IN THE SUPREME COURT OF FLORIDA

NO. SC-_____

DANE P. ABDOOL, CLEMENTE JAVIER AGUIRRE-JARQUIN, LLOYD CHASE ALLEN, ANDREW R. ALLRED, JOSHUA L. ALTERSBERGER, CHARLES ANDERSON, FRED ANDERSON, JR., RICHARD ANDERSON, GUILLERMO O. ARBELAEZ, LANCELOT ARMSTRONG, JEFFREY LEE ATWATER, CORNELIUS BAKER, JAMES BARNES, ARTHUR BARNHILL, KAYLE BATES, BRETT A. BOGLE, LUCIOUS BOYD, HARREL F. BRADDY, CHARLES G. BRANT, PAUL BROWN, DANIEL BURNS, HARRY LEE BUTLER, JOHN M. BUZIA, MILFORD WADE BYRD, LUIS CABALLERO, LORAN COLE, DANIEL CONAHAN, JERRY CORRELL, ALLEN COX, WILLIE CRAIN, JAMES DAILEY, DOLAN DARLING, EDDIE WAYNE DAVIS, LABRANT D. DENNIS, WILLIAM DEPARVINE, KENNETH DESSAURE, JOEL DIAZ, JAMES AREN DUCKETT, DONALD W. DUFOUR, DWIGHT T. EAGLIN, TERRY M. ELLERBEE JR., RICHARD ENGLAND, PAUL EVANS, STEVEN EVANS, WYDELL EVANS, ANTHONY J. FARINA, MICHAEL FITZPATRICK, FRANKLIN D. FLOYD, MAURICE FLOYD, KEVIN FOSTER, KONSTANTIN FOTOPOULOS, DAVID FRANCES, CARLTON FRANCIS, GUY GAMBLE, LOUIS GASKIN, MICHAEL ALLEN GRIFFIN, MICHAEL J. GRIFFIN, THOMAS GUDINAS, JERRY LEON HALIBURTON, DONTE HALL, ENOCH HALL, FREDDIE HALL, JOHN HAMPTON, PATRICK HANNON, WILLIAM HAPP, JOHN HARDWICK, STEVEN DOUGLAS HAYWARD, PEDRO HERNANDEZ-ALBERTO, JUSTIN HEYNE, PAUL CHRISTOPHER HILDWIN, JAMES HITCHCOCK, JOHNNY HOSKINS, GERHARD HOJAN, JOHN HUGGINS, JEROME HUNTER, CONNIE ISRAEL, ETHERIA V. JACKSON, RAY JACKSON, SONNY JEFFRIES, BRANDY JENNINGS, EMANUEL JOHNSON, RICHARD A. JOHNSON, RAY JOHNSTON, CLARENCE J. JONES, RANDAL JONES, VICTOR TONY JONES, BILLY KEARSE, DEAN KILGORE, DARIUS KIMBROUGH, MICHAEL KING, RICHARD KNIGHT, RONALD KNIGHT, GENGHIS KOCAKER, WILLIAM M. KOPSHO, ANTON KRAWCZUK, CARY MICHAEL LAMBRIX, IAN DECO LIGHTBOURNE, HAROLD LUCAS, RICHARD E. LYNCH, SCOTT MANSFIELD, JOHN MARQUARD, MATTHEW MARSHALL, DOUGLAS MATTHEWS, RENALDO MCGIRTH, NORMAN MCKENZIE, DERRICK MCLEAN, EUGENE MCWATTERS,

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Petitioners,

v.

PAMELA JO BONDI, ATTORNEY GENERAL, AND STATE OF FLORIDA,

Respondents.

