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Discovery of Public Records in Capital Cases

by Judge O.H. Eaton, Jr.

Litigation in a death penalty case does not end when the judgment and sentence of death are affirmed by the Supreme Court of Florida. The next phase of litigation in these cases falls under the general heading of "postconviction relief." It is during this phase that death row defendants litigate matters "collateral" to the judgment and sentence that could not have been raised on appeal. Issues such as competence of defense trial counsel, voluntariness of a guilty plea, and "actual innocence" claims through scientific evidence such as DNA comparisons are examples of claims brought by motions for postconviction relief.

The lawyers who represent death row inmates in postconviction matters are referred to as "collateral counsel." These lawyers practice in one of the most stressful areas of the law. They are charged with reinvestigating the case to find out deficiencies that occurred during the trial. This reinvestigation usually includes review of numerous public records that may have some bearing on the case.

The procedure governing postconviction litigation in capital cases is contained in Fla. R. Crim. P. 3.851. The procedure to obtain public records for use in postconviction litigation is contained in Rule 3.852. The Supreme Court of Florida published its most recent versions of Rules 3.851 and 3.852 on September 26, 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. 2d 298 (Fla. 2001). The changes became effective on October 1, 2001, but do not apply to motions pending before that date. This publication is the latest in a series of rules changes governing postconviction procedure in capital cases.

Over the last several years both the Supreme Court and the legislature have made efforts to streamline the processing of postconviction motions in capital cases. These efforts have met with mixed results. For instance, the legislature passed the Death Penalty Reform Act of 2000 (DPRA) and the Supreme Court declared it unconstitutional at its first opportunity.1 However, the legislature has provided substantive law and, more importantly, resources to allow postconviction litigation in capital cases to proceed more rapidly.

Every death row inmate in Florida has a lawyer. That statement alone is a positive comment on legislative commitment. There are three publicly funded offices of Capital Collateral Regional Counsel representing the vast majority of death row inmates. Also, there is a registry of attorneys available for appointment at public expense if Capital Collateral Regional Counsel are unable to undertake representation of a particular defendant.

Additionally, there is a legislatively created Capital Commission composed of judges and legislators that is tasked to monitor capital cases and make recommendations to the legislature on a periodic basis.2 This commission also maintains the registry of qualified attorneys available to be appointed to represent a death row inmate if the Capital Collateral Regional Counsel cannot represent the

inmate.

Collateral counsel is appointed for a death row inmate by the Supreme Court of Florida upon the issuance of the mandate affirming the judgment and sentence of death on direct appeal.3

Prior to 1996, collateral counsel had to file a civil action in order to obtain public records from persons or agencies other than the state attorney and local law enforcement agencies that investigated the crime.4 This cumbersome process often required suit to be filed in several jurisdictions and delays were inevitable. The Florida Legislature enacted DPRA to streamline processing of capital cases and included a provision for the discovery of public records in the act.5

The procedural aspects of the statute were held to be unconstitutional in Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000). In Allen, the court stated:

> Next, we feel it is important to specifically address §3 of the DPRA, which substantially amends §119.19. Although this Court has recognized that the Legislature "has the prerogative to place reasonable restrictions" on the right of public records access, Henderson, 745 So. 2d at 326, this Court has also noted that Rule 3.852 is "a discovery rule for public records production ancillary to proceedings pursuant to Rule 3.850 and 3.851." Amendments to Florida Rules of Criminal Procedure 3.852, 754 So. 2d 640, 642 (Fla. 1999). Hence, the Legislature has the authority to define the substantive right to public records, but the adoption of time limitations and procedures governing the production of public records in capital cases is within the exclusive province of this Court. With the exception of §119.19(9) (directing the Secretary of State to provide the personnel, supplies, and any necessary equipment to copy records held at the records repository), which is consistent with our proposed rules, we find that §3 of the DPRA is unconstitutional, as this section attempts to regulate the procedure for public records production in capital cases.

Id. at 66. (Footnote omitted.)

The legislature created a centralized repository for storage of public records in capital cases in order to provide easy access to them. It was the legislature's hope that a process could be developed that would allow these records to be automatically sent to the repository and made accessible to counsel without the necessity of resorting to litigation.

