

**2009 FLORIDA COLLEGE
OF ADVANCED JUDICIAL STUDIES**

**POSTCONVICTION
PROCEEDINGS IN
CAPITAL CASES**

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POSTCONVICTION PROCEEDINGS IN CAPITAL CASES

I. POSTCONVICTION MOTIONS UNDER RULE 3.851

A. Scope of the Rule

Rule 3.851 of the Florida Rules of Criminal Procedure provides a separate set of procedures for postconviction motions by defendants who have been sentenced to death. This rule has been substantially revised and applies to motions filed after October 1, 2001. *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852 and 3.993 and Florida Rule of Judicial Administration 2.050*, 802 So. 298 (Fla. 2001). Prior to the 2001 revision, rule 3.851 merely supplemented rule 3.850 by adding certain requirements that apply only in death cases.

The rule was most recently amended on December 7, 2006. *Amendments to Florida Rules of Criminal Procedure 3.851 and*

3.590, 945 So.2d 1124 (Fla. 2006). The relevant amendments will be discussed throughout these materials.

B. Pleading Requirements- Rule 3.851(e)

Special pleading requirements are set out in rule 3.851(e). This subdivision provides that an initial postconviction motion and memorandum of law must not exceed seventy-five pages exclusive of the attachments. A copy of the judgment and sentence must be included with the attachments.

1. Contents of Motion

An initial postconviction motion in a capital case must include:

(a) a statement specifying the judgment and sentence under attack and the name of the court that rendered the judgment;

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

(c) the nature of relief sought;

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

(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. Fla.R.Crim.P. 3.851(e)(1).

Each claim must be pled separately and the accompanying memorandum must set forth the applicable case law supporting

the request for relief as to each claim. If the motion includes claims that were raised on direct appeal or could have been raised on direct appeal, the memorandum must contain a brief statement explaining why those claims are being raised in the motion. Fla.R.Crim.P. 3.851(e)(1).

2. Signature and Oath

The motion for postconviction relief must be signed by the defendant and it must be under oath. Fla.R.Crim.P. 3.815(e)(1); *Scott v. State*, 464 So. 2d 1171 (Fla. 1985), *clarified by Gorham v. State*, 494 So. 2d 211 (Fla. 1986). In *State v. Shearer*, 628 So. 2d 1102 (Fla. 1993), the Supreme Court held that declaration in the form set out in section 92.525, Florida Statutes, is acceptable in lieu of an oath before a notary public. The declaration in section 92.525 states "Under penalties of perjury, I declare that I have read the foregoing [document] and that the facts stated in it are true."≡

3. Answer- Rule 3.851(f)(3)(A)

The trial court does not issue an order to show cause as it would in a motion filed under rule 3.850. Instead, rule 3.851 requires the state to file an answer to the motion. Under rule 3.851(f)(3)(A) the answer to an initial postconviction motion must

be filed within sixty days of the date the motion was filed. Like the motion itself, the answer may not exceed seventy-five pages exclusive of the attachments. The answer must address the legal insufficiency of any claim in the motion, respond to the allegations of the motion, and address any procedural bars.≅ Rule 3.851(f)(3)(A). The rule also provides that A[a]s to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.≅

4. Amendments- Fla.R.Crim.P. 3.851(f)(4)

A defendant may seek to amend his motion by filing a motion to amend, showing good cause. The motion may be amended at any time up until thirty days before an evidentiary hearing. The motion to amend must contain a copy of the proposed amended claim and explain why it was not asserted earlier. If the motion to amend is granted, the state must file an answer to the amended claim within twenty days. The need to amend a postconviction motion is not a ground for a continuance of a scheduled evidentiary hearing unless manifest injustice would occur if the hearing were not continued.

5. Successive Motions- Rule 3.851(e)(2)

A motion is considered A successive≅ under this rule A if a state court has previously ruled on a postconviction motion

challenging the same judgment and sentence.≡ Fla. R. Crim. P. 3.851(e)(2).

A second or successive postconviction motion in the same case must not exceed twenty-five pages exclusive of the attachments and, in addition to the pleading requirements that apply to an initial motion, it must also include a statement regarding the disposition of all claims raised in previous postconviction proceedings and a statement explaining why the claims raised in the present motion were not previously asserted. Fla.R.Crim.P. 3.851(e)(2). For further discussion regarding the procedural bar to successive motions, see part H.2, *infra*.

If a successive motion contains a claim of newly-discovered evidence, failure to disclose exculpatory evidence, or knowing use of perjured testimony, it must also include:

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

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

(c) copies of any documents and affidavits supporting the claim: and

(d) a statement explaining why any witness supporting the claim was not previously available. Fla.R.Crim.P. 3.851(e)(2)(C).

As with the requirements that apply to the defendant, the state's answer to a successive motion may not exceed twenty-five pages exclusive of the attachments. The answer must respond to each claim in the motion and it must state the reason or reasons that an evidentiary hearing is or is not required. Fla.R.Crim.P. 3.851(f)(3)(B). The state's answer to a successive postconviction motion must be filed within twenty days of date the motion is filed. Fla.R.Crim.P. 3.851(f)(3)(B).

6. Legally Insufficient Motion

If a postconviction motion (or an individual claim within the motion) is legally insufficient, the court should not deny the motion or claim but rather should dismiss (or strike) it and give defendant an opportunity to amend to state a legally sufficient claim. *Spera v. State*, 971 So.2d 754 (Fla. 2007). If a proper amendment is not filed within the time frame set by the court (or as required under the rule), the court may then deny the motion or claim with prejudice. *Nelson v. State*, 875 So.2d 579 (Fla. 2004); *Collins v. State*, 898 So.2d 1002 (Fla. 2d DCA 2005).

C. Time Limitation

A motion for postconviction relief under rule 3.851 must be filed within one year after the date the judgment and sentence

becomes final. Fla.R.Crim.P. 3.851(d)(1); *Mills v. State*, 684 So. 2d 801 (Fla. 1996); *Scott v. State*, 657 So. 2d 1129 (Fla. 1995); *Porter v. State*, 653 So. 2d 374 (Fla. 1995).

As explained in rule 3.851(d)(1), a judgment and sentence of death is final

(A) upon the expiration of the time permitted to file a petition for writ of certiorari in the United States Supreme Court seeking review of the decision of the Supreme Court of Florida affirming a judgment and sentence of death (90 days after the opinion becomes final), or (B) upon the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

This definition of finality is consistent with the case law interpreting the previous time limit in rule 3.850(b). See *Burr v. State*, 518 So. 2d 903 (Fla. 1987); *Bundy v. State*, 538 So. 2d 445 (Fla. 1989) (the judgment and sentence becomes final when the United States Supreme Court denies certiorari to the Florida Supreme Court on direct appeal), *vacated on other grounds*, 487 U.S. 1201, 108 S.Ct. 2840, 101 L. Ed. 2d 878 (1988); and *Huff v. State*, 569 So. 2d 1247 (Fla. 1990) (if no petition for writ of certiorari is filed, the judgment and sentence becomes final when the Supreme Court issues its mandate to the trial court).

The end of the time period is measured by the date the motion is filed in the circuit court. However, under a rule of practice referred to as the “mailbox rule”, a *pro se* postconviction motion is deemed to be filed when it is deposited in the prison mailbox or placed in the hands of prison officials for forwarding to the clerk of the circuit court. See *Haag v. State*, 591 So. 2d 614 (Fla. 1992).

Rule 3.851(d)(5) states that the Supreme Court may grant an extension of time to file a postconviction motion if the defendant’s counsel can make a showing of good cause for the extension within the one-year time period. Furthermore, rule 3.851(d)(4) provides that a timely postconviction motion may be supplemented or amended after the expiration of the time period. The right to assert an untimely claim as an amendment to a timely postconviction motion was formerly established in case law. See *Woods v. State*, 531 So. 2d 79 (Fla. 1988).

A motion filed beyond the one-year time limit will generally not be considered by the trial court. Fla.R.Crim.P. 3.851(d)(2). However, the trial court could consider an untimely postconviction motion in any of the following three situations:

(1) Newly-Discovered Evidence: the motion alleges that the facts on which the claim is predicated were not known to the

defendant or the defendant's attorney and could not have been ascertained by the exercise of due diligence;

(2) Retroactive Right: the claim is based on fundamental constitutional right which was not established within the time period and has been held to apply retroactively¹; or

(3) Neglect of Counsel: the failure to meet the one-year deadline was caused by the neglect of postconviction counsel. Fla.R.Crim.P. 3.851(d)(2). The third exception allowing a belated postconviction motion was adopted in *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999), and is now incorporated into the Florida Rules of Criminal Procedure. See Fla.R.Crim.P. 3.850(b)(3); 3.851(d)(2); see also *Medrano v. State*, 748 So. 2d 986 (Fla. 1999).

The purpose of the time limit is to promote fairness and finality, and to avoid piecemeal litigation in postconviction proceedings. See *Johnson v. State*, 536 So. 2d 1009 (Fla. 1988); *Woods v. State*, 531 So. 2d 79 (Fla. 1988). Time limitations on filing a postconviction motion do not violate due process or equal

¹For further discussion of the retroactive application of a constitutional right as an exception to the time limitations under rule 3.851 see *infra* at 61-66.

protection principles. See *Remeta v. Dugger*, 622 So. 2d 452 (Fla. 1993); *Roberts v. State*, 568 So. 2d 1255 (Fla. 1990).

The Supreme Court has declined to consider an untimely claim based on evidence that could have been discovered earlier by the exercise of due diligence, see *Johnson v. State*; *Bolender v. State*, 658 So. 2d 82 (Fla. 1995); *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995), as well as claims based on legal issues that could have been raised within the time limit. See *Demps v. State*, 515 So. 2d 196 (Fla. 1987); *Delap v. State*, 513 So. 2d 1050 (Fla. 1987); *Agan v. State*, 560 So. 2d 222 (Fla. 1990); *Spaziano v. State*, 570 So. 2d 289 (Fla. 1990). The court has considered untimely postconviction claims, however, if the evidence could not have been discovered, with the exercise of due diligence, within the time period set out in the rule. See *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995); *Way v. State*, 630 So. 2d 177 (Fla. 1993); *Provenzano v. Dugger*, 561 So. 2d 541 (Fla. 1990); *Jennings v. State*, 583 So. 2d 316 (Fla. 1991). The court has also deferred the commencement of the time period for asserting an ineffective assistance of counsel claim if the defendant was represented in the first postconviction proceeding by the same defense lawyer who represented defendant at trial. As a practical matter, a defendant in this situation is precluded from raising the claim in

the first postconviction motion. *See Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995).

The defendant has a right to a stay of execution if the governor signs a death warrant during the time period in which a postconviction motion could be filed. Rule 3.851(d)(4) states: AShould the governor sign 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.≡

D. Appointment of Counsel

1. Right to Counsel

It has been said that there is no absolute constitutional right to counsel in postconviction proceedings, *see Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L. Ed. 2d 539 (1987); *Ross v. Moffitt*, 417 U.S. 600, 94 S.Ct. 2437, 41 L. Ed. 2d 341 (1974), but this statement is usually qualified with an explanation that the circumstances of a particular case may require the appointment of counsel. *See Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). Moreover, the need for appointed counsel may rise to the level of a constitutional right if there is no statutory provision for the appointment of counsel in such proceedings. *See Murray*

v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L. Ed. 2d 1 (1989) (Kennedy, J., concurring).

The Office of Capital Collateral Regional Counsel (CCRC) was established under Florida law to represent death row inmates in all postconviction proceedings after the completion of the direct appeal. *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988). The CCRC is charged with the duty of representing indigent death row inmates within its region, in all state postconviction proceedings and all other collateral review proceedings in the federal courts in Florida, the Eleventh Circuit Court of Appeals, and the United States Supreme Court. See §27.702, Fla. Stat. (2003).

The Legislature established three independent offices of the CCRC, corresponding to the three federal districts in Florida. If the assigned office has a conflict of interest, the representative in that office must file a motion to withdraw as counsel and the court will then designate one of the two remaining offices. If the conflict exists in all three offices, the court may then appoint counsel from the registry of lawyers qualified to handle capital postconviction motions. See §§ 27.703, 27.710, Fla.Stat. (2003). Counsel is then compensated according to a statutory fee schedule. See § 27.711, Fla. Stat. (2003). In unusual or extraordinary circumstances the

court may award a fee in excess of the applicable statutory maximum. See *Olive v. Maas*, 811 So. 2d 644 (Fla. 2002).

In 2002, the Legislature created a pilot program which temporarily eliminated the Northern Region Office of the CCRC, replacing it with a privatized process. This was done in an effort to determine whether such privatization would reduce costs and increase efficiency.

In the Northern Region, counsel is appointed from a court registry of qualified attorneys. Once appointed to a capital postconviction case, a registry attorney may not withdraw without a showing of sufficient good cause. Fla. Stat. §27.710(3). An attorney on the registry may not be counsel of record for more than four capital postconviction proceedings at any one time, and must certify such when accepting the appointment.

Pursuant to the legislation's sunset provision, this pilot program will end on July 1, 2007 unless extended by further legislation.