EMERGENCY PETITION TO INVOKE THIS COURT'S ALL WRITS JURISDICTION, TO DECLARE UNCONSTITUTIONAL PROVISIONS OF THE TIMELY JUSTICE ACT OF 2013, AND FOR IMMEDIATE TEMPORARY INJUNCTIVE RELIEF

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INTRODUCTION

The interest in timely adjudication of capital cases is superseded by the need to provide adequate process for resolution of constitutional issues. Constitutional protections must not be lost to expediency. For decades, this Court has grappled mightily with the task of balancing the competing objectives of timeliness and fairness—of urgency and constitutionality—in Florida's capital postconviction rule regime. As the ultimate arbiter of constitutional rights and capital litigation in this State, it is this Court's sole province to do so. This Court alone determines the procedure that is necessary—the process that is due—to make meaningful the rights and duties created by the Legislature and the Florida Constitution. Over years of labor to that end, this Court has promulgated, revised, and re-revised rules, instituted commissions, appointed special reviewers, stayed hundreds of problematic warrant proceedings, examined procedural flaws that led to several gruesomely botched executions, exercised judicial review to strike down legislative interferences, and painstakingly honed a judicial system that strives for a constitutional and just process to govern the State's use of the death penalty that will not repeat the mistakes of the past.

However, in an abrupt whirlwind of political maneuvering, the Florida Legislature has passed an act which does away with much of this Court's efforts to shape, and authority to govern, the means and method of capital postconviction

litigation. During the regular session of 2013, the Legislature passed the Timely Justice Act,[1] in an effort to accelerate the frequency of death warrants and limit the capital postconviction process. During the debate prior to the bill's passage, lawmakers argued that it "is not about guilt or innocence, it's about timely justice," Bill Cotterell, *Florida legislators approve measure to speed up executions*, Reuters, April 29, 2013, http://www.reuters.com/article/2013/04/29/us-usa-florida-deathpenalty-idUSBRE93S0UT20130429, that "[o]nly God can judge. But we sure can set up the meeting," Rania Khalek, *Florida Lawmakers Pass Bill To Speed Up Executions*, Dispatches From The Underclass, May 14, 2013, http://raniakhalek.com/2013/05/14/florida-lawmakers-pass-bill-to-speed-up-executions/, that "when you kill someone, we kill you back,'" *House OKs bill to speed up capital punishment*, The Tampa Tribune, April 25, 2013, http://tbo.com/news/politics/florida-house-oks-bill-to-speed-up-capital-punishment-b82483569z1, that "'[v]engeance is mine, sayeth the lord," Jessica Palombo, *Fla. House Passes 'Timely Justice Act' To Cut Death Row Wait Time*, WFSU, April 25, 2013, http://news.wfsu.org/post/fla-house-passes-timely-justice-

[1] In response to the Florida Legislature's action, the Editorial Board of the New York Times warned that Florida's "indisputably defective death penalty system is made more horrifying by attempts to rush inmates to execution" with this "grotesquely named bill." Editorial Board, *Grotesque Speed for Florida Capital Cases*, N.Y. Times, May 14, 2013, at A24, http://www.nytimes.com/2013/05/15/opinion/grotesque-speed-for-florida-capital-cases.html?_r=0.

act-cut-death-row-wait-time, and that "'[i]f man sheds blood, by man shall his blood be shed.'" *Id.* It can only be said that such arguments are founded on political considerations without regard for constitutional requirements.

Upon its effective date of July 1, 2013, the Act will strike a heavy blow to this Court's authority to dictate how it and its Clerk oversee Florida's use of the death penalty. It will also devastate the due process provided by this Court in its rule regime. Judicial principles will be discarded, and hard-earned protections will be lost.