Currently, the Secretary of State is the officer responsible for storing the records and the records repository is located in the R.A. Gray building in Tallahassee.

The location of the repository has met with general criticism because the vast majority of capital cases are filed at the opposite end of the state and air travel to Tallahassee has never been optimal. Collateral counsel may prefer to go to the local agency that maintains the records and review them there. However, the statute governing the appointment of collateral counsel restricts counsel from

requesting public records except from the records repository. F.S. §27.708(3) provides as follows: "(3) Except as provided in §119.19, the capital collateral regional counsel or contracted private counsel shall not make any public records request on behalf of his or her client."

This statute is arguably unconstitutional because it violates the equal protection clause by prohibiting collateral counsel from obtaining public records by other means available to the public. Sims v. State, 753 So. 2d 66, 71 (Anstead, J., concurring). It also attempts to restrict the practice of law.

Those problems aside, the procedural aspects of discovery of public records are now regulated by the Supreme Court of Florida. Rule 3.582 provides for an orderly method to obtain public records and, if the various offices and agencies that maintain public records cooperate, collateral counsel should be able to review them and have copies made in a timely fashion.

The remainder of this article explains the operation of Rule 3.852 and provides some direction for capital postconviction counsel by reviewing the few cases that address the subject.

Definitions
Rule 3.852 defines the various terms used as follows:

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

(2) "Trial Court" means (A) the judge who imposed the sentence of death; or (B) the judge assigned by the Chief Judge.

(3) "Records repository" means the location designated by the Secretary of State pursuant to §119.19(2), Florida Statutes (Supp. 1998), for archiving capital postconviction records.

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

(5) "Agency" and "person" mean an entity or individual as defined in §119.011(2), Florida Statutes (1997), that is subject to the requirements of producing public records for inspection under §119.07(1)(a), Florida Statutes (1997). 119.011(2) "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

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

Steps to Obtain Public Records in Capital Cases
Rule 3.852 provides for persons and agencies to be served with notice to send relevant public records to the records repository and to provide a certificate that the records have been sent. The process begins upon the issuance of the mandate by the Supreme Court of Florida affirming the sentence of death.

• Step 1
The attorney general has the responsibility to begin the process within 15 days from the date the mandate affirming the death sentence is issued by filing a notice of the mandate with the trial court and serving a copy upon the state attorney who tried the case, the Department of Corrections, and the defendant's trial counsel.

This seemingly simple procedure provides the two main executive branch agencies in the case with notice that public records are to be identified and collected. It also provides notice to the defendant's trial counsel. However, it provides no alternative in the event that trial counsel is no longer practicing law, is dead, or has moved to another state. This oversight may cause problems due to the length of time appeals in capital cases remain pending prior to the issuance of the mandate.

The notice directs the state attorney and the Department of Corrections to submit public records to the records repository within 90 days. The state attorney is also required to provide notice to all law enforcement agencies involved in the investigation of the case to submit public records to the records repository within 90 days.

• Step 2
The state attorney of the circuit where the case was tried has 90 days from the date of service of the notice from the attorney general to provide the attorney general with the name and address of any additional person or agency having public records pertinent to the case.

Additionally, within the same 90-day period, the defendant's trial counsel is responsible for providing written notification to the attorney general of the name and address of any person or agency with information pertinent to the case which has not been previously provided to collateral counsel.

This latter provision has the potential to cause confusion and delay. It gives trial counsel the option of either advising the attorney general of the names and addresses of any additional person or agencies having public records, or not advising the attorney general of such persons or agencies by previously notifying collateral counsel of their existence. This could result in public records not being sent to the records repository for inspection by the state attorney. While it is unlikely that some person or agency foreign to the case will possess valuable material, in capital litigation there is always the possibility.

• Step 3
The attorney general must notify any person or agency disclosed by the state attorney or trial counsel to submit public records to the records repository. This notice must be given within 15 days from receipt of the names and addresses of the additional persons or agencies. The additional persons or agencies have 90 days in which to comply.

• Step 4
The state attorney has 15 days after receipt of the notice from the attorney general to notify each law enforcement agency involved in the case to submit public records to the records repository within 90 days. A copy of the notice must be served upon the defendant's trial counsel.