2. Procedure

Rule 3.851(b)(1) provides that the Supreme Court shall issue an order appointing the office of the Capital Collateral Regional Counsel at the time the mandate issues in the direct appeal. Within thirty days of the issuance of the mandate, appointed

counsel must either file a notice of appearance or a motion to withdraw based on a conflict of interest or some other ground. Although the appointment order is issued by the Supreme Court, the notice or motion to withdraw must be filed in the circuit court. If a motion to withdraw is filed, the chief judge or the assigned trial judge must rule on the motion within fifteen days and appoint new collateral counsel if necessary. Fla.R.Crim.P. 3.851(b)(3).

3. Defendant's Right to Discharge Collateral Counsel and Dismiss Postconviction Proceedings

Although an inmate facing execution has a statutory right to the representation of counsel, he may also waive that right. Sections 27.701-708 do not create any right on the part of the Capital Collateral Regional Counsel, or conflict counsel, to provide representation to an inmate who wishes to waive the right to counsel. See *Castro v. State*, 744 So. 2d 986 (Fla. 1999); *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). Prior to 2007, caselaw governed the procedure to be followed when a defendant sought to dismiss his postconviction proceedings and discharge collateral counsel. The rule was recently amended to formalize this procedure. Rule 3.851(i) provides that, when a defendant files a motion seeking both to dismiss pending postconviction proceedings and to discharge collateral counsel, the court shall:

1. Schedule a hearing at which the defendant and his collateral counsel are present;
2. Examine the defendant and hear argument;
3. Appoint 2 or 3 qualified experts to examine the defendant if the court concludes there are reasonable grounds to believe defendant is not mentally competent to waive these rights.

If defendant is found incompetent, the judge shall deny the motion without prejudice. If defendant is found competent (or the court has no basis to believe defendant is not competent), the court shall conduct a *Faretta/Durocher* hearing to determine whether defendant knowingly, freely and voluntarily wishes to dismiss the postconviction proceedings and dismiss collateral counsel. Upon an affirmative finding, the court shall grant defendant's request and a copy of the order and transcript of the proceedings shall be forwarded to the Florida Supreme Court within 30 days. If the court determines that the decision was not made knowingly, freely and voluntarily, the court shall deny the motion without prejudice.

Any conflict in the expert testimony regarding the defendant's competency is an issue of fact to be resolved by the trial judge. See *Castro v. State, supra*. The ultimate determination on the voluntariness of the defendant's decision is reviewed on appeal

under an abuse of discretion standard. *Slawson v. State*, 796 So. 2d 491 (Fla. 2001).

4. Foreign Attorneys

Postconviction motions in capital cases are occasionally filed by lawyers who are not members of the Florida Bar. If the attorney has filed a motion to appear *pro hac vice* along with the rule 3.851 motion, the trial judge must first rule on the motion to appear *pro hac vice* rather than simply striking the postconviction motion on the ground that it was not filed by an attorney authorized to practice in Florida. See *Huff v. State*, 569 So. 2d 1247 (Fla. 1990). Summary denial of the motion for leave to appear deprives the defendant of his right to due process of law.

E. Competency to Proceed

If the defendant is adjudged to be incompetent to proceed on his postconviction claim, a sentence of death must be stayed if the claim requires a factual determination. However, a postconviction claim can be litigated notwithstanding the defendant's incompetence to proceed if it can be resolved on the basis of the record and without the need for additional evidence. Rule 3.851(g). See *Carter v. State*, 706 So. 2d 873 (Fla. 1997).

Rule 3.851(g) outlines the procedure for determining whether a defendant sentenced to death is competent to proceed on a claim for postconviction relief. Experts appointed to examine a

defendant alleged to be incompetent to proceed shall be paid by the county and not from the budget of the Office of Capital Collateral Regional Counsel. *Miami-Dade County v. Jones*, 793 So. 2d 902 (Fla. 2001); Fla. Stat. §43.28 (2003).

F. Disposition of Postconviction Motions

1. Preliminary Procedures

a. Judicial Assignment

Within thirty days of the issuance of the mandate affirming a judgment and sentence of death on direct appeal, the chief judge must assign a qualified trial judge to preside over the postconviction proceeding. Fla.R.Crim.P. 3.851(c)(1). See Fla. R. Jud. Admin. 2.215 (b)(10) (defining who is a “qualified” judge). This provision ensures that a judge will be available to monitor the case during the period of time in which the defendant’s counsel is investigating and evaluating potential postconviction claims. The chief judge is required to submit to the Chief Justice quarterly reports on the status of each capital postconviction claim pending in the circuit.

b. Status Conferences

The assigned judge must conduct a status conference not later than ninety days after the judicial assignment. The judge must then conduct status conferences at least every ninety days thereafter until an evidentiary hearing has been completed or until

the motion has been resolved without a hearing. Fla.R.Crim.P. 3.851(c)(2). During these conferences, the court may consider motions or requests made in connection with a postconviction motion. With the court=s permission, the lawyers may appear at a status conference by telephone.

c. Duties of Trial Counsel

Within forty-five days of the appointment of collateral counsel, the defendant=s trial lawyer shall provide to collateral counsel all relevant information obtained during the representation of the defendant in the trial court. Collateral counsel is bound by an obligation to maintain the confidentiality of the information. Fla.R.Crim.P. 3.851(c)(4).

d. Discovery

The parties have a limited right to obtain discovery before a hearing on a postconviction motion. Discovery is not automatic, but it is permissible upon a showing of good cause by the moving party. As the Supreme Court explained in *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994), A[o]n a motion which sets forth good reason the [trial] court may allow limited discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and

scope.≡ The court noted that discovery would be unnecessary in most postconviction proceedings because in most cases the grounds supporting the motion would appear on the face of the record.

The Supreme Court has indicated that it will exercise jurisdiction over appeals from discovery orders in postconviction proceedings in capital cases even though its jurisdiction is generally limited to the review of final orders. In *Trepal v. State*, 754 So. 2d 702 (Fla. 2000), the court held that it would grant interlocutory review of a discovery order if the order does not conform to the essential requirements of law and if it would cause an injury that could not be corrected on appeal from the final order.

The petition for review must be filed in the Supreme Court within thirty days of the order to be reviewed. This procedure is now incorporated in the Florida Rules of Appellate Procedure. See Fla.R.App.P. 9.142; *Amendment to Florida Rules of Appellate Procedure (Rule 9.142)*, 837 So.2d 911 (Fla. 2002). After the *Trepal* decision, the Supreme Court expanded its interlocutory review jurisdiction in capital postconviction proceedings to include orders other than those relating to discovery. See *Florida Department of Corrections v. Watts*, 800 So. 2d 225 (Fla. 2001).

Litigation regarding the disclosure of public records in death penalty cases is conducted as a part of the postconviction process

and not as separate civil actions under Chapter 119, Florida Statutes. Rule 3.852 contains a comprehensive set of procedures for the adjudication of Public Records Act claims in death penalty cases.

e. Mental Health Experts

If the defendant intends to offer expert testimony regarding his or her mental status, the state shall have a right to have the defendant examined by its own expert. Fla.R.Crim.P. 3.851(f)(6); *Hodges v. State*, 885 So.2d 338 (Fla. 2004). If the defendant fails to cooperate with the state's expert, the trial court may (1) order the defense to allow the state's expert to review all mental health reports, tests, and evaluations by the defendant's mental health expert; or (2) prohibit defense mental health experts from testifying concerning mental health tests, evaluations, or examinations of the defendant. See Fla.R.CrimP. 3.202(e). Reports provided to either party by an expert witness shall be provided to the opposing party.

2. General Procedures

a. Filing and Service

When a defendant has filed a motion under rule 3.851, the clerk of the court must immediately forward the motion to the assigned judge. Fla.R.Crim.P. 3.851(f)(2). All pleadings filed in

the case must then be served on the assigned judge, the opposing party, and the Attorney General. Fla.R.Crim.P. 3.851(f)(1).

b. Presence of Defendant

The defendant must be present during an evidentiary hearing on a postconviction motion and in any hearing involving a conflict with or removal of collateral counsel. Otherwise, the defendant's presence is not required. Fla.R.Crim.P. 3.851(c)(3). Generally, status conferences and other hearings can be conducted by the court with appearances by the attorneys without the presence of the defendant.

Under the prior case law interpreting rule 3.850, the defendant's presence was required if there was an evidentiary hearing, but was not required if the motion is denied without a hearing. See *Clark v. State*, 491 So. 2d 545 (Fla. 1986).

3. Case Management Conference

The trial court must conduct a case management conference not later than ninety days after the state files its answer to an initial postconviction motion. Fla.R.Crim.P. 3.851(f)(5)(A). At the case management conference the parties must disclose all documentary exhibits they intend to offer at the evidentiary hearing, provide an exhibit list that includes all such exhibits, and exchange a witness list with the names and addresses of potential witnesses. If the parties intend to present expert testimony, the

expert witnesses must be designated with copies of all expert reports attached.

At the case management conference the trial court must (1) schedule an evidentiary hearing on any claim that requires a factual determination, (2) hear argument on any purely legal claim not based on disputed facts, and (3) resolve any dispute arising from the exchange of information. Fla.R.Crim.P. 3.851(f)(5)(A).

4. The Evidentiary Hearing Requirement

Prior to the 2001 revision of rule 3.851, an evidentiary hearing was required unless the postconviction motion was legally insufficient on its face or unless the files and records conclusively demonstrated that the defendant was not entitled to relief. See *State v. Williams*, 797 So. 2d 1235 (Fla. 2001); *Freeman v. State*, 761 So. 2d 1055 (Fla. 2000); *Peede v. State*, 748 So. 2d 253 (Fla. 1999); *Valle v. State*, 705 So. 2d 1331 (Fla. 1997); *Maharaj v. State*, 684 So. 2d 726 (Fla. 1996); *Anderson v. State*, 627 So. 2d 1170 (Fla. 1993). While the defendant had the burden of pleading a sufficient factual basis for relief, an evidentiary hearing was presumed necessary absent a showing that defendant was entitled to no relief. The burden was on the state to establish the motion was legally insufficient or that the record conclusively refuted the defendant's claim. See *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999). A concession by the state that an evidentiary hearing is

required was relevant but not dispositive. Whether the motion required an evidentiary hearing was a determination for the trial court.

Under the prior rule, the trial court was required to allow the parties to appear at a hearing (known as a “*Huff*” hearing) to determine whether an evidentiary hearing is necessary. Even if an evidentiary hearing was not required, the parties had a right to appear before the court to present argument on the merits of the postconviction motion. See *Huff v. State*, 622 So. 2d 982 (Fla. 1993). The Supreme Court held in *Lopez v. Singletary*, 634 So. 2d 1054, 1057 (Fla. 1993), that in a death case a trial court must give the parties the opportunity to appear in person to argue the postconviction motion and whether an evidentiary hearing is needed.≡ This right was incorporated in a previous version of rule 3.851.

With the 2001 revision of rule 3.851, **an evidentiary hearing is now required on an initial motion as a matter of course for “all claims listed by the defendant as requiring a factual determination.”** Rule 3.851(f)(5)(A) provides that the trial court must schedule the hearing at the time of the case management conference. The hearing must be scheduled within ninety days of the conference. However, the trial court may extend the time for

holding an evidentiary hearing for up to ninety days. Fla.R.Crim.P. 3.851(f)(5)(c) The procedure in rule 3.851(f)(5) effectively replaces the need for a *Huff* hearing. As previously explained, the trial court is now required to conduct a case management conference and schedule an evidentiary hearing on every claim listed by the defendant that requires a factual determination. Fla.R.Crim.P. 3.851(f)(5).

The Supreme Court has acknowledged, however, that a barebones postconviction claim, unaccompanied by specific factual allegations to support that claim, will be insufficient to mandate an evidentiary hearing under the rule. *Derrick v. State*, 983 So.2d 443 (Fla. 2008); *Bowles v. State*, 979 So.2d 182 (Fla. 2008); *Jones v. State*, 998 So.2d 573 (Fla. 2008).

An error in denying an evidentiary hearing on a postconviction motion cannot be deemed harmless error, and will always result in a reversal and a remand for an evidentiary hearing. See *Atwater v. State*, 788 So.2d 223 (Fla. 2001); *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). Moreover, the decision regarding the need for an evidentiary hearing must be made in the trial court and cannot be made on review by the appellate court. For example, if the motion is dismissed on the ground that it is untimely and if that ruling is reversed, the appellate court cannot proceed to the merits of the claim on the ground that a hearing in

the trial court was unnecessary. See *Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995).

If there are claims that do not require an evidentiary hearing, the trial court should hear legal argument on those claims during the case management conference.

5. Successive Motions

The trial court is required to hold a case management conference on a successive motion within thirty days after the state files its answer to the motion. Fla.R.Crim.P. 3.851(f)(5)(B). Unlike the procedure that applies to an initial motion, the trial court is not required to schedule an evidentiary hearing on all claims raised in a successive motion as a matter of course. Instead, the trial court may deny the successive motion without an evidentiary hearing if the files and records conclusively show that the defendant is not entitled to relief (which is the current standard under rule 3.850 and which was the standard under the previous version of rule 3.851).