The Timely Justice Act violates the doctrine of Separation of Powers by requiring that constitutional officers of the judicial and executive branches of government take immediate actions upon the effective date of the Act, in accordance with a strict statutory time schedule, and by creating obligations on attorneys that conflict with preexisting, judicially-determined rules. It also unconstitutionally suspends the writ of habeas corpus, violates due process by interfering with judicial resolution of constitutional claims, violates equal protection by limiting the successive claims of capital but not non-capital defendants, and will result in cruel and unusual punishments contrary to evolving standards of decency.[2]

[2] This Petition does not challenge the Timely Justice Act in its entirety, but seeks only the invalidation of certain unconstitutional provisions. This Petition challenges only the provisions of the Act amending Florida Statutes §§ 922.052,

It would be impossible to resolve these problems in individual cases after officers and litigants have taken various and conflicting actions in independent attempts to comply with the Act. The Act creates a rushed process for issuance of a likely flood of death warrants that will inundate the courts and abruptly cut off this Court's exercise of judicial review in capital cases. If not addressed prior to its operation in practice, the process will have the unconstitutional and irreversible result of individuals being executed under a legislatively-determined judicial procedure in which violations of their constitutional rights go unresolved. Further, Florida history shows that diminished process can have tragic and irreversible consequences.

The Petitioners urge this Court to secure the constitutional boundaries of Florida's governmental branches prior to the unconstitutional executions and irreversibly compromised capital litigation that will result from the Legislature's blurring of those boundaries in the Timely Justice Act.

JURISDICTION

Article V § 3(8) gives this Court the authority to "issue writs of mandamus and quo warranto to state officers and state agencies." While "[o]rdinarily the initial challenge to the constitutionality of a statute should be made before a trial

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27.7045, 27.7081, and 27.703(1). The Petitioners and their counsel express no opinion as to provisions of the Act not challenged herein.

court," *Division of Bond Finance v. Smathers*, 337 So. 2d 805, 807 (Fla. 1976), "mandamus is the appropriate vehicle for addressing claims of unconstitutionality 'where the functions of government will be adversely affected without an immediate determination.'" *Allen v. Butterworth*, 756 So. 2d 52, 54-55 (Fla. 2000) (quoting *Smathers*, 337 So. 2d at 807). In *Allen v. Butterworth*, this Court found a mandamus action appropriate where the Death Penalty Reform Act "drastically change[d] Florida's postconviction death penalty proceedings, thereby affecting a large number of cases pending in this Court and at various stages in the trial courts throughout the state." As in *Allen v. Butterworth*, the Timely Justice Act adversely affects the functions of government by altering legal rules for pending cases. It also requires immediate, affirmative actions by the Clerk of the Florida Supreme Court and the Governor, to be performed in accordance with strict deadlines contained in the Act. Thus, this Court has original jurisdiction over this action pursuant to Article V § 3(b)(8), as described in Florida Rule of Appellate Procedure 9.030(a)(3).

Article V § 3(7) of the Florida Constitution gives this Court the authority to "issue writs of prohibition to courts and all writs necessary to the complete exercise of its jurisdiction." The "all writs provision . . . does not constitute a separate source of original or appellate jurisdiction" but instead "operates as an aid to the Court in exercising its 'ultimate jurisdiction.'" *Williams v. State*, 913 So. 2d

541, 543 (Fla. 2005). This Court has found it appropriate to "utilize[] its all writs authority in order to complete the full exercise of its appellate jurisdiction," *id*., where its authority to resolve criminal cases is implicated. Because the Act operates to cut off this Court's power to resolve capital cases under its own procedures and in accordance with the timeframes it deems necessary to perfect the constitutional rights involved, this Court has original jurisdiction over this action pursuant to Article V § 3(b)(7), as described in Florida Rule of Appellate Procedure 9.030(a)(3).

REQUEST FOR ORAL ARGUMENT

The Timely Justice Act will change the face of the death penalty in Florida by determining how and when each of the Petitioners hereto will face execution and whether their constitutional claims will be adjudicated by courts before being cut short by an accelerated warrant-issuance process. The constitutional principles involved are multifarious and informed by long histories. The Petitioners request oral argument on this Petition to allow for full discussion of these critical issues.