• Step 5
The state attorney, the Department of Corrections, law enforcement agencies, and other persons or agencies having public records must collect the public records in their possession and copy, index, and deliver the records to the records repository. Written notification of compliance must be furnished to the attorney general. The notification shall certify "to the best of the person or agency's knowledge and belief" all public records have been included.

For obvious reasons, the certificate "to the best of the person or agency's knowledge and belief" is ineffective and will not be relied upon by collateral counsel. The reason for this ambiguous certificate was concern that large agencies like the Florida Department of Law Enforcement may unintentionally miss some public records and should not be held to an exact standard to produce them. However, the certificate is misleading and should be omitted from the rule. The arrival of a box of public records at the records repository or a statement that there are no such records provides the same assurance as the certificate.

Additional Public Records
Rule 3.852(g) provides for collateral counsel to demand additional public records from any person or agency submitting public records or identified as having information pertinent to the case. This demand must be made within 240 days after collateral counsel is appointed, retained, or appears pro bono. If collateral counsel was appointed before October 1, 2001, the time limit is 90 days after the date of appointment. This limitation may cause problems. Since collateral counsel is appointed shortly after the mandate affirming the death sentence is issued, it is entirely possible that all of the public records have not been delivered to the records repository and are not even due to be there within 90 days after collateral counsel is appointed or appears. The demand must be answered and additional public records sent to the records repository within 90 days. However, an objection may be filed within 60 days from the date of the receipt of the demand and the trial court must hold a hearing and issue a ruling within 30 days after receipt of the objection. The person or agency supplying the additional public records must certify "to the best of the person or agency's knowledge and belief" that all additional public records have been delivered to the records repository or that no additional public records were found.

The trial court may overrule any objection to the production of additional public records if the court

finds 1) collateral counsel has made a timely and diligent search, 2) collateral counsel's written demand identifies, with specificity, those additional public records that are not in the records repository, 3) the additional public records are relevant or appear reasonably calculated to lead to discovery of admissible evidence, and 4) the additional public records request is not overly broad or unduly burdensome.

The filing of a demand for additional public records under this section of the rule appears to be mandatory since it uses the word "shall." Collateral counsel will undoubtedly file a "shell" demand for additional public records and move to amend at a later date. This will cause additional delay.

Assuming every person and agency complies with the requirement to submit public records to the records repository, all of the public records should be on file there less than 330 days from the date the mandate affirming the death sentence is issued by the Supreme Court of Florida. However, in capital litigation, things are never that easy. Some of the records may be claimed to be exempt or confidential and there may be old cases out there that are subject to a separate procedure. Ironically, the persons or agencies claiming records to be exempt or confidential are aligned with the prosecution whose interest is to avoid delays. By providing a separate procedure for old cases, additional delays may be expected.

Exempt or Confidential Public Records

Rule 3.852(f) provides that any public records delivered to the records repository that are claimed to be exempt or confidential must be boxed separately, without redaction, and sealed. The box must clearly identify that the public record is confidential or exempt and the seal may not be broken without an order of the trial court. The box must also identify "the nature of the public records and the legal basis for the exemption."

In order for collateral counsel to obtain a ruling to unseal the public records claimed to be exempt or confidential, an order must first be obtained from the trial court directing the records repository to ship the sealed boxes of records to the clerk of the trial court. Undoubtedly, collateral counsel will always want to obtain a ruling to determine if these records are really exempt or confidential and delay could be avoided if these records were filed with the clerk of the court in the first place. However, the Supreme Court wanted to carry out legislative intent where possible so this unnecessary complication is part of the procedure and will undoubtedly cause delay.

The "moving party" is responsible to pay for the cost of the "transportation and inspection of such records by the trial court." Presumably, the "cost" will be just the postage. It is unclear what "cost" could possibly be associated with inspecting the records.

Once the records claimed to be exempt or confidential are delivered to the clerk of the court, they may only be opened by the trial court in camera without ex parte communication in the same manner as inspecting any sealed document. Presumably, the trial court will enter an order sustaining the claim of exemption or confidentiality or order the records disclosed.