In the event an evidentiary hearing is required on a successive claim, it must be scheduled to begin not more than sixty days from the date of the conference. However, the trial court may extend the time for holding an evidentiary hearing for up to ninety days. Fla.R.Crim.P. 3.851(f)(5)(c).

6. Procedure After Evidentiary Hearing

a. Transcript

Immediately following an evidentiary hearing the trial court must order a transcript of the hearing and the court reporter must prepare and file the transcript within thirty days. Fla.R.Crim.P. 3.851(f)(5)(D).

b. Final Order

Within thirty days of receipt of the transcript, the trial court shall render a final order adjudicating the claims considered in the evidentiary hearing and all other claims decided without a hearing.

The order must contain findings of fact and conclusions of law and it must include an attachment or reference to any part of the record that is necessary for meaningful appellate review. Fla.R.Crim.P. 3.851(f)(5)(D). *See Ragsdale v. State*, 798 So. 2d 713 (Fla. 2001) (noting that the order failed to contain significant findings of fact).

The required content of an order on a successive postconviction motion depends on whether the motion is summarily denied (and if so, the reason) or whether the motion is granted or denied after an evidentiary hearing. If the motion is summarily denied on the ground that it is not legally sufficient on its face, then the order of denial should contain conclusions of law explaining why the defendant is not entitled to relief. If the motion is summarily denied on the ground that the files and records

conclusively show that the defendant is not entitled to relief, the trial judge should attach those portions of the record necessary to support that conclusion. See *Roberts v. State*, 678 So. 2d 1232 (Fla. 1996). The Supreme Court has held that the order is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim. See *Asay v. State*, 769 So. 2d 974 (Fla. 2000), citing *Diaz v. Dugger*, 719 So. 2d 865 (Fla. 1998), but it is not clear how a recitation of the rationale for the trial court's summary denial would create a record showing that the claim is refuted. Rule 3.851 is not satisfied by attaching the entire record to the order. As the Supreme Court explained in *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990), interpreting the prior rule, some greater degree of specificity is required.

Findings of fact are essential if the motion is decided after an evidentiary hearing. Otherwise the Supreme Court will have a difficult task in providing meaningful appellate review. The Supreme Court must accept the trial court's findings of fact if they are supported by substantial competent evidence in the record. See *Huff v. State*, 762 So. 2d 476 (Fla. 2000); *Steinhorst v. State*, 695 So. 2d 1245 (Fla. 1997).

The trial judge must prepare the order on a postconviction motion and should not delegate the task to one of the lawyers. If the trial judge decides to request proposed orders on the motion, that request should be made with notice to all parties and an opportunity for counsel to object to the contents of opposing counsel's proposed order. In *Rose v. State*, 601 So. 2d 1181 (Fla. 1992), the Supreme Court reversed an order denying a postconviction motion because the order was prepared by counsel for the state at the request of the court. The trial judge had requested the draft of the order in an *ex parte* conversation with counsel for the state and the defense was unaware of the request. Similarly, in *Huff v. State*, 622 So. 2d 982 (Fla. 1993), the Supreme Court reversed a case on the ground that the trial judge had signed a draft of a postconviction order proposed by the state without giving defense counsel an opportunity to object. Compare *Groover v. State*, 640 So. 2d 1077 (Fla. 1994), a case in which the state's draft of the order was submitted to the court and opposing counsel three days before it was signed; see also *Glock v. Moore*, 776 So. 2d 243 (Fla. 2001) (the defendant had notice of the fact that the state was preparing a draft order and sufficient time to object once the order was submitted).

c. Rehearing

A motion for rehearing directed to a final order on a postconviction motion must be filed within fifteen days of the date of rendition of the order. The opposing party may file a response within ten days thereafter. Fla.R.Crim.P. 3.851(f)(7).

G. Grounds for Postconviction Relief

1. In General

A motion for postconviction relief under rule 3.851 may include any claim that is collateral to the issues the defendant raised or could have raised at trial. The collateral issue must be one that relates to the proceeding in the trial court. A postconviction motion may not be used to address an alleged error committed by the reviewing court on direct appeal or to raise a claim of ineffective assistance of appellate counsel. See *Foster v. State*, 810 So. 2d 910 (Fla. 2002). See *infra* at H.1.

The issues that most frequently arise in postconviction motions filed in death penalty cases are discussed in more detail below.

2. Competency at Trial/Mental Retardation

Competency issues are often litigated in postconviction motions under rule 3.851. The Supreme Court has held that a claim that the defendant was incompetent to proceed is one that can be raised for the first time in a postconviction motion. See *Jones v. State*, 740 So. 2d 520 (Fla. 1999); *Hill v. State*, 473 So.

2d 1253 (Fla. 1985); *Mason v. State*, 489 So. 2d 734 (Fla. 1986). This does not mean, however, that the trial judge is always required to grant an evidentiary hearing on such claims. See *Johnston v. Dugger*, 583 So. 2d 657 (Fla. 1991); *Engle v. Dugger*, 576 So. 2d 696 (Fla. 1991).

In *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L. Ed. 2d 53 (1985), the Court held that a criminal defendant who makes a preliminary showing that his mental condition may be an issue in a death penalty case, either in the guilt phase or the penalty phase, is entitled to a court-appointed expert to assist in the investigation and presentation of the mental health issues. Under rule 3.216(a), the defendant is entitled to an appointed confidential psychiatrist or psychologist to assist the defense, but the decision of the Court in *Ake* may produce postconviction litigation as to the extent of the psychiatric assistance provided at the trial.

A claim that the defendant suffers from mental retardation may also be raised in a postconviction motion. See *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

In 2001, the Florida Legislature enacted a statute to establish a uniform pretrial procedure to be followed when a defendant in a capital case raises the issue of mental retardation as a bar to the imposition of the death penalty. Under the statute,

the term *mental retardation* means *significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the period from conception to age 18.* See Fla. Stat. §921.137 (2001). The defendant must have a documented history of mental retardation. The Supreme Court has created a rule which is similar in most respects to the statute. See Fla. R. Cr. P. 3.203. Although this legislation was intended to guide the trial courts in determining whether a defendant is mentally retarded and therefore ineligible for the death penalty, defendants who were convicted and sentenced prior to the enactment of this law may raise the issue by way of postconviction motion, or (if convicted after enactment of the statute) by way of ineffective assistance of counsel if it is alleged that trial counsel knew of defendant's mental retardation but failed to raise it before trial.

3. Ineffective Assistance of Counsel

a. In General

The claim most frequently raised in a postconviction proceeding is that the defendant was denied effective assistance of counsel. Challenges to the effectiveness of counsel are often raised in collateral proceedings because the record of the alleged

errors and the effect of those errors are not easily developed until after the trial and the direct appeal.

i. Ineffective Assistance Claim Can Involve
Guilt Or Penalty Phase:

An ineffectiveness claim can be raised as to the guilt phase, the penalty phase, or both. To demonstrate prejudice in connection with a death sentence a defendant must show that there was a reasonable probability that, absent the deficient performance, the outcome at sentencing would have been different. See *Tompkins v. State*, 872 So.2d 230 (Fla. 2003); *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000); *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995); *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988); *Eutzy v. State*, 536 So. 2d 1014 (Fla. 1988). Naturally, it will be more difficult to establish a claim of ineffectiveness at sentencing when the trial judge has overridden a life recommendation and imposed a sentence of death. A jury's recommendation of life is a strong indication of counsel's effectiveness. See *Francis v. State*, 529 So. 2d 670 (Fla. 1988). One of the most common allegations made by defendants in a penalty phase ineffective assistance claim is the failure to investigate or present mitigating evidence, discussed *infra* at G.3. b.i.

ii. Filing of Motion Waives Attorney-Client

Privilege:

Generally, the filing of a postconviction motion alleging ineffective assistance of counsel is a waiver of the attorney-client privilege. See *Arbelaez v. State*, 775 So. 2d 909 (Fla. 2000). The state can discover pretrial communications between the defendant and counsel as well as counsel's files and records. In *Reed v. State*, 640 So. 2d 1094 (Fla. 1994), the Supreme Court held that the state has a right to obtain all of the files and records in the possession of the trial attorney which are relevant to the ineffective assistance claim. The court noted that the waiver also extends to materials that fit more squarely into the category of work product. Ordinarily, the waiver will entitle the state to examine the trial attorney's entire file. However, if the defendant moves to limit or exclude from discovery certain records or items, the court should conduct an *in camera* inspection to determine whether a privilege has been waived as to those items. See *LeCroy v. State*, 641 So. 2d 853 (Fla. 1994); *Reed, supra*.

b. Ineffective Assistance Claims: Three Categories

There are three general categories of ineffective assistance of counsel claims and each is measured by a different standard:

Actual Ineffective Assistance of Counsel; Per Se Ineffective Assistance; and Conflict of Interest/Violation of an Ethical Duty.

i. Actual Ineffective Assistance of Counsel:

This first type of ineffective assistance of counsel claim is one based entirely on the acts or omissions of the lawyer, and requires a showing that such actions or omissions actually caused prejudice of a constitutional magnitude. The proper standard for resolving this type of ineffective assistance of counsel claim is outlined in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The standard contains two prongs. To be entitled to relief, the defendant must satisfy both prongs:

1. The lawyer's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the sixth amendment. Defendant must show that the representation fell below an objective standard of reasonableness under prevailing professional norms; and

2. The deficient performance prejudiced the defense. Under this prong, defendant must show that but for counsel's ineffective performance, there is a reasonable probability of a different result, i.e., a probability sufficient to undermine

confidence in the outcome.≡ *Strickland*; *Shere v. State*, 742 So. 2d 215 (Fla. 1999); *Sims v. State*, 602 So. 2d 1253 (Fla. 1992); *Harris v. State*, 528 So. 2d 361 (Fla. 1988).

Because a defendant must establish both prongs, trial judges have the option to decide either prong first; that is, a trial judge need not determine whether counsel's performance was deficient before examining whether the alleged deficiency was prejudicial. If the defendant fails to establish either of the two prongs, the defendant's claim must fail.

Two of the most common claims asserted as ineffective assistance of counsel under rule 3.851 are the failure to investigate and the failure to present evidence.

(a). Failure to Investigate

Counsel has “a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.≡ *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). This obligation to conduct a reasonable investigation is even more compelling in a death penalty case, where the penalty phase allows the defense to introduce mitigation evidence that would otherwise be inadmissible in a criminal prosecution. As the Florida Supreme Court has noted: “The obligation to investigate and prepare for the

penalty portion of a capital case cannot be overstated.” *State v. Lewis*, 838 So.2d 1102 (Fla. 2002)

In *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989), the court held that the defense attorney's failure to investigate or present mitigating evidence was a deficiency that reasonably may have affected the outcome of the sentencing hearing. Thus, the court found that the defendant did not receive effective assistance of counsel and ordered a new sentencing hearing.

Failure to take the deposition of a witness does not necessarily lead to a finding that counsel was ineffective. It must be shown that some relevant and helpful information would have been obtained or that the defendant was otherwise prejudiced by counsel's failure to take depositions. See *Gorham v. State*, 521 So. 2d 1067 (Fla. 1988).

The United States Supreme Court recently addressed the parameters of defense counsel's duty to investigate, especially in the context of preparation for the penalty phase proceedings. In *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), defense counsel was aware that the prosecution was relying on defendant's prior sexual battery conviction as an aggravating circumstance. The prosecutor advised counsel that he intended to read into evidence the testimony of the victim from that prior sexual battery trial. Defense counsel did not obtain the

transcript of the testimony until the day before the penalty phase proceeding and did not review the transcript prior to the penalty phase proceeding. The Court held that defense counsel's actions constituted deficient performance under *Strickland*. The Court found defense counsel's actions were not justified by the fact that defendant and his family advised counsel that the victim's testimony would be neither helpful nor harmful in the penalty phase:

It flouts prudence to deny that a defense lawyer should try to look at a file he knows the prosecutor will cull for aggravating evidence. No reasonable lawyer would forgo examination of the file thinking he could do as well by asking the defendant or family... whether they recalled anything helpful or damaging in the prior victim's testimony. *Rompilla*, 125 S.Ct. at 2467 (emphasis supplied).

While this may appear to conflict with Florida cases which hold that the reasonableness of an attorney's investigation may be affected by the defendant's own statements or actions (see *infra* at 46) the strict holding in *Rompilla* goes no further than to require counsel to make reasonable efforts to obtain and review any evidence the prosecutor intends to rely upon at the penalty phase.

However, the *Rompilla* Court found that defense counsel's performance was deficient not only in his failure to review the transcript of the prior testimony, but in failing to review the court file related to that prior conviction. It is in this regard that the prejudice component of *Strickland* was established: Had counsel reviewed the court file of defendant's prior felony conviction, he would have discovered significant mitigation evidence (and information leading to even more mitigation evidence). This failure to review the prior court file (and the failure to discover the mitigation evidence) led the Court in *Rompilla* to conclude that defendant was entitled to a new penalty phase proceeding.

(b). What is a
"Reasonable Investigation"?

Rompilla suggests the need for counsel to do more than simply rely upon the defendant or his family as the single source of information regarding potential mitigation. The following general rules could fairly be said to flow from *Rompilla*:

1. Defense counsel has a duty to obtain and review any evidence she knows the State intends to introduce at the penalty phase proceeding.
2. If the State intends to introduce evidence of a prior conviction (or evidence related to that prior conviction),

defense counsel should review the entire court file of that prior conviction.

