for a public record belonging to any other agency. Requires that supplemental requests be made within 90 days after the initial production. Requires agency to produce or object within 60 days of the request. Provides that all motions or objections shall be decided by the trial court “on an expedited basis.”
- ▶ *Waivers.* Failure to comply with the timetables waives the production or objection for purposes of any capital postconviction proceedings. Other requests are precluded, unless it is demonstrated to the trial court that the existence of the records was unknown and the need was unknown when the time periods expired and could not have been known through the exercise of due diligence.
- ▶ *Scope of the rule.* Specifies that the rule only governs discovery in 3.850 and 3.851 proceedings and “does not render inadmissible into evidence any relevant evidence which is in the possession of a postconviction defendant.”

5. Supreme Court Tolls Time Limitations in Rule 3.852.

In October 1997, the three offices of the CCRCs moved the Florida Supreme Court to “toll” (suspend) the time limitations under Rule 3.852. *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production--* Rule 3.852, 700 So. 2d 680 (Fla. 1997). The basis for these motions was to allow time for the transition from a single CCR office to three regional offices and to allow sufficient time to hire the necessary lawyers to replace the lawyers who left the prior CCR office. *Id.* The court concluded that it had no choice but to grant a tolling of Rule 3.852 until January 15, 1998 for a total of 43 death-sentenced defendants. *Id.*

On January 15, 1998, after reviewing the schedules and inventories from the CCRCs, the court entered a "blanket tolling of time limitations set forth in rule 3.852 until June 1, 1998, for each of those cases ... for which an extension was requested." *In re Amendment to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production (Time Tolling)*, No. 92,026 (Fla. Jan. 15, 1998). In entering this order the court stated:

This tolling will provide an opportunity for the administrative problems to be resolved and will allow the legislature to examine and address the administrative problems currently being experienced by the regional offices as well as the regional offices' contentions that more funding is needed before rule 3.852 can be implemented. *Id.*

Justice Wells dissented from the decision to stay Rule 3.852 until June 1998. Justice Wells made a number of recommendations to resolve the current problem. *Id.* In doing so, Justice Wells took aim at the rule 3.852 and chapter 119 problem. *Id.* Although acknowledging that the rule "has not been fully effectuated" because of the court's granting extensions of time, he stated that the CCRCs were asserting that the rule compels them to file numerous motions to produce records in many state agencies. *Id.* Further, "[i]n some cases, circuit judges report receiving up to 100 motions to compel productions of public records." *Id.* Justice Wells stated, "This procedure inhibits successful records production, causes more delays in the circuit courts, and obviously is not working as intended by our rule, or in my view, within the intent of chapter 119." *Id.* Justice Wells recommended the following:

- ▶ The legislature should amend chapter 119 and chapter 27 to specify what records are subject to production under chapter 119 in a records request pursuant to a Rule 3.851 proceeding and which records may be requested using resources appropriated for postconviction capital representation.
- ▶ Agencies possessing such records should send them to a single repository at a stated time subsequent to notification of a defendant's death sentence.
- ▶ The Attorney General should be responsible for notifying agencies and ensuring that such records are timely sent to the repository. *Id.*

B. EFFECT OF PROPOSED CHANGES:

This bill repeals Rule 3.852 of the Florida Rules of Criminal Procedure. The effect of this would be to abolish the public records discovery rules relating to postconviction proceedings established by the Florida Supreme Court in October 1996 when it adopted Rule 3.852.

Senate Bill 1330 establishes a regional records repository and establishes timetables for production of public records in capital postconviction proceedings. Because SB 1330 relates to public records requests in postconviction proceedings, passage of this bill (SB 898) is necessary in order to avoid a conflict with existing Rule 3.852. If SB 1330 becomes law, it will control public records requests in postconviction proceedings. If SB 898 becomes law and SB 1330 does not become law, the effect of this bill would be to return to the postconviction public records procedures in place before the adoption of

Rule 3.852, see "Present Situation," or the supreme court could adopt a different rule on the subject.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

N/A

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

N/A

(3) any entitlement to a government service or benefit?

N/A

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

N/A

b. Does the bill require or authorize an increase in any fees?

N/A

c. Does the bill reduce total taxes, both rates and revenues?

N/A

d. Does the bill reduce total fees, both rates and revenues?

N/A

e. Does the bill authorize any fee or tax increase by any local government?

N/A

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

N/A

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

N/A

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

N/A

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

N/A

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

E. SECTION-BY-SECTION RESEARCH:

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

N/A

2. Direct Private Sector Benefits:

N/A

3. Effects on Competition, Private Enterprise and Employment Markets:

N/A

D. FISCAL COMMENTS:

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

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V. COMMENTS:

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

VII. SIGNATURES:

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