BACKGROUND

There is much to be learned from the history of this Court's decades-long struggle with the procedural difficulties of providing "timely justice" in the capital postconviction process. That history is lengthy but essential to understanding the impact of the Timely Justice Act. First, history makes clear that the matter is

established soundly within this Court's sole purview. Second, history shows that this Court "has engaged in exhaustive efforts to balance the concerns of fairness and justice with the need for finality in postconviction proceedings in death penalty cases," considering "the essential ingredients necessary to balance these competing concerns," which cannot and should not be displaced by a lawmaking process based on political, rather than constitutional and equitable, concerns.[3] *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Florida Rule of Judicial Admin. 2.050*, 797 So. 2d 1213, 1214 (Fla. 2001). Third, history shows that the tragic results of reducing procedural protections in the capital postconviction and warrant-issuance processes profoundly affirm the need to prevent the Legislature from exercising control over those processes, such that they become politically shaped, rather than constitutionally shaped.

A. Florida's historic struggle with capital postconviction procedure

In *Allen v. Butterworth*, this Court looked back on "a long history of efforts by all three branches of Florida government to improve the efficiency of Florida's death penalty process." 756 So. 2d 52, 57 (Fla. 2000). A difficult moment in that history occurred during the governorship of Bob Martinez, from January 6, 1987 to

[3] This Court has stated that it has "attempted to strike a proper balance between the State's legitimate interest in the prompt and efficient administration of justice in capital cases and the capital defendant's legitimate interest that the capital postconviction process be fair, just, and humane." *Allen v. Butterworth*, 756 So. 2d 52, 65 (Fla. 2000).

January 8, 1991, during which Martinez vowed to "clear Death Row" and signed over ninety death warrants in 1989 alone. Richard Lacayo, *The Politics of Life and Death*, Time Magazine, Apr. 02, 1990, http://www.time.com/time/magazine/article/0,9171,969743,00.html#ixzz2TUCOd700. Despite the hundred-some warrants signed by Governor Martinez, only nine executions occurred during his four years in office. *See* Execution List: 1976 – Present, Florida Department of Corrections, http://www.dc.state.fl.us/oth/deathrow/execlist.html. The courts became inundated, there were inadequate resources to provide attorneys to the condemned, and rather than clearing Death Row, Governor Martinez managed only to break the capital postconviction system.

On May 4, 1990, it became undeniable that the system was broken, when an event happened that any sufficient process, any properly functioning system of review and challenge equipped to contend with demand for resources and time, could never permit. On that day, "fire, smoke and sparks . . . spewed from [the] head" of Jesse Tafero during his execution, "in which three surges of power had to be used before he was declared dead." *Killer, 38, Is Executed in Florida*, AP article published in N.Y. Times, July 28, 1990, http://www.nytimes.com/1990/07/28/us/killer-38-is-executed-in-florida.html. "[T]hree were necessary due to a malfunctioning piece of equipment and the fact

that Tafero appeared to still be breathing after the first two." Larry Keller, *Witness To Tafero Execution Has One Overriding Thought: The Horror Of It All*, Sun Sentinel, May 10, 1990, http://articles.sun-sentinel.com/1990-05-10/news/9001070544_1_execution-death-row-horror. The process, intended to prevent cruel and unusual punishments and to minimize the barbarism of state-sanctioned taking of life, did neither.

That same year, in response to the failings of the postconviction process caused by multiple warrants, underfunding of capital collateral counsel, and various other failings of the capital postconviction system, this Court created the Supreme Court Committee on Postconviction Relief Proceedings, which was tasked with determining how to provide "timely resolution for all postconviction relief matters . . . ." *Id*. That Committee made recommendations in 1991, including the recommendation that, "until additional funding and staff could be provided to the office of Capital Collateral Representative (CCR), the Court seek pro bono assistance from the Volunteer Lawyers Resource Center (VLRC) and members of The Florida Bar." *Id*. It was necessary to reach out to the legal community for help to keep the floundering system afloat.