3. As a part of the investigation for the penalty phase, defense counsel should attempt to obtain defendant's school, medical and prison records to the extent they are readily available.

In determining whether counsel has acted reasonably in obtaining (or not obtaining) files and records in the course of her investigation, a trial court should consider the following factors:

- The number of records or files involved
- The cost and time required to obtain and review the records
- Accessibility of the records
- Actual efforts made to obtain or review the records
- Certainty of State's intent to use the records
- Timing of notice to defense attorney of the State's intent to use the records
- Potential impact of the records on the defense theory or argument

In analyzing a claim of ineffective assistance of counsel based upon a failure to investigate, the trial court should focus on the reasonableness of the underlying investigation, not trial counsel's decisions based upon the investigation. If counsel

conducts a reasonable investigation, decisions based upon that investigation are “virtually unchallengeable.” *Strickland*. Such decisions presumed reasonable & strategic, and a defendant can only rebut this presumption by establishing that “no competent attorney” would have made the same decision. *White v. State*, 729 So.2d 909 (Fla. 1999).

Postconviction counsel will often attempt to establish “reasonableness” seeking to introduce ABA standards on the duties of attorneys representing individuals charged with capital crimes. See ABA Standards for Criminal Justice, Defense Function, www.abanet.org/crimjust/standards. See, e.g., *Morton v. State*, 995 So.2d 223 (Fla. 2008).

However, the United States Supreme Court (and the Florida Supreme Court) has held that the ABA standards are merely guides for the trial court to consider in determining what is “reasonable”. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527 (2003); *Lynch v. State*, 2 So.3d 47 (Fla. 2008). They do not necessarily establish a standard of care for counsel to be considered competent.

With regard to the admissibility of expert testimony on the reasonableness or deficiency of trial counsel’s performance, see *Lynch v. State*, 2 So.3d 47 (Fla. 2008) and *Casey v. State*, 969 So.2d 1055 (Fla. 4th DCA 2007).

A defendant's cooperation or lack of cooperation with his trial counsel can certainly be a factor in determining whether counsel's investigative efforts were reasonable under the circumstances. The same can be said regarding the level of cooperation from defendant's family members. But a defendant's mere silence or lack of cooperation with his counsel does not necessarily relieve counsel of his duty to conduct a reasonable investigation for both phases of a capital case. *Henry v. State*, 937 So.2d 563 (Fla. 2006). And merely interviewing the defendant or family members, without conducting a follow-up investigation based upon information gleaned from those interviews, may be unreasonable. *Ponticelli v. State*, 941 So.2d 1073 (Fla. 2006). On the other hand, counsel's investigation could not be deemed unreasonable where any deficiency or limitation was attributable to the defendant and his family members, who refused to provide information or to assist in counsel's investigation. *Hodges v. State*, 885 So.2d 338 (Fla. 2004).

Keep in mind that the obligation to investigate does not equate to an obligation to present evidence. The first focuses on the nature, extent and quality of the actions of counsel in seeking to discover or uncover evidence and witnesses; the latter focuses on the strategic decision, made after a reasonable investigation,

whether and how to present the evidence gathered during the investigation.

(c). Failure to Present
Mitigating Evidence

Failure to present mitigating evidence during the penalty phase does not invariably require a conclusion that the trial attorney's performance was deficient. Such a conclusion depends on whether the decision not to present mitigating evidence was an informed decision based on a reasonable investigation of the available mitigating evidence. If the attorney has made a tactical decision not to present mitigating evidence after a full investigation, the court is not likely to find ineffectiveness. See *Eutzy v. State*, 536 So. 2d 1014 (Fla. 1988); *Porter v. State*, 478 So. 2d 33 (Fla. 1985). Strategic decisions of counsel should not be second-guessed by a reviewing court. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Smith v. Dugger*, 840 F.2d 787 (11th Cir. 1988). However, as in the guilt phase, an attorney has a strict duty to conduct a reasonable investigation of a defendant's background for possible mitigation evidence. *State v. Riechmann*, 777 So.2d 342 (Fla. 2000). If, having conducted an investigation, alternative courses have been considered and rejected, and counsel's

decision was reasonable under the norms of professional conduct, counsel=s decision not to present certain evidence will not constitute ineffective assistance.

Where trial counsel=s action is the result of a reasoned and informed decision, and not merely the product of a failure to investigate, deference will be given to trial counsel=s decisions on the presentation of evidence. *Gorham v. State*, 521 So.2d 1067 (Fla. 1988).

In analyzing the actions or inactions of trial counsel, the focus is not on whether trial counsel could or should have taken a different course of action; the central question is whether the course of action taken was a reasonable one which resulted from an informed, professional judgment. *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003); *Rutherford v. State*, 727 So.2d 216 (Fla. 1998); *Henry v. State*, 862 So.2d 679 (Fla. 2003).

The fact that a defendant, at an evidentiary hearing, presents mitigation evidence superior to that presented at the penalty phase of his trial does not necessarily render trial counsel ineffective. *Pace v. State*, 854 So.2d 167 (Fla. 2003); *Asay v. State*, 769 So.2d 974 (Fla. 2000).

Nor is it likely that an ineffective assistance of counsel claim will be sustained if the newly-offered mitigating evidence is merely cumulative to the evidence presented at trial. See *Gudinas v. State*, 816 So. 2d 1095 (Fla. 2002); *Hill v. Dugger*, 556 So. 2d 1385 (Fla. 1990).

By contrast, the court is more likely to find ineffectiveness in a case in which the attorney has not investigated potential mitigating evidence. For example, in *Stevens v. State*, 552 So. 2d 1082 (Fla. 1989), the court found that the defendant did not receive effective assistance of counsel and ordered a new sentencing. The court noted that the defense attorney did Avirtually nothing≅ on the defendant's behalf and explained that the defense attorney's failure to investigate or present mitigating evidence was a deficiency that may have affected the outcome of the sentencing hearing. In *State v. Michael*, 530 So. 2d 929 (Fla.1988), the court affirmed a finding of ineffectiveness at sentencing when the attorney was on notice of a potential insanity defense but failed to present, at sentencing, relevant and helpful expert testimony regarding the defendant's mental condition. See also *Orme v. State*, 896 So.2d 725 (Fla. 2005)(trial counsel's performance was deficient where, without explanation, he failed to investigate defendant's bipolar disorder and failed to present evidence of such illness during the penalty phase).

And, in *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995), the court found trial counsel rendered ineffective assistance during the penalty phase based on the Avolume and detail of evidence of mitigation alleged to exist compared to the sparseness of the evidence actually presented.≅

The common theme in each of the above case is not the ultimate decision by defense counsel but rather the inadequacy of the underlying investigation which preceded the decisions.

The reasonableness of an attorney=s actions in preparing a case or presenting evidence may be substantially influenced by the defendant=s own statements or actions. For example, in *Stewart v. State*, 801 So. 2d 59 (Fla. 2001) the court held that an attorney could not be faulted for failing to investigate a claim that the defendant had been abused as a child; the defendant was questioned by counsel about his childhood and he never mentioned the alleged abuse.

And in *Cummings-El v. State*, 863 So.2d 246 (Fla. 2003), defendant could not be heard to complain about trial counsel=s failure to call defendant=s family members to testify at the penalty phase, where it was shown that defendant told his counsel he was adamantly opposed to his family testifying and begging the jury to spare defendant=s life.

Counsel cannot be deemed ineffective where the deficiencies in the investigation were directly attributable to an uncooperative defendant. *Hodges v. State*, 885 So.2d 338 (Fla. 2003). See also *Fotopoulos v. State*, 838 So.2d 1122 (Fla. 2002)(failure to locate witnesses to testify at suppression hearing not ineffective assistance where defendant told counsel the property seized by police did not belong to defendant).

Counsel is not ineffective simply because he or she fails to raise every conceivable claim, even those of constitutional magnitude. See *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). Matters of strategy and tactics are generally not evidence of ineffectiveness. For example, a reasonable decision to advise a defendant not to take the witness stand, even if it proves improvident, is a tactical decision within the realm of counsel's professional judgment and generally may not be regarded as ineffective assistance of counsel.

ii. Per Se Denial of Assistance of Counsel :

As discussed previously, most claims of ineffective assistance of counsel require proof of deficient performance and actual prejudice. In rare circumstances, however, certain actions may rise to the level of actual or constructive denial of the assistance of counsel. In such rare cases, prejudice will be presumed and need not be established by the defendant to

warrant relief. This claim is most often based on an allegation that the state (or a state actor) constructively or actually prevented the defendant from receiving assistance of counsel. For example, if the trial judge appoints a probate lawyer to a capital case one day before the trial, the defendant will have an argument that the actions of the court constructively deprived him of the assistance of counsel. *See, e.g., Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The standard for a claim of per se denial of effective assistance of counsel is whether there has been a breakdown in the adversary process. *See United States v. Cronin*, 466 U.S. 648, 104 S.Ct. 2039, 80 L. Ed. 2d 659 (1984). If such a breakdown is established, it constitutes a per se denial of the sixth amendment right, making the adversary process presumptively unreliable. A defendant raising a claim of ineffective assistance of counsel will often urge the trial court to analyze the claim under the *Cronin* standard as opposed to *Strickland*. The reason for this is quite simple: Under *Strickland*, the defendant must establish deficient performance and prejudice. Under *Cronin*, once defendant establishes a denial of counsel, prejudice need not be proven; the Court has held that such a denial of counsel is so likely to prejudice the accused that the cost of litigating the extent of the prejudice in a particular case is unnecessary.

However, the cases that fall within the category of per se denial of counsel are narrow indeed, and the Court has been very reluctant to extend its reach beyond the strict parameters created in *Cronic*.

In capital cases, a *Cronic* claim is most frequently raised when defense counsel in opening statement concedes defendant=s guilt to first degree murder, and does so without the defendant=s consent. Defendants have, for many years, argued that such an action by defense counsel is the functional equivalent of a guilty plea at trial without defendant=s knowledge or consent, thus denying defendant=s sixth amendment right to counsel. This, defendants claim, constitutes a failure to subject the government=s case to adversarial testing, and is a constructive denial of assistance of counsel which should be measured under the per se standard established by *Cronic*.

In *Nixon v. State*, 857 So.2d 172 (Fla. 2003), the Florida Supreme Court considered such a claim and reasoned that by conceding guilt to the crime charged in opening statement, without defendant=s consent defense counsel failed to subject state=s case to meaningful adversary testing. The Florida Supreme Court held that absent the defendant=s express consent

to such a strategy, the actions of defense counsel are presumptively prejudicial, requiring a new trial.

The United States Supreme Court overturned the decision of the Florida Supreme Court, holding that the per se standard of *Cronic* was not applicable to the facts of this case. *Florida v. Nixon*, 543 U.S. 175, 125 S.Ct. 551 (2004). Rather, the more appropriate measure of counsel's conduct is the standard announced in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Critical to the Court's consideration was the fact that defense counsel had tried, on several occasions, to advise his client of the proposed strategy. The defendant refused to respond or provide input. He neither consented nor objected to the strategy of conceding guilt in opening. The Court held:

When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfied the Strickland standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.

Id. at 563.

Both the Florida and United States Supreme Courts have recognized that such a strategy might well be reasonable in a particular case given the nature of Florida's bifurcated death penalty scheme:

"The gravity of the potential sentence in a capital trial and the proceeding's two-phase structure [three-phase in Florida] vitally affect counsel's strategic calculus in regard to deciding whether to concede guilt in the guilt phase."

Henry v. State, 937 So.2d 563 (Fla. 2006) (quoting *Nixon*).

One should not read *Nixon* and its progeny as a general approval of such a strategy. Rather, *Nixon* simply holds that, under most circumstances, such a decision by counsel will be measured under the *Strickland*, not *Cronic*, standard.

iii. Conflict of Interest/Violation of Ethical Duty:

The third category of commonly-raised ineffective assistance claims centers upon a violation of an ethical duty of the lawyer. For example, if the lawyer representing the defendant had an actual conflict of interest and if the conflict resulted in a deficiency in the lawyer's performance, the defendant would have a valid claim. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L. Ed. 2d 333 (1980); *Quince v. State*, 732 So. 2d 1059 (Fla. 1999).

The test announced in *Cuyler* requires defendant to establish:

1. Counsel actively represented conflicting interests;
and
2. An actual conflict adversely affected counsel's performance.

While the second prong imposes a less stringent prejudice requirement than that of *Strickland, supra* at 34 (requiring a showing that, but for the deficient performance, there is a reasonable probability that the result of the proceeding would have been different), *Cuyler* nevertheless requires that defendant demonstrate some prejudice. Prejudice will not be presumed. *Cf. Cronin, supra* at 44. It is satisfied by a showing that the conflict "adversely affected counsel's performance". However, defendant need not establish a probability or likelihood of a different outcome but for the conflict. *Cuyler, Wright v. State*, 857 So.2d 861 (Fla. 2003).