Procedure to be Used in Old Cases
Rule 3.852(h)-(i) provides for the procedure to be used in cases where the mandate affirming the death sentence was issued prior to October 1, 1998. These cases will be referred to as "old cases."

In old cases where no public records request was made before October 1, 1998, the attorney general and the state attorney should have filed notifications in accordance with the other provisions of the rule by December 30, 1998. Public records should have then been delivered to the records repository as in any other case.

In old cases where collateral counsel has initiated the public records process before October 1, 1998, a demand for additional public records must be filed with the trial court and served upon any person or agency designated in the demand. This demand must have been filed and served within 90 days after October 1, 1998, or within 90 days after the production of records which were requested prior to October 1, 1998, whichever was later. The persons or agencies designated in the demand must copy, index, and deliver any public records to the records repository within 90 days.

A separate procedure is provided in old cases when a death warrant is issued. Collateral counsel is required to request in writing the production of any public records from any person or agency from which public records have been previously requested. The person or agency must copy, index, and deliver to the records repository within 10 days any public record 1) that was not previously the subject of an objection, 2) that was received or produced since the previous request, or 3) that was, for any reason, not previously produced.

Alternatively, the person or agency may file an affidavit with the trial court stating that no other public records exist and that all public records have been previously produced. Interestingly, this section of the rule omits the "best of knowledge and belief" provision contained in other sections of the rule.

The trial court has the authority to reduce the time for production of these records from 10 days to another time.

This section of the rule specifically requires production of public records from persons or agencies that have previously been the subject of a public records demand. The Supreme Court recognized that fact in Sims.

Where written notification is required in old cases, the receiving party is required to provide proof of receipt by return mail or other carrier. This provision may cause delay in receipt of important documents while under the pressure of a death warrant. It provides for no alternative delivery such as electronic transfer.

Scope of Production and Resolution of Production Issues
Rule 3.852(l) provides that public records must be produced unless they are privileged or immune from production and are either relevant to the subject matter of the proceeding or are reasonably

calculated to lead to the discovery of admissible evidence.

Destruction of Records Repository Records
Rule 3.852(m) provides for the destruction of public records filed in the records repository. Records may be destroyed 60 days after the defendant is executed, released from custody, or sentenced to a term of years. The attorney general is responsible to notify the secretary of state to destroy the records. The secretary of state may destroy the records unless an objection is filed in the trial court and served upon the secretary of state. The records may not be destroyed until there is a final disposition of the objection.

Case Law Update
Relatively few cases have been reported on the subject of public records since Rule 3.852 was adopted. This update reviews the most pertinent cases reported through February 1, 2002.

Sufficiency of Public Records Request
The Supreme Court has consistently required collateral counsel to be specific when complaining about public records not being produced. For instance, the fact that the public records files are "thin" is insufficient to establish that public records have been wrongfully withheld. In Thompson v. State, 759 So. 2d 650 (Fla. 2000), the court stated, "However, collateral counsel did not specifically allege at the Huff hearing which agencies had wrongfully withheld documents in violation of chapter 119, or what type of documents had been wrongfully withheld. Instead, collateral counsel pointed to the thin size of the files received as indicating that documents had been wrongfully withheld."

The court in Thompson also discusses the history of discovery of public records under chapter 119 prior to Rule 3.852 and gives citations to cases involving the civil actions that were used prior to the enactment of the rule.

Limitations After Death Warrant Is Issued
In Sims, the court addressed the requirements for obtaining public records after a death warrant is signed. Collateral counsel for Sims filed requests for public records from 23 agencies. Some of the agencies objected, some produced some records, and some ignored the request. The trial court ordered some of the records requested to be produced and the state attorney agreed to produce some of the records. The author was the trial judge in the Sims case. The state attorney and the Department of Corrections agreed to produce certain records considering the fact that failure to do so could result in a stay of execution. Collateral counsel filed a motion to compel the production of the other records and the trial court denied the motion. The Supreme Court affirmed noting first it agreed with the trial court that the public records request was "an eleventh hour attempt to delay the execution rather than a focused investigation into some legitimate inquiry."

The court then noted that Rule 3.852(h) restricts discovery of public records after a death warrant is signed to persons or agencies that have previously produced public records. The records that are the subject of discovery are limited to records 1) not previously the subject of an objection, 2) that were received or produced since the previous request, or 3) that were, for any reason, not previously

produced.