In 1993, this Court adopted Florida Rule of Criminal Procedure 3.851, which created a one-year time limitation for filing initial postconviction motions and allowed for successive motions to be based on new evidence or the

establishment of constitutional rights. *See In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed)*, 626 So. 2d 198 (Fla. 1993); *see* Fla. R. Crim. Pro. 3.851(d)(2) and (e)(2). The purpose of the Rule was to "assure that death penalty proceedings proceed in a more orderly manner." *In re Rule of Criminal Procedure 3.851*, 626 So. 2d at 198. However, there was concern by certain justices over the potential that Rule 3.851 "abridges the right to obtain collateral relief in death cases," "despite the fact that [this Court had] held that relief of this type is guaranteed by the Florida Constitution" and "[w]e should never let a constitutional right be diminished . . . ." *In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed)*, 626 So. 2d 198, 202 (Fla. 1993) (Kogan, J., dissenting).

The concern was a result of the fact that the Legislature had made funding for CCR "contingent upon the Florida Supreme Court reducing the time frame from 2 years to 1 year within which a rule 3.850 motion . . ." could be filed. *In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed)*, 626 So. 2d 198, 201 (Fla. 1993) (Barkett, C.J., dissenting). In other words, the Legislature forced this Court's hand by holding hostage funding for capital counsel. The Legislature was "attempt[ing] to confront the Court with the choice of adopting a rule change in order to improve legal representation for death-sentenced individuals or rejecting the change and putting up with inadequate

representation," because "it [wa]s no secret that the Office of the Capital Collateral Representative has been underfunded." *Id*. at 200-02 (Barkett, C.J., dissenting). Chief Justice Barkett warned that, while "[e]liminating unwarranted delay in all court cases is a laudable goal," there was no guarantee that "the Legislature w[ould] adhere to its part of the bargain" in preserving due process through funding representation and providing a meaningful proceeding. *Id*. at 201-02. And the bargain "establishe[d] a dangerous precedent" of "inappropriately interfere[ing] with this Court's constitutional authority to adopt rules for practice and procedure in all courts." *Id*. at 201. The Timely Justice Act evokes these fears.

Still not satisfied with the time limitations, and facing continued difficulties in capital postconviction procedure, Governor Lawton Chiles requested further efforts, and in 1994 this Court reconstituted the Supreme Court Committee on Postconviction Relief Proceedings to review the effectiveness of Rule 3.851. *See Allen*, 756 So. 2d 52, 57 (Fla. 2000).

Meanwhile, CCR was forced to file an emergency motion to toll the 3.851 time limitation because it did not have the resources to comport with filing deadlines while still providing meaningful adversarial representation. *See id*. The fears of the 3.851 dissenters were realized.

So this Court's efforts continued. In 1996, it adopted Florida Rule of Criminal Procedure 3.852, governing public records litigation in postconviction

proceedings, in an attempt to improve the procedural organization of the discovery process in capital postconviction. *See id.* It also took the extraordinary step of appointing former Attorney General Robert Shevin to study the procedural problems in the system. *See id.* "The 'Shevin Study' examined, at this Court's request, the issue of delays in capital postconviction relief proceedings" and made certain observations, such as that "travel problems of counsel cause part of those delays." *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Florida Rule of Judicial Admin. 2.050*, 797 So. 2d 1213, 1233 (Fla. 2001).

In response to the Shevin Study, the Governor and Legislature found it appropriate to get involved, and attempted themselves to address the broken capital postconviction system. They appointed a committee, headed by former Justice Parker Lee McDonald, "to study postconviction representation and recommend reforms to the Legislature." *Id.* at 58. Based on that committee's findings, the Legislature in 1997 found it appropriate to exercise its power over the creation of government agencies to divide CCR into three regional offices, known as the Offices of the Capital Collateral Regional Counsel (CCRC). *See id.* The hope was that the new agency would be better funded and organized to handle Florida's capital postconviction cases than the former CCR.