To demonstrate an actual conflict, the defendant must identify specific evidence in the record that suggests his or her interests were compromised. A possible, speculative or merely hypothetical conflict is insufficient to impugn a criminal conviction. *Hunter v. State*, 817 So.2d 786 (Fla. 2002). In *Harich v. State*, 542 So. 2d 980 (Fla. 1989), the court held that

the defense attorney's status as a deputy sheriff in a neighboring county was a fact requiring an evidentiary hearing to determine whether there was a conflict of interest sufficient to deny the defendant adequate assistance of counsel. However, it has been held that a defense attorney's honorary title of deputy sheriff, without more, does not create an actual conflict of interest. *Wright v. State*, 857 So.2d 861 (Fla. 2003). See also *Wright v. State*, 581 So.2d 882 (Fla. 1991); *Herring v. State*, 580 So. 2d 135 (Fla. 1991); *Quince v. State*, 592 So. 2d 669 (Fla. 1992).

The fact that there were disciplinary proceedings against the attorney at the time of the trial does not require a finding that the attorney failed to provide effective assistance. See *O'Callaghan v. State*, 542 So. 2d 1324 (Fla. 1989) (investigation into alcohol abuse alleged to affect attorney's ability to practice law).

The fact that the defense counsel attempted to acquire defendant's property rights in the defendant's life story, songs and poetry, did not create an actual conflict of interest where the evidence at hearing established that the agreement between the defendant and his counsel was entered into after defendant's sentencing. *Brown v. State*, 894 So.2d 137 (Fla. 2004).

4. Involuntariness of Plea, Ineffective Assistance Leading to a Guilty Plea , and Failure to Convey Offer

The voluntariness of the defendant's plea of guilty to a capital offense is a matter that can be raised for the first time in a postconviction motion. There is a critical difference, however, between a claim that the plea was involuntary and a claim of ineffective assistance of counsel prior to the entry of a plea. The latter claim is governed by the two-part standard set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). See *Hill v. Lockhart*, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985).

A defendant may allege that counsel's deficient performance (e.g., lack of a reasonable investigation of a potential defense) resulted in defendant entering a guilty plea. A failure to investigate leading to an ill-advised plea can constitute ineffective assistance of counsel. To be entitled to relief, the defendant must prove that, but for counsel's deficient performance, there is a reasonable probability that defendant would not have pled guilty but would have insisted on going to trial. *Grosvenor v. State*, 874 So.2d 1176 (Fla. 2004). Defendant need not establish a reasonable probability that he would have prevailed at trial. *Id.*

A defendant may also allege ineffective assistance of counsel in connection with the failure to convey a plea offer by the

state. To establish such a claim, the defendant need not demonstrate the court would have actually accepted the plea. However, the defendant must establish:

- a. trial counsel failed to communicate a plea offer;
- b. that had defendant been correctly advised he would have accepted the plea offer; and
- c. defendant=s acceptance of the state=s plea offer would have resulted in a lesser sentence.

See *Cottle v. State*, 733 So. 2d 963 (Fla. 1999).

5. Newly-Discovered Evidence

Prior to 1989, claims of newly-discovered evidence could only be raised by petition for writ of error coram nobis. This was a cumbersome procedure in which the defendant was required to obtain the approval of the appellate court before presenting the new evidence in the trial court. See *Hallman v. State*, 371 So. 2d 482 (Fla. 1979), abrogated by *Jones v. State*, 591 So.2d 911 (Fla. 1991); *Smith v. State*, 400 So. 2d 956 (Fla. 1981).

The 1989 decision of the Florida Supreme Court in *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989), eliminated the writ of coram nobis as a postconviction remedy available to a defendant sentenced to death. The defendant must now raise the claim of newly-discovered evidence in a postconviction motion under rule 3.851.

The rationale of the decision in *Richardson* is that rule 3.851 was intended to provide a comprehensive remedy for all collateral attacks on the judgment and sentence. Since a claim of newly-discovered evidence is a form of collateral attack, such a claim is cognizable in a rule 3.851 motion. The court concluded that the remedy afforded by the rule supplants the remedy previously afforded only by the writ, providing far more efficient trial and appellate procedures than those required in seeking writs of error coram nobis.

Although the Supreme Court in *Richardson* altered the procedure for raising newly-discovered evidence claims, the court did not address the substantive law regarding the legal standard for establishing such claims. Many judges and lawyers assumed that the standard for obtaining relief remained the same. However, the Supreme Court has since explained that the previous standard established by *Hallman v. State*, 371 So. 2d 482 (Fla. 1979), that the Anewly-discovered evidence would have conclusively prevented entry of the judgment,≡ is so strict that it would be difficult to meet in any case. The Supreme Court has now held that a party presenting a claim of newly-discovered evidence must show the following:

- (a) The evidence was unknown to defendant, his attorney and the court at the time of trial;
- (b) The evidence could not have been discovered by due diligence; and
- (c) The evidence must be of such a nature that it would probably produce an acquittal on retrial.

Jones v. State, 591 So. 2d 911 (Fla. 1991); see also *Johnson v. State*, 804 So. 2d 1218 (Fla. 2001); *Davis v. State*, 736 So. 2d 1156 (Fla. 1999); *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994); *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995). The court in *Jones* held that the *Hallman* definition of Anewly-discovered evidence remains intact.≅ *Jones*, 591 So.2d at 916.

Hence, a claim of newly-discovered evidence must be rejected if the evidence in question could have been discovered at trial, with the exercise of due diligence. See *Swafford v. State*, 828 So.2d 966 (Fla. 2002); *Steinhorst v. State*, 695 So. 2d 1245 (Fla. 1997); *Correll v. State*, 698 So. 2d 522 (Fla. 1997).

In *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), the Supreme Court reaffirmed the *Jones* standard for newly-discovered evidence claims. In *Scott* the court held that an intervening decision to reduce a codefendant's sentence from death to life in prison could be raised as newly-discovered evidence and this new

evidence could be used to support a proportionality argument in a postconviction motion.

a. Recanted Testimony

There is a specific standard that governs recanted testimony as newly-discovered evidence. Although such an allegation may support a claim for an evidentiary hearing, the court must be careful in vacating the judgment and sentence or in granting a new trial based on recanted testimony. In *Armstrong v. State*, 642 So. 2d 730, 735 (Fla. 1994), the court held that recanted testimony is exceedingly unreliable, and it is the duty of the court to deny a new trial, where it is not satisfied that such testimony is true.≡ See also *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995).

A defendant seeking a new trial based upon recanted testimony must establish:

- (a) the recantation is true; and
- (b) The witness= testimony will change to such an extent as to render probable a different verdict.

Armstrong, supra. Such a claim will almost always require an evidentiary hearing.

6. Failure to Disclose Exculpatory Evidence (*Brady*)

Failure to disclose exculpatory evidence is a ground for relief under rule 3.851. Furthermore, such a claim can be raised in a postconviction motion if the failure was not known at the time of the trial. In *Roman v. State*, 528 So. 2d 1169 (Fla. 1988), the prosecution failed to provide pretrial statements of a critical witness. Since the pretrial statements supported the defendant's defense of intoxication and would have impeached the state's witness at trial, the court granted relief.

These claims are often referred to as *Brady* claims after the decision in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

The Brady Test

To successfully assert a *Brady* claim, the defendant must establish the following:

(1) the evidence at issue is favorable to the accused, either because it is exculpatory, or because it is impeaching;

(2) the evidence was suppressed by the state, either willfully or inadvertently; and

(3) the state's failure to disclose the evidence was prejudicial.

See *Spencer v. State*, 842 So.2d 52 (Fla. 2003); *Strickler v. Greene*, 527 U. S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); *Johnson v. State*, 804 So.2d 1218 (Fla. 2001); *Sireci v.*

State, 773 So.2d 34 (Fla. 2000); *Way v. State*, 760 So.2d 903 (Fla. 2000).

The third prong of the *Brady* test requires the defendant to establish that the state's failure to disclose exculpatory evidence resulted in prejudice. A prejudice \cong for *Brady* purposes is the same as A prejudice \cong for an ineffective assistance claim under *Strickland v. Washington, supra*. The test for measuring the effect of the failure to disclose exculpatory evidence, regardless of whether such failure constitutes a discovery violation, is whether there is Aa reasonable probability that had the evidence been disclosed to the defense, the result of the proceeding would have been different \cong . *Duest v. Dugger*, 555 So. 2d 849, 851 (Fla. 1990) (the failure to disclose evidence was harmless); *Swafford v. Dugger*, 569 So. 2d 1264 (Fla. 1990) (the defendant failed to establish the materiality of the undisclosed evidence); *Lightbourne v. State*, 644 So. 2d 54 (Fla. 1994) (the evidence would not have affected the outcome); *Atkins v. State*, 663 So. 2d 624 (Fla. 1995) (the photographs could not possibly have affected the outcome of the trial). The Supreme Court defined A reasonable probability \cong in *White v. State*, 664 So. 2d 242 (Fla. 1995) as a A probability sufficient to undermine confidence in the outcome. \cong *Id* at 244, quoting *Strickland*.

Earlier decisions required that the defendant also establish that he did not have access to the evidence. See *Downs v. State*, 740 So.2d 506 (Fla. 1999); *Mills v. State*, 684 So.2d 801 (Fla. 1996); *Scott v. State*, 657 So.2d 1129 (Fla. 1995); *Hildwin v. Dugger*, 654 So.2d 107 (Fla. 1995); *Mendyk v. State*, 592 So.2d 1076 (Fla. 1992); *Routly v. State*, 590 So.2d 397 (Fla. 1991). This requirement is now subsumed within the second element (Asuppressed \cong). As the Supreme Court explained in *Occhicone v. State*, 768 So. 2d 1037 (Fla. 2000), the defendant cannot show that evidence was suppressed if he had access to it.

But in *Allen v. State*, 854 So.2d 1255 (Fla. 2003) the court held that, for *Brady* purposes, a defendant=s knowledge that the state has submitted certain evidence for testing does not impose upon defendant an affirmative duty to inquire further to discover the results of that testing. This is consistent with the concept that a *Brady* claim, unlike a claim of newly-discovered evidence, does not contain a due diligence component. *Occhicone v. State*, *supra*.

Citing the decision of the United States Supreme Court in *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the Florida Supreme Court in *Young v. State*, 739 So.

2d 553 (Fla. 1999), noted that there were three situations in which a defendant might have a valid *Brady* claim:

first, where previously undisclosed evidence revealed that the prosecution introduced trial testimony that it knew or should have known was perjured;

second, where the government failed to accede to a defense request for disclosure of some specific kind of exculpatory evidence;

and third, where the Government failed to volunteer exculpatory evidence never requested, or requested only in a general way.

Young v. State, 739 So. 2d at 556. The court also noted that the prosecution has the responsibility to determine whether the undisclosed evidence is exculpatory. Because the prosecution alone can know what is undisclosed, the prosecution has the responsibility to gauge the cumulative effect of all of the evidence and to determine whether there is a reasonable probability the undisclosed evidence would change the result of the case. See *Kyles v. Whitley*, 514 U.S. at 434-436; *Young v. State*, 739 So. 2d at 557.

Failure to disclose exculpatory evidence is the type of claim that will frequently require an evidentiary hearing. In *Hoffman v. State*, 571 So. 2d 449 (Fla. 1990), for example, the Supreme Court reversed the summary denial of a postconviction motion,

because the defendant had alleged that the state suppressed the names of other persons who confessed to the crime, and the state was unable to refute this claim without a hearing. Likewise, in *Muhammad v. State*, 603 So.2d 488 (Fla. 1992), the court reversed the summary denial of a postconviction motion alleging that the state had withheld exculpatory statements of prison employees who witnessed the offense. Finally, in *Scott v. State*, 657 So. 2d 1129 (Fla. 1995), the Supreme Court reversed the summary denial of a postconviction motion, because the motion alleged that the state had suppressed favorable crime scene photographs and exculpatory statements by a codefendant.

Brady claims in postconviction relief motions may arise in the context of the penalty phase as well. Even if undisclosed evidence was immaterial to the issue of guilt or innocence it is a violation of the rule for the state to withhold evidence that relates to the penalty phase of the trial. See *Garcia v. State*, 622 So.2d 1325 (Fla. 1993).

7. Deliberate Use of Misleading or Perjured Testimony (Giglio)

The deliberate use of false or misleading testimony is a claim that can be raised in a postconviction motion. See *Lightbourne v. Dugger*, 549 So. 2d 1364 (Fla. 1989). These claims are sometimes referred to as *Giglio* claims, after the

decision in *Giglio v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972).

The Giglio Test

To be entitled to relief, the defendant must establish the following:

- (1) the testimony was false;
- (2) the prosecutor knew the testimony was false; and
- (3) the testimony was “material.”

See *Spencer v. State*, 842 So.2d 52 (Fla. 2003); *Rose v. State*, 774 So.2d 629 (Fla. 2000); *Routly v. State*, 590 So. 2d 397 (Fla. 1991).

False testimony is Amaterial \cong for *Giglio* purposes if there is a reasonable likelihood that it could have affected the verdict. *Ventura v. State*, 794 So.2d 553 (Fla. 2001). This is a lower standard than the prejudice prong required in *Brady* and *Strickland* claims, reflecting a heightened judicial concern, and correspondingly heightened judicial scrutiny, where perjured testimony is knowingly used to convict a defendant.