Interlocutory Review of Discovery Orders

There has been an ongoing debate about whether the Supreme Court has jurisdiction to review discovery orders in postconviction proceedings where the death penalty has been imposed. In Trepal v. State, 754 So. 2d 702 (Fla. 2000), the court held that it does have that jurisdiction. The basis for such jurisdiction is not clearly stated in the opinion. The court stated that it does not have jurisdiction to issue writs of common law certiorari in such cases so it founded jurisdiction upon the constitutional provision granting jurisdiction to "hear appeals from final judgments of trial courts imposing the death penalty." As the court stated, "We therefore must rely on our constitutional jurisdiction to hear appeals from final judgments of trial courts imposing the death penalty to avoid such harmful 'cat out of the bag' disclosures that can result in irreparable harm." Id. at 707. The filing of such an interlocutory appeal does not automatically stay the proceedings or work to extend the time limitations in Rules 3.851 or 3.852.

In Camera Inspection of Exempt Public Records

Persons or agencies claiming public records to be exempt from production must box the records separately, seal them, index them with the reasons for the exemption, and deliver them to the records repository. From there, the records are shipped to the clerk of the trial court.

The trial judge must inspect the records in camera to determine if they are in fact exempt. A detailed order must be entered identifying each public record and the reason for its exemption.

In Rose v. State, 774 So. 2d 629 (Fla. 2000), the trial judge held an in camera inspection of public records claimed to be exempt before the Huff hearing. The state attorney was ordered to produce certain of the records and others were ruled to be exempt. The Supreme Court approved the procedure.

It should be noted that in Rose, the trial judge denied the pending motion for postconviction relief without an evidentiary hearing after the Huff hearing was completed. This is risky and may result in years of delay. However, it is proper to deny an evidentiary hearing when there is no basis for one.

Summary

Rule 3.852 governs the procedure for the production of public records in capital cases. The rule has its potential problems but it is adequate for most cases. Trial judges and capital counsel need to remember that the history of capital punishment procedure in Florida is full of cases that are exceptions to existing rules. The Supreme Court of Florida has not hesitated to make exceptions in appropriate cases.6

The present procedure is designed to speed up public records production by providing a central records repository with a more or less automatic process to send public records to that location. Trial judges are responsible to rule on discovery issues including in camera inspection of records that are claimed exempt.

Collateral counsel is expected to "focus on some legitimate area of inquiry" if motions to compel production are filed or if additional public records are sought.

Public records requests are limited after a death warrant is issued to records that were not the subject of a previous objection and which have not been produced in the past. Rule 3.852(h). In other words, records recently discovered by a person or agency, records generated since the last request, or records otherwise not previously produced. Additionally, collateral counsel is limited to requesting public records under 3.852(h) from persons or agencies that were previously the subject of a public records request. There is a safety valve for counsel to use to obtain records both before and after a death warrant is issued. Rule 3.852(i) provides for production of records that could not reasonably have been previously discovered provided collateral counsel files an affidavit to that effect and specifically identifies the records sought to be produced.

Public records have provided collateral counsel with significant evidence in the past and will undoubtedly continue to do so in the future. Trial judges need to take their responsibility to rule on public records issues seriously and make every effort to resolve public records disputes in a timely manner.

Conclusion

Discovery of public records in capital cases during the postconviction relief phase has been simplified in recent years through the efforts of the legislature and the Supreme Court. The present procedure will need time before it is fully accepted by collateral counsel. However, the Supreme Court has been willing to make changes to solve problems that arise as the procedure is used. Hopefully, the time will come when public records are made readily available to collateral counsel and the postconviction phase of capital cases will proceed more expeditiously than in the past.

1 Allen v. Butterworth, 756 So. 2d 52 (Fla. 2000).
2 Fla. Stat. §27.709.
3 Fla. R. Crim. P. 3.851(b).
4 Thompson v. State, 759 So. 2d 650 (Fla. 2000).
5 Fla. Stat. §119.19.
6 Spaziano v. State, 660 So. 2d 1363 (Fla. 1995).

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