However, the transition to CCRC was confounded to some degree by the defunding of the federal agency that supported VLRC. *See id.* VLRC collapsed,

and their many capital clients reverted to CCR, "result[ing] in funding deficiencies for CCR" prior to the establishment and operation of CCRC. *Id*. In order to allow for the institution of CCRC and the reassignment of VLRC's clients, this Court tolled the time limitations for filing postconviction motions. *See id*. The process stalled.

In 1997, facing the institution of the fledgling CCRC, this Court continued to address procedural difficulties by having chief judges inventory postconviction cases and provide reports. *See id*. It also enacted Florida Rule of Judicial Administration 2.050(b)(10), which created a training process for capital judges, *see In re Amendment to Fla. Rules of Jud. Admin.*, 688 So. 2d 320 (Fla. 1997). Those judges' extensive experience as attorneys and jurists and their abilities to interpret law and rules was insufficient to qualify them to sit on capital postconviction cases without special instruction. The training requirement exists to this day, because the process is still uniquely difficult to appreciate and implement, for those that operate in it daily, much less in the abstract for members of the Legislature.

At a time when the State was grappling with procedural rules and providing adequate representation, the State continued with executions. During the execution of Pedro Medina, Florida witnessed one of the most grisly moments in its history as "a 6-inch flame arose from the right side of Medina's black leather face mask

during the execution, flickering for several seconds and filling the room with smoke and the smell of burning flesh." *Flames erupt from inmate's mask during Florida execution*, CNN, March 25, 1997, http://www.cnn.com/US/9703/25/fl.execution/. Betraying the lack of regard for a postconviction process that places importance on constitutionality and humanism, Governor Chiles, "[j]ust hours after flames burst from the mask of a prisoner as he was electrocuted . . . , said he would not stop upcoming executions." *Id*.

Later, in 1998, during the execution of Allen Lee Davis,

> [h]is body reared back against the chair's restraints, giving witnesses a grotesque glimpse under a black hood designed to hide the faces of the condemned. His round, moon face contorted grossly, the flesh seeming to knot, and colored a vivid purple. Blood poured from his nose, ran down the wide leather strap that covered his mouth and soaked his white shirt.
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> After the power was turned off, Mr. Davis . . . was still alive. Witnesses said his chest rose and fell about 10 times before he went still.

Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. Times, November 18, 1999, http://www.nytimes.com/1999/11/18/us/florida-s-messy-executions-put-the-electric-chair-on-trial.html?pagewanted=all&src=pm.[4]

[4] This was not the last botched execution in this State's history. In 2006, during the thirty-four-minute execution of Angel Diaz by lethal injection, *Lightbourne v. McCollum*, 969 So. 2d 326, 328-29 (Fla. 2007), Diaz suffered the effects of suffocation while conscious, and foot-wide chemical burns appeared on his arms due to errors by the Department of Corrections executioners, one of which later

State Senator Ginny Brown, who had volunteered to witness the Davis execution, was unfazed by the blood, viewing it as a miracle in which God had blessed Florida's execution of those convicted of murder, because the pattern that the blood made as it gushed down the front of Davis's body appeared to form a cross. *See* Mary Jo Melone, *A switch is thrown, and God speaks*, St. Petersburg Times, July 13, 1999, http://www.sptimes.com/News/71399/news_pf/TampaBay/A_switch_is_thrown__a.shtml.

Reviewing this State's use of the electric chair in *Provenzano v. Moore*, Justice Shaw dissented to express strong views that would later carry the day and remain important:

> Execution by electrocution-with its attendant smoke and

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admitted "'I have no medical training or qualifications.'" Lynn Waddell and Abby Goodnough, *Florida Executioner Says Procedures Were Followed*, N.Y. Times, February 20, 2007, http://www.nytimes.com/2007/02/20/us/20death.html?ref=angeldiaz&_r=0. Clearly the process had again failed, as no constitutionally adequate process would permit such an inhumane result. Governor Jeb Bush stayed all executions and created a Governor's Commission on Administration of Lethal Injection "to 'review the method in which the lethal injection procedures are administered by the Department of Corrections and to make findings and recommendations as to how administration of the procedures and protocols can be revised.'" *Id*. at 329-30. The Commission held hearings and submitted a report in 2007, finding that the Department of Corrections "failed to follow its protocols, failed to ensure successful intravenous [] access, failed to provide adequate training, and failed to have guidelines in place for handling complications." *Id*. at 329-30 (citing Governor's Commission Report at 2, 8-9).