Once a defendant establishes that the prosecutor knowingly presented false testimony at trial, the burden shifts to the state to show that the false evidence was not material. The state must establish that the error was harmless beyond a reasonable doubt. *Guzman v. State*, 868 So. 2d 498 (Fla. 2004).

(a). Cumulative Effect of New Evidence

When an evidentiary hearing has been conducted, the trial court is required to consider the cumulative effect of all *admissible* newly-discovered, *Brady*, and *Giglio* evidence in determining whether this new or different evidence would probably produce a different result upon retrial. See *Lightbourne v. State*, 742 So. 2d 238 (Fla. 1999); *Kokal v. State*, 901 So.2d 766 (Fla. 2005).

8. Sentencing Errors of Constitutional Magnitude

Since the imposition of an illegal sentence is fundamental error, a claim that the defendant's sentence of death is illegal is the kind of claim that can be raised for the first time in a postconviction motion. However, if the sentencing issue presents a substantive or procedural error that does not affect the legality of the sentence itself, then it must be presented on direct appeal and not in a postconviction motion.

Many sentencing issues are presented in postconviction motions as alleged violations of newly-established constitutional principles. For example, a few years ago many postconviction motions contained either a claim under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), that the jury was not informed of its right to consider nonstatutory mitigating factors; a claim under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), that the trial judge

improperly minimized the role of the jury in the sentencing process; or a claim under *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988), that the statutory aggravating circumstances relating to murders that are Acold, calculating, and premeditated≅ or Aespecially heinous, atrocious, and cruel≅ are facially unconstitutional. These points of law have now been settled, but the cases illustrate that sentencing issues can be presented for the first time in postconviction motions.

With the recent decision in *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)(holding unconstitutional Arizona=s capital sentencing scheme Ato the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty≅) defendants in Florida are raising constitutional claims regarding Florida=s procedures by which the jury and the judge consider, determine, recommend and impose the death penalty. Generally, these errors are raised in the context of a claimed violation of a fifth amendment due process right and sixth amendment right to jury trial. Examples of issues: failing to require the listing of aggravating circumstances in the indictment; failing to require jury unanimity on a recommendation of death; failing to require jury unanimity on the specific aggravating

circumstances found to exist. The Florida Supreme Court has considered Florida=s capital sentencing scheme in light of *Ring* and has reaffirmed its constitutionality. See, e.g., *Bottoson v. Moore*, 833 So.2d 693 (Fla. 2002); *King v. Moore*, 831 So.2d 143 (Fla. 2002). See also *Doorbal v. State*, 837 So.2d 940 (Fla. 2003); *Monlyn v. State*, 894 So.2d 832 (Fla. 2004); *Globe v. State*, 877 So.2d 663 (Fla. 2004).

H. General Grounds for Denial

1. Procedural Default

Issues that were, or could have been, raised on direct appeal are procedurally barred and cannot be raised in a postconviction motion. Fla. R. Crim. P. 3.851 (d)(2). See *Hardwick v. Dugger*, 648 So. 2d 100 (Fla. 1994); *Lambrix v. Singletary*, 641 So. 2d 847 (Fla. 1994); *Bryan v. Dugger*, 641 So. 2d 61 (Fla. 1994); *Lopez v. Singletary*, 634 So. 2d 1054 (Fla. 1993); *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991); *Bates v. Dugger*, 604 So. 2d 457 (Fla. 1992); *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992); *White v. Dugger*, 565 So. 2d 700 (Fla. 1990). For the same reason, an issue that was or could have been presented in a postconviction motion cannot be relitigated in a successive postconviction motion. See *Marek v. Singletary*, 626 So. 2d 160 (Fla. 1993); *Scott v. Dugger*, 634 So. 2d 1062 (Fla. 1993); *Atkins v. State*, 663 So. 2d 624 (Fla. 1995).

The defendant cannot overcome a procedural default merely by using a different argument to relitigate an issue that has been decided on appeal or in a previous postconviction motion. See *Bates v. Dugger*, 604 So. 2d 457 (Fla. 1992); *Medina v. State*, 573 So. 2d 293 (Fla. 1990); *Quince v. State*, 477 So. 2d 535 (Fla. 1985); *Zeigler v. State*, 654 So. 2d 1162 (Fla. 1995). Nor can the defendant overcome a procedural default by recasting the argument as a claim for ineffective assistance of counsel. See *Kight v. Dugger*, 574 So. 2d 1066 (Fla. 1990); *Cherry v. State*, 659 So. 2d 1069 (Fla. 1995). If the issue is one that was or could have been made in a direct appeal or a previous postconviction motion, then it is barred.

a. Retroactive Application of Constitutional Right

Under certain circumstances, a significant change in substantive or procedural law may excuse the failure to raise an issue on direct appeal or in a prior postconviction motion. For example, the courts allowed claims under *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987)-- that the jury was not informed of its right to consider nonstatutory mitigating factors-- to be raised for the first time in postconviction motions. See *Hall v. State*, 541 So. 2d 1125 (Fla. 1989); *Ford v. State*, 522 So. 2d 345 (Fla. 1988); *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989). However, this is only an example of the

principle. The principle of law announced in *Hitchcock* is now well-established; therefore new postconviction claims on this issue would have to be raised within the time limit of the rule or would otherwise be time-barred. See *Davis v. State*, 589 So. 2d 896 (Fla. 1991).

While a significant change in the law may excuse the failure to timely raise a claim on direct appeal or in a postconviction motion, a mere evolutionary refinement of the law will not provide the same excuse. *Ferguson v. Singletary*, 632 So. 2d 53 (Fla. 1993). For example, in *Rogers v. State*, 511 So. 2d 526 (Fla. 1987), the Supreme Court limited the scope of the aggravating circumstance for murders that are *A*cold, calculated and premeditated.≅ The court held in a subsequent case that the *Rogers* decision was merely a refinement of existing law and not a new point of law. See *Harich v. State*, 542 So. 2d 980 (Fla. 1989). Thus such claims must be raised in a timely fashion or are procedurally barred.

The Florida Supreme Court has held that a claim under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985)-- that the trial judge improperly minimized the role of the jury in the sentencing process-- can be procedurally barred because *Caldwell* did not announce a new rule of law. See *Cave*

v. State, 529 So. 2d 293 (Fla. 1988); *Ford v. State*, 522 So. 2d 345 (Fla. 1988). The United States Supreme Court has agreed that the *Caldwell* decision is not *Acause*≡ for excusing a procedural default. See *Dugger v. Adams*, 489 U.S. 401, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989).

These principles have been codified in rule 3.851(d)(2)(B), which permits an untimely postconviction motion if the defendant can allege:

- (1) the fundamental constitutional right was not established within the time period provided for in the rule; and
- (2) the fundamental constitutional right has been held to apply retroactively.²

As a general proposition, new rules of substantive criminal law are presumed to apply retroactively, and new rules of procedure are presumed not to apply retroactively. There is an exception to the non-retroactivity of a new procedural rule. A new procedural rule will be applied retroactively if the change:

² In *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005) Justices Wells, Cantero and Bell suggested in a concurring opinion that the phrase “has been held to apply retroactively” necessarily means that such claims cannot be raised until the Supreme Court has affirmatively determined that the constitutional right is to be given retroactive application.

- (1) emanates from the Florida Supreme Court or the United States Supreme Court;
- (2) is constitutional in nature; and
- (3) constitutes a development of fundamental significance.≡

Witt v. State, 387 So.2d 922 (Fla. 1980); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed. 2d 334 (1989). A development of fundamental significance≡ is a change of law which presents a new watershed rule of criminal procedure that alters our understanding of bedrock procedural elements essential to the fairness of a particular conviction. *Teague*.

- i. *Ring and Apprendi* issues

The United States Supreme Court and the Florida Supreme Court have held that the rule announced in *Ring* and *Apprendi* is procedural and does not apply retroactively to cases whose convictions are already final. *Shriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004); *Johnson v. State*, 904 So.2d 400 (Fla. 2005); *Hughes v. State*, 901 So.2d 837 (Fla. 2005).

- ii. Murder Committed as a Juvenile

In *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), the United States Supreme Court held that the execution of

individuals who were under 18 years of age at the time of their capital crimes is prohibited by the eighth amendment. Defendants who meet this criterion will be able to raise this claim by way of postconviction relief, even if the claim would otherwise be time barred. *Roper* announces a rule of substantive law and as such is presumed to apply retroactively. The rule of *Roper* applies only to chronological age, and does not apply to someone with a mental or emotional age under 18 years. *Hill v. State*, 921 So. 2d 579 (Fla. 2006).

iii. Mental Retardation

In *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) the United States Supreme Court held that the eighth amendment prohibits the execution of a mentally retarded person. It has since been held that this ruling is retroactively applicable to cases on collateral review. *U.S. v. Holladay*, 331 F.3d 1169 (Fla. 11th Cir. 2003); *In re Morris*, 328 F.3d 739 (5th Cir. 2003); *Hill v. Anderson*, 300 F.3d 679 (6th Cir. 2002). See also *Phillips v. State*, 894 So.2d 28 (Fla. 2005)(Wells, Cantero and Bell, JJ., concurring).

iv. Crawford issues

In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held that a testimonial hearsay statement is inadmissible at trial unless

the declarant is shown to be unavailable and the party against whom the statement is admitted had an opportunity for cross-examination. The Florida Supreme Court has held that the rule announced in *Crawford* is not retroactively applicable to cases already final on appeal. *Chandler v. Crosby*, 916 So.2d 728 (Fla. 2005). The United States Supreme Court has also held that *Crawford* does not apply retroactively. *Whorton v. Bockting*, 549 U.S. 406, 127 S.Ct. 1173 (2007).

2. Abuse of Process/Successive Motions

A second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion. See *Eutzy v. State*, 541 So. 2d 1143 (Fla. 1989); *Steinhorst v. Singletary*, 638 So. 2d 33 (Fla. 1994); *Pope v. State*, 702 So. 2d 221 (Fla. 1997). In *Spaziano v. State*, 545 So. 2d 843 (Fla. 1989), the Supreme Court affirmed the summary denial of a second postconviction motion in which the defendant claimed ineffective assistance of counsel at resentencing. There was no reason why this argument could not have been raised in the first postconviction motion. The Supreme Court is most likely to find an abuse of process if the second motion presents a claim that was actually raised in a prior postconviction motion. See *Bundy v.*

State, 538 So. 2d 445 (Fla. 1989); *Booker v. State*, 503 So. 2d 888 (Fla. 1987).

The trial court is authorized to dismiss a successive motion if: the motion fails to allege new or different ground and the prior determination was on the merits; or if new and different grounds are alleged, and the trial court finds the failure to assert those grounds in a prior motion constituted an abuse of the procedure governed by the rule. See *Downs v. State*, 740 So. 2d 506 (Fla. 1999); *Mills v. State*, 684 So. 2d 801 (Fla. 1996); *Pope v. State*, 702 So. 2d 221 (Fla. 1997).

The concept of procedural default also applies to successive postconviction motions. If the issue was or could have been raised in the previous postconviction motion, then it is barred. See *Adams v. State*, 543 So. 2d 1244 (Fla. 1989). However, the court has declined to bar a claim of ineffective assistance of counsel in a subsequent postconviction motion if the defendant was represented in the first postconviction proceeding by the same defense lawyer who handled the trial and if the defendant was therefore precluded from raising the claim in the first postconviction motion. See *Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995).

3. Harmless error

A postconviction claim may also be denied on the ground that the trial error was harmless, and this is one instance in which it would be appropriate for a trial judge to apply the harmless error rule. For example, the failure to instruct the jury on its right to consider nonstatutory mitigating circumstances, as required by *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347 (1987), might be harmless beyond a reasonable doubt, see *Tafero v. State*, 561 So. 2d 557 (Fla. 1990), particularly if the jury returned a life recommendation. See *Heiney v. Dugger*, 558 So. 2d 398 (Fla. 1990), or if there was a complete absence of nonstatutory mitigating evidence. See *Steinhorst v. State*, 574 So. 2d 1075 (Fla. 1991). As with errors revealed in direct appeals, the state must show that an error raised on a postconviction motion is harmless beyond a reasonable doubt. See *Rivera v. Dugger*, 629 So. 2d 105 (Fla. 1993) (the Supreme Court declined to conclude the use of an invalid prior conviction was harmless beyond a reasonable doubt).

I. Stay of Execution

1. General Considerations

Section 922.06, Florida Statutes, states that A[t]he execution of a death sentence may be stayed only by the Governor or incident to an appeal.≡ In spite of the restrictive

language of this statute, the Florida Supreme Court has recognized in many cases that trial judges have the inherent authority to grant a stay of execution pending disposition of a postconviction motion. *See State ex rel Russell v. Schaeffer*, 467 So. 2d 698 (Fla. 1985); *Spalding v. Dugger*, 526 So. 2d 71 (Fla. 1988).

In death penalty cases, the prospect of irreparable injury is apparent. Therefore, whether it is appropriate to grant a stay is often dependent upon an assessment of the likelihood of success on the merits of the case. The Florida Supreme Court has held that it is proper to grant a stay of execution when the petitioner demonstrates that he might be entitled to postconviction relief, *see State ex rel. Russell v. Schaeffer*, 467 So. 2d 698 (Fla. 1985), or when the files and records fail to establish conclusively that the defendant is not entitled to relief. *See State v. Sireci*, 502 So. 2d 1221 (Fla. 1987); *State v. Crews*, 477 So. 2d 984 (Fla. 1985); *O'Callaghan v. State*, 461 So. 2d 1354 (Fla. 1984). Similarly, in federal postconviction proceedings to review state convictions and sentences of death, the courts have said that it is proper to grant a stay if the petitioner has presented colorable, non-frivolous issues, *Booker v. Wainwright*, 675 F.2d 1150 (11th Cir. 1982), or when the petitioner presents claims that are debatable among jurists of reason. *See Barefoot v. Estelle*, 463 U.S. 880, 103 S.

Ct. 3383, 77 L. Ed. 2d 1090 (1983). The subject of stays in federal habeas corpus proceedings is discussed in more detail in Section IV.G below.

The defendant has a right to a stay of execution if the governor signs a death warrant during the time period in which a postconviction motion could be filed. Rule 3.851(d)(4) states A[s]hould the governor sign 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.≡

Among other things, the trial judge should determine whether a stay is necessary to facilitate the preparation for, and scheduling of, an evidentiary hearing. The Florida Supreme Court has held that trial judges are required to afford the defendant a full and fair evidentiary hearing on a postconviction claim unless the files and records conclusively show that the defendant is not entitled to relief. See *Holland v. State*, 503 So. 2d 1250 (Fla. 1987). A stay of execution may also be required to ensure that the defendant is able to receive adequate assistance of counsel in the postconviction proceeding. See *Spalding v. Dugger*, 526 So.

2d 71 (Fla. 1988); *Hoffman v. Haddock*, 695 So. 2d 682 (Fla. 1997).

The trial court is without jurisdiction to enter an order granting a stay of execution prior to the filing of a motion under rule 3.851. The postconviction motion must be filed before the court can consider the application for a stay. See *State ex rel. Russell v. Schaeffer*, 467 So. 2d 698 (Fla. 1985); *Bundy v. State*, 490 So. 2d 1257 (Fla. 1986). However, the trial judge can treat the application for stay as a postconviction motion, and grant a stay of execution, if the application itself contains sufficient facts to demonstrate an entitlement to relief. See *Schaeffer*.

The rule provides that the Supreme Court has the authority to issue a stay of execution if the governor signs a death warrant during the time period in which a postconviction motion could be filed. Rule 3.851(d)(4) states A[s]hould the governor sign 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.≡

The court is not required to issue a stay on a successive motion for postconviction relief, even if the same issue is pending in the United States Supreme Court in another case. See *Darden*

v. State, 521 So. 2d 1103 (Fla. 1988) (the claim on the merits had been raised and rejected in an earlier postconviction motion and appeal).

2. Insanity at the Time of Execution

A prisoner in custody under a sentence of death has a constitutional right not to be executed while insane. See *Ford v. Wainwright*, 477 U.S. 399, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). Rule 3.811(d) establishes the procedure to be followed if the defendant moves to stay his execution on the ground that he is insane. Rule 3.812 outlines the procedure to be followed in a hearing on such a motion and it specifically provides that the hearing shall not be a review of the Governor=s determination of the defendant=s sanity under Fla. Stat. § 922.07.

If a motion under rule 3.811 sets forth reasonable grounds to believe that the defendant is insane, the trial court must hold a hearing on the motion and make a determination based on the facts. See *Provenzano v. State*, 751 So. 2d 37 (Fla. 1999).

3. Method of Execution/Execution Day Procedures

Since 2000, Florida law has provided two methods of execution: lethal injection and electrocution. Lethal injection is the default method, and a death sentence shall be carried out by lethal

injection unless the defendant affirmatively elects electrocution. *Fla. Stat.* §922.105.

Both methods of execution have survived a variety of constitutional attacks. See *Sims v. State*, 754 So.2d 657 (Fla. 2000)(lethal injection does not violate eighth amendment); *Provenzano v. State*, 739 So. 2d 1150 (Fla. 1999)(electrocution does not violate eighth amendment); *Sochor v. State*, 883 So.2d 786 (Fla. 2004)(neither method violates eighth amendment); *Bryan v. State*, 753 So.2d 1244 (Fla. 2000)(statutory change adding lethal injection as method of execution does not violate separation of powers, *ex post facto*); *Diaz v. State*, 945 So.2d 1136 (Fla. 2006)(same); *Rutherford v. State*, 926 So.2d 1100 (Fla. 2006)(lethal injection method does not violate first amendment upon assertion that defendant is unable to communicate any feeling of pain that may result if the execution procedure is carried out improperly).

The procedures to be followed on the day of an execution are set out in the appendix to the Court=s opinion in *Provenzano*.

J. Procedure After Death Warrant Issued

Proceedings in the trial court after the issuance of a death warrant are controlled by rule 3.851(h). This provision in the rule was adopted separately. See *Amendments to Florida Rule of*

Criminal Procedure 3.851(h), 828 So.2d 999 (Fla. 2002). Subdivision (1) provides that the time periods in the rule A shall be expedited after a warrant has been signed.” The need for a prompt disposition is emphasized in subdivision (2) of the rule, which states that A proceedings after a death warrant has been issued shall take precedence over all other cases,≡ and in subdivision (3) which provides that all motions A shall be heard expeditiously considering the time limitations set by the date of execution and the time required for appellate review.≡

When a death warrant has been issued, the chief judge must assign the case to a judge qualified under the Rules of Judicial Administration. See Fla.R.Crim.P. 3.851(h)(1). The assigned judge must then schedule a case management conference. See Fla.R.Crim.P. 3.851(h)(6). During the case management conference, the trial judge shall set a time limit for filing a postconviction motion and schedule a hearing to determine whether the motion will require an evidentiary hearing. If an evidentiary hearing is required, the trial judge must schedule the hearing as soon as possible considering the date set for the execution and the time required for appellate review. See Fla.R.Crim.P. 3.851(h)(6).

Proceedings conducted after the issuance of a death warrant must be reported by the most accurate and advanced technology available. See Fla.R.Crim.P. 3.851(h)(7). The proceedings must be transcribed expeditiously. Subdivisions (8) and (9) of the rule provide for expedited preparation of the transcript and submission of the record to the Supreme Court.

K. Appeals from Postconviction Orders

Rule 3.851 provides a remedy that has been characterized by the appellate courts as a civil remedy. See *Jackson v. State*, 452 So. 2d 533 (Fla. 1984). Therefore, an order granting a motion for postconviction relief under rule 3.851 is appealable by the state as a final order, see *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000); *State v. Lara*, 581 So. 2d 1288 (Fla. 1991); *State v. White*, 470 So. 2d 1377 (Fla. 1985); *State v. Sireci*, 502 So. 2d 1221 (Fla. 1987); *State v. Bolender*, 503 So. 2d 1247 (Fla. 1987); *State v. Breedlove*, 655 So. 2d 74 (Fla. 1995), just as an order denying such a motion is appealable by the defendant.

As with the direct appeal from a judgment and sentence of death, the appeal from a postconviction order is to the Florida Supreme Court. Likewise, an appeal by the state from an order granting postconviction relief to an inmate sentenced to death is to the Supreme Court.

If the state appeals an order granting a postconviction motion on some but not all of the grounds, the defendant may cross appeal the order to the extent that it denies relief. See *State v. Williams*, 797 So. 2d 1235 (Fla. 2001).

The Office of the Capital Collateral Representative is obligated to pay the court reporter for the costs of preparing the transcript of a postconviction hearing. See *Gaskin v. State*, 798 So. 2d 721 (Fla. 2001).

L. Practical Considerations

Postconviction motions in capital cases should take first priority over all other matters pending before the court. In *Glock v. State*, 537 So. 2d 99 (Fla. 1989), the Supreme Court sharply criticized the trial judge for using nearly two months of the warrant period leaving the Supreme Court and federal courts only eleven days of the remaining time period.

The clerk of the court and court reporter should be directed to prepare the record expeditiously. In *Glock*, the court expressed its displeasure over the fact that the clerk had to be ordered by the appellate court to prepare the record and then waited eighteen days after the initial request. Clerks should be informed of the following: (1) filing fees are not jurisdictional; (2) a clerk cannot refuse to accept a notice of appeal simply because it is not

accompanied by a filing fee; (3) the time period for preparing the record is drastically shortened in a postconviction appeal under warrant.

The trial court should rule on a postconviction motion promptly. In *Peede v. State*, 748 So. 2d 253 (Fla. 1999), the postconviction motion had been pending in the trial court for eight years before it was summarily denied. The court reversed the summary denial and remanded for an evidentiary hearing Awithout delay.≡ See also *Jones v. State*, 740 So. 2d 520 (Fla. 1999) (holding that the defendant was entitled to a new trial because the trial court allowed twelve years to pass before conducting an evidentiary hearing on the defendant=s postconviction claim of incompetence to stand trial).

II. HABEAS CORPUS IN FLORIDA COURTS

A. Jurisdiction

Article V of the Florida Constitution provides that a writ of habeas corpus can be issued by the Florida Supreme Court or any justice of the Supreme Court, Art. V 3(b)(9), Fla.Const. (1968); by a district court of appeal or any judge of a district court of appeal, Art. V 4(b)(3), Fla.Const. (1968); or by a circuit court judge, Art. V 5(b), Fla.Const. (1968).

Although the Supreme Court has jurisdiction to issue a writ of habeas corpus, the court will not allow the remedy to be used as a substitute for a direct appeal or as an opportunity to relitigate issues that were resolved on direct appeal. The Supreme Court has held that an issue presented on direct appeal cannot be reconsidered on a petition for writ of habeas corpus. See *Francis v. Barton*, 581 So. 2d 583 (Fla. 1991); *Porter v. Dugger*, 559 So. 2d 201 (Fla. 1990); *Swafford v. Dugger*, 569 So. 2d 1264 (Fla. 1990).

Before the adoption of rule 3.850, habeas corpus was widely used in the trial courts as a postconviction remedy. For all practical purposes, habeas corpus is now limited to unique issues that cannot be resolved in the trial court. As explained below, habeas corpus is most often used in death penalty cases to challenge the effectiveness of appellate counsel. In such cases, the petition for writ of habeas corpus is filed directly in the Florida Supreme Court.

B. Grounds for Issuance of the Writ

1. Ineffective Assistance of Appellate Counsel

a. In General

The proper method for challenging the effectiveness of appellate counsel is to file a petition for writ of habeas corpus in the appellate court. Effectiveness of counsel on appeal is

measured by the same standard that applies at trial. See *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001); *Williamson v. Dugger*, 651 So. 2d 84 (Fla. 1994). In order to prevail on a habeas corpus petition alleging ineffective assistance of appellate counsel, the defendant must show that the appellate lawyer's performance fell below an objective standard of reasonableness and, but for the lawyer's unprofessional errors, there is a reasonable probability that the result of the proceeding would have been different. See *Harvey v. Dugger*, 650 So. 2d 982 (Fla. 1995); *Scott v. Dugger*, 604 So. 2d 465 (Fla. 1992), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Ferguson v. Singletary*, 632 So. 2d 53 (Fla. 1993).

In the absence of fundamental error, an appellate attorney has no obligation to raise an issue that was not preserved for review. See *Downs v. Moore*, 801 So. 2d 906 (Fla. 2001); *Robinson v. State*, 773 So. 2d 1 (Fla. 2000). Therefore, the failure to argue an unpreserved error cannot amount to ineffective assistance of appellate counsel, even if the argument would have been meritorious. See *Hardwick v. Dugger*, 648 So. 2d 100 (Fla. 1994); *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990).

Given the standard set forth in *Strickland v. Washington*, the claim omitted by the appellate attorney must also be meritorious. The omission of frivolous or immaterial arguments cannot support

a finding that the defendant did not receive effective assistance of appellate counsel. See *Correll v. Dugger*, 558 So. 2d 422 (Fla. 1990). For example, the failure to raise a claim on appeal under *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), that the standard jury instructions impermissibly minimize the role of the jury in sentencing does not establish ineffectiveness of appellate counsel because the Florida Supreme Court has held that the standard jury instruction is valid even in light of *Caldwell*. See *King v. Dugger*, 555 So. 2d 355 (Fla. 1990). Appellate counsel's failure to brief an issue that is without merit is not a deficient performance which falls measurably outside the range of professionally acceptable performance.≡ *Suarez v. Dugger*, 527 So. 2d 190 (Fla. 1988); *McCrae v. Wainwright*, 439 So. 2d 868 (Fla. 1983).

b. Time for Filing Petition

A petition for writ of habeas corpus alleging ineffective assistance of appellate counsel must be filed simultaneously with the initial brief on appeal from the order denying postconviction relief. Fla.R.Crim.P. 3.851(d)(3); *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001).

2. Ineffective Assistance of Postconviction Counsel

Habeas corpus was once used to challenge the effectiveness of an attorney representing the defendant in a postconviction proceeding in a capital case. See *Lambrix v. State*, 559 So. 2d 1137 (Fla. 1990). However, the Supreme Court has since determined that a defendant is not entitled to assert a claim of ineffective assistance of counsel in a postconviction proceeding. See *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999); *Lambrix v. State*, 698 So. 2d 247 (Fla. 1996).