> flames and blood and screams-is a spectacle whose time has passed. The fiery deaths of Jesse Tafero and Pedro Medina and the recent bloody execution of Allen Lee Davis are acts more befitting a violent murderer than a civilized state. The color photos of Davis depict a man who-for all appearances-was brutally tortured to death by the citizens of Florida. Violence begets violence, and each of these deaths was a barbaric spectacle played by the State of Florida on the world stage. Each botched execution cast the entire criminal justice system of this state-including the courts-in ignominy.

744 So. 2d 413, 440 (Fla. 1999) (Shaw, J., dissenting). Justice Shaw also attached the photographs to his opinion to confront the proponents of a hurried death penalty with the fruits of their labors. *See id*.[5]

Governor Bush referred to the botched Davis execution as "a 'nosebleed,' insignificant when viewed alongside [Davis's] crime," perfectly capturing this State's history of justifying unconstitutional executions by pointing to the greater and less diffuse moral culpability of convicted murderers, and failing to appreciate that human beings should not be "brutally tortured to death by the citizens of Florida," not only for their sakes, but for ours. *Provenzano*, 744 So. 2d at 440 (Shaw, J., dissenting).

Yet, as described below, this notion of comparative morality to justify

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[5] Florida had become known for such events, as they became the "focus of talk shows and political rallies as far away as Madrid." Rick Bragg, *Florida's Messy Executions Put the Electric Chair on Trial*, N.Y. Times, November 18, 1999, http://www.nytimes.com/1999/11/18/us/florida-s-messy-executions-put-the-electric-chair-on-trial.html?pagewanted=all&src=pm.

execution was palpable in the floor debate for the Timely Justice Act, so it is important to recognize that moments like these botched executions are not old news, irrelevant to present day considerations of procedure. They are a part of this State's death penalty and procedure for which we are responsible and which we will either recall moving forward towards the Timely Justice Act, or relive.

In that climate of 1998, the Legislature took an action that proved that fears of its interference with procedural matters raised by the dissenters at the adoption of Rule 3.851 were well-founded. When it passed Florida Statutes § 119.19, the Legislature "repealed rule 3.852 and established a procedure for the production of public records in postconviction cases." *Allen*, 756 So. 2d at 58. The repeal was effected by Senate Bill 898. A review of the staff analyses of SB 898, which were prepared by the Criminal Justice Committee and the House Committee on Civil Justice and Claims, reflects that there was no concern of overstepping the Legislature's constitutional power in repealing by statute a procedural rule of this Court. However, this action set in motion the conflicting treatment of capital postconviction procedure by this Court and the Legislature which would lead to the *Allen v. Butterworth* ruling that the Legislature's interference with judicial procedure was unconstitutional. *See id*. at 66-67.

It took time for this Court to resolve that question, however, because prior to the enactment of § 119.19, this Court had instituted yet another committee, chaired

by Judge Stan Morris, to address problems with public records. It was not until after the Morris Committee had proposed a revised rule, in September of 1998, that this Court would adopt amendments to Rule 3.852 partially in response to the Legislature's venture into judicial procedure with SB 898. *See id.* at 58-59.