III. EXECUTIVE CLEMENCY

A. Appointment of Counsel

The circuit court has authority to appoint private counsel for the purpose of assisting an indigent death row inmate in the filing and presentation of an application for executive clemency. Section 925.035(4), Florida Statutes, sets the maximum fee for representation in such cases at \$1000.00, but the trial judge has authority to award a fee in excess of the maximum, under the same principles that apply to attorney's fee awards in trials and appeals. See *Remeta v. State*, 559 So. 2d 1132 (Fla. 1990).

B. Overview of the Process

Executive clemency is a power vested in the Governor by Article IV, Section 8(a) of the Florida Constitution. See *Parole Commission v. Lockett*, 620 So. 2d 153 (Fla. 1993)(defining the nature of the clemency power and explaining the clemency process in capital cases). The general power of clemency includes numerous remedies ranging from a restoration of civil rights to a full pardon, but the remedy most often sought in death penalty cases is a commutation of the sentence from death to life in prison. In such cases, the defendant must follow the procedures set out in Chapter 940, Florida Statutes, and the Rules of Executive Clemency.

In all cases in which the death penalty has been imposed, the Florida Parole Commission is required to conduct a clemency investigation. At some point in the process, usually before the investigation begins, the Office of Executive Clemency will contact the sentencing judge and request that the judge appoint counsel for the defendant. The Parole Commission investigation must include (1) an interview of the defendant (with counsel) by at least three parole commissioners, (2) an interview (if possible) with the trial attorneys who prosecuted and defended the case, and (3) an interview (if possible) with the victim's family. After the investigation is completed, the commissioners who interviewed the

defendant must prepare a final report on their findings and conclusions.

The Parole Commission report must be transmitted to all members of the Clemency Board within one hundred and twenty days of the completion of the investigation. If any member of the Board requests a hearing within thirty days, the case is then scheduled for a hearing before the Clemency Board and notice is given to the state attorney and the attorney for the defendant. The prosecution and defense may each make an oral argument not to exceed fifteen minutes. A representative of the victim's family also has a right to address the Clemency Board by making a presentation not to exceed five minutes.

IV. HABEAS CORPUS IN FEDERAL COURTS

A. In General

The statutory authority for filing a petition for writ of habeas corpus is set forth in 28 U.S.C. § 2254. The pleading requirements are outlined in the Rules Governing 2254 Cases. Local rules of the United States District Courts establish more specific pleading and procedure requirements. See U.S. Dist. Ct. Northern Dist. Rules 5(J), 5(K), 72.2(B); U.S. Dist. Ct. Middle Dist. Rules 4.14, 4.17; U.S. Dist. Ct. Southern Dist. Rule 88.2.

B. Grounds for Relief

Federal habeas corpus is available as a remedy to any person who is detained in violation of the United States Constitution. See *Maleng v. Cook*, 490 U.S. 488, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989). The remedy is not intended to correct errors of state law and may not be used for that purpose. See *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984).

C. Time Limitation

The Antiterrorism and Effective Death Penalty Act³ places a one-year time limit on the right to file a federal habeas corpus petition. According to 28 U.S.C. Section 2244(d)(1), the time runs from the latest of:

- (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
- (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant is prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims, presented could have been discovered through the exercise of due diligence.

These time periods are tolled during the period in which an "application for State postconviction or other collateral review" is pending. See 28 U.S.C. § 2244(d)(2). This phrase has been interpreted to mean an application for postconviction relief in state court. See *Duncan v. Walker*, 533 U.S. 167, 121 S. Ct. 2120, 150 L. Ed. 2d 251 (2001) (holding that a previous federal habeas corpus petition did not toll the time because it was not a petition filed in state court). A state postconviction motion is effective to toll the time period for filing a federal habeas corpus petition even though all of its claims are procedurally barred under state law. See *Artuz v. Bennett*, 531 U.S. 4, 121 S.Ct. 361 (2000). Once the mandate is issued by the Florida Supreme Court, however, the time period resumes running and the filing of a petition for writ of certiorari with the United States Supreme Court does not toll the

running of the one-year period. *Lawrence v. Florida*, 549 U.S. 327, 127 S.Ct. 1079 (2007).

D. General Defenses

1. Failure to Exhaust State Remedies

The petitioner must present the federal constitutional issues to the state court before the federal court can consider granting relief for a violation of the petitioner's rights. This requirement is generally referred to as “exhaustion of state remedies.” Generally, a defendant convicted under state law who has not exhausted available state remedies is not entitled to a writ of habeas corpus in federal court. See *Picard v. Connor*, 404 U.S. 270, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971); *Rose v. Lundy*, 455 U.S. 509, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

2. Deliberate Bypass or Procedural Default

An issue that was not raised in state court may not be raised in federal court unless the petitioner can show good cause for not raising the point in state court and resulting prejudice if the issue is not resolved in federal court. See *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); *Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986).

If a state court does not reach the merits of an issue, but instead disposes of it on the basis of a procedural default, that fact

must plainly appear from the ruling of the state court. See *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 103 L. Ed. 2d 308 (1989).

Otherwise, the federal court may assume that the state court addressed the issue on its merits, which will in turn be cause for the federal court to assume that the issue is exhausted. See *Johnston v. Singletary*, 640 So. 2d 1102 (Fla. 1994) (the federal court decided an issue because the Florida Supreme Court said that it was *without merit or . . . procedurally barred*). The federal court could not determine whether the decision of the Florida Supreme Court was based on an independent state ground.

E. Disposition of Habeas Corpus Petitions

1. Evidentiary Hearings

The federal habeas corpus statute, 28 U.S.C. § 2254(d), sets forth a list of circumstances under which a United States District Court is required to grant an evidentiary hearing on a federal habeas corpus petition. For the most part, these reasons deal with the adequacy of the state-court hearing procedure, and the hearing itself in the state court.

2. Deference to State Court Findings

In the adjudication of federal habeas corpus petitions, the federal courts are required to presume that factual findings made

by state courts are correct. See *Wainwright v. Witt*, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985); *Sumner v. Mata*, 449 U.S. 539, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981). There is no presumption of correctness, however, as to non-factual findings and conclusions in state court. See *Miller v. Fenton*, 474 U.S. 104, 106 S. Ct. 445, 88 L. Ed. 2d 405 (1985).

F. Successive Petitions

The Antiterrorism and Effective Death Penalty Act³ outlines the limited circumstances in which it is proper for a defendant to file a second or successive petition for writ of habeas corpus in federal court. The defendant has no right to file a successive petition to assert a claim that was presented in a prior petition for writ of habeas corpus. See 28 U.S.C. § 2244(b)(1). A claim that was not presented in a previous federal habeas corpus petition may be presented in a successive petition only if :

(a) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable see *Tyler v. Cain*, 533 U.S. 656, 121 S.Ct. 2478, 150 L. Ed. 2d 632 (2001) (holding that a successive petition should have been dismissed

because the right at issue had not been made retroactive); or

(b) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2244(b)(2) (emphasis added).

The United States Supreme Court upheld the Antiterrorism and Effective Death Penalty Act in *Felker v. Turpin*, 518 U.S. 651, 116 S. Ct. 2333, 135 L. Ed. 2d 827 (1996). The standard established in Section 2244(b)(2) is similar to the test articulated by the Supreme Court in *Sawyer v. Whitley*, 505 U.S. 333, 112 S. Ct. 2514, 120 L. Ed. 2d 269 (1992). Since the *Sawyer* decision, however, the Supreme Court has drawn a distinction between new evidence relating to the defendant's eligibility for the death penalty and new evidence showing that the defendant did not commit the crime. See *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). According to the *Calderon* decision, a

defendant who relies on new evidence that he did not kill the victim need only show that it is more likely than not that the new evidence would have changed the outcome.

Authority to consider a successive petition for writ of habeas corpus must be first granted by the Court of Appeals having jurisdiction over the District Court in which the petition will be filed. See 28 U.S.C. § 2244(3)(A). The Courts of Appeals serve a gatekeeping function in that they screen the successive petitions that qualify for consideration. However, the District Court still has authority to dismiss a federal habeas corpus petition on the ground that it fails to meet the requirements of Section 2244, even if the filing of the petition was authorized by the Court of Appeals. See 28 U.S.C. § 2244(b)(4).

G. Cause of Action Under 42 U.S.C. §1983

By its very nature, a postconviction claim involves a challenge to the validity of the conviction or the duration of the sentence. This is the very essence of habeas corpus, and thus most claims seeking federal postconviction relief must proceed under the federal habeas statute, 28 U.S.C. § 2254. See *Preiser v. Rodriguez*, 411 U.S. 475, 489, 93 S.Ct. 1827, 36 L. Ed. 2d 439 (1973).

Because the Antiterrorism and Effective Death Penalty Act (“AEDPA”, discussed *supra* at 92) prohibits defendants from filing successive habeas corpus petitions except in very limited circumstances, defendants have sought to avoid this procedural bar by using alternative vehicles to raise constitutional postconviction claims in federal court. One of the more recent methods is a cause of action filed pursuant to 42 U.S.C. §1983.

A §1983 claim authorizes a “suit in equity, or other proper proceeding for redress,” against any person who, under color of state law, “subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution.” Section 1983 has been held to be an appropriate vehicle to raise constitutional claims that seek to challenge the conditions of a prisoner's confinement. Such claims are deemed to fall outside of the scope of federal habeas. *See Muhammad v. Close*, 540 U.S. 749, 750, 124 S.Ct. 1303, 1304, 158 L.Ed.2d 32 (2004).

Defendants have filed §1983 actions seeking to challenge the precise methods used in carrying out an execution as an unconstitutional “condition of confinement” and therefore not subject to the federal habeas statute or the limitations of AEDPA. *See, e.g., Nelson v. Campbell*, 541 U.S. 637, 124 S.Ct. 2117, 158

L.Ed.2d 924 (2004); *Hill v. McDonough*, 547 U.S. 573, 126 S.Ct. 2096, 165 L.Ed.2d 44 (2006).

In *Hill*, the prisoner filed an action for injunctive relief under §1983. The suit sought to enjoin the respondents “from executing [Hill] in the manner they currently intend.” 126 S.Ct. at 2102. The challenge was to the anticipated protocol to be used in carrying out the execution by lethal injection; Hill alleged the protocol would cause a foreseeable risk of gratuitous and unnecessary pain. Hill conceded that he was not seeking to enjoin altogether the execution, nor was he asserting that the state could not carry out the execution by way of lethal injection; rather, the claim was limited to the assertion that the specific procedures to be followed in doing so would violate defendant’s constitutional rights and should be enjoined. Given the limited nature of the claim and the relief sought, the Court held that it could proceed under §1983.

H. Stay of Execution

1. United States District Courts

There is no automatic right to a stay of execution pending the adjudication of a federal habeas corpus petition, but in most cases a stay will be entered to allow review of the first petition. The chances of obtaining a stay of execution pending consideration of a second or successive petition for writ of habeas corpus are diminished. The United States Supreme Court held in *Barefoot v.*

Estelle, 463 U.S. 880, 103 S.Ct. 3383, 77 L. Ed. 2d 1090 (1983), that the district courts have authority to expedite disposition of a second or successive petition and that the granting of a stay in such a case should reflect the presence of substantial grounds upon which relief might be granted.≡ *Barefoot*, at 463 U.S. 895.

2. United States Circuit Courts of Appeal

The opinion in *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983), also addresses the procedures to be followed by a federal appellate court when considering a motion for stay of execution pending an appeal from the denial of habeas corpus. In essence, the Court held that a stay of execution should be granted if the district court has denied a petition for writ of habeas corpus but a determination has been made either by the district court or by the circuit court of appeals that there is *A*probable cause≡ for the appeal. It has been said that *A*probable cause≡ is something more than the *A*absence of frivolity≡ and that it requires a *A*substantial showing of a violation of a federal right.≡ *Barefoot*, at 463 U.S. 893.

Although stays of execution are not automatic, they are entered in the majority of cases the first time the defendant has filed a federal habeas corpus petition. The procedures that apply to stays of execution pending review of an order denying a federal

habeas corpus petition are set out in Rule 22-3 of the Rules of the Eleventh Circuit Court of Appeals.

3. United States Supreme Court

Before the United States Supreme Court will grant a stay of execution there must be reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari [to review the affirmance of an order denying habeas corpus] or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.≅ *White v. Florida*, 458 U.S. 1301, 103 S.Ct. 1, 73 L. Ed. 2d 1385 (1982). See also *Maggio v. Williams*, 464 U.S. 46, 104 S.Ct. 311, 78 L. Ed. 2d 43 (1983) (the Court vacated a stay on the ground that there was no likelihood that four members would grant certiorari); *Woodard v. Hutchins*, 464 U.S. 377, 104 S.Ct. 752, 78 L. Ed. 2d 541 (1984) (the Court denied a stay finding that the successive petition was an abuse of the writ); and *Autrey v. Estelle*, 464 U.S. 1301, 104 S.Ct. 24, 78 L. Ed. 2d 7 (1983), (stay granted on the ground that the Court had accepted review of the issue in another case).