At that time, this Court attempted to "accommodate the implementation of the new legislation and the necessity of establishing the registry and to allow the implementation of a new rule 3.852 consistent with the recent legislation." *Amendments to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod. (Time Tolling)*, 719 So. 2d 869 (Fla. 1998). This Court tolled the time requirements of Rule 3.852 and Rule 3.851 "in part to allow the legislature to examine and address the administrative problems currently being experienced by CCRC as well as to address the contention that additional funding is needed before rule 3.852 can be implemented." *Amendments to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod. (Time Tolling)*, 719 So. 2d 869 (Fla. 1998) (citing *In Amendments to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production (Time Tolling)*, 708 So. 2d 913 (Fla. 1998) and *In re Rule of Crim. Proc. 3.851 (Collateral Relief After Death Sentence has been Imposed) and Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence)*, 708 So. 2d 912 (Fla. 1998)). Put simply, this Court went to great lengths to accommodate the Legislature's actions rather than compete with

them or to exercise judicial review over them. This Court tried to facilitate a coordinated effort among the branches of government even as its rulemaking authority was being stripped away.

However, after the enactment of § 119.19, this Court saw the need to reconstitute the Morris Committee." *See Allen*, 756 So. 2d at 59. "Because of the Legislature's abolishment of rule 3.852, this Court . . . expanded the committee's charge to include 'making recommendations as to procedures concerning the newly enacted capital postconviction public record statute.'" *See Amendments to Florida Rules of Criminal Procedure-Capital Postconviction Pub. Records Prod. (Time Tolling)*, 719 So. 2d 869, 870 (Fla. 1998). But, as this Court was considering the Morris Committee's proposal in January, 2000, the Legislature took further action in the area of judicial procedure, adopting the Death Penalty Reform Act, which created new time limits for postconviction actions and created a dual-track system for direct appeals and collateral proceedings. *See Allen*, 756 So. 2d at 55, 59.

In *Allen v. Butterworth*, this Court was finally left with no other course but to strike down the Death Penalty Reform Act and the Legislature's efforts to alter and displace Rules 3.852 and 3.851, beginning with Senate Bill 898 in 1998, as an encroachment on this Court's rulemaking authority under Article V § 2(a) of the Florida Constitution. *Id*. at 66-67. At that time, this Court noted that it was

"mindful that [its] primary responsibility is to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions" and that this was "particularly important in a capital case because, as we have said, death is different.'" *Id*. at 59 (citing *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995)). *Allen* re-secured this Court's rulemaking authority and reaffirmed this State's commitment to due process.

Subsequently, this Court continued making efforts to improve the system, amending rules, implementing an online case management system, and issuing orders concerning timely record preparation. *See id*. at 58 n.1.

When this Court amended Rules 3.851 and 3.852 yet again in 2002, Justice Anstead concurred to express the caution that in this Court's "exhaustive efforts to reform the postconviction process in death penalty jurisprudence," "we appear to have reached the outer limits of our authority to restrict the constitutional process under habeas corpus for catching serious mistakes in capital cases" and "must be mindful that there are limits to how far we can go in restricting a capital defendant's access to the courts to present a claim that a serious mistake was made in his conviction or capital sentence." *Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Florida Rule of Judicial Admin. 2.050*, 797 So. 2d 1213, 1222 (Fla. 2001) (Anstead, J., concurring). Justice Anstead warned that

> [t]he reality is that few, if any, of the numerous postconviction decisions finding major errors in capital convictions and sentences in Florida would have occurred if a strict one-year limitation had been rigidly enforced. Those decisions demonstrate that the discovery of major flaws based upon new evidence, Brady claims, or the recantations of witnesses, does not always conveniently occur in that brief time span. If fewer errors are to be found in the future let us hope that it will be because the thoroughness of the process allowed fewer errors, and not because of the expiration of an arbitrary deadline.

Amendments to Florida Rules of Criminal Procedure 3.851, 3.852, & 3.993 & Florida Rule of Judicial Admin. 2.050, 797 So. 2d 1213 (Fla. 2001) (Anstead, J., concurring). Years later, with the passage of the Timely Justice Act, we see again an overstepping of the constitutional low threshold for catching mistakes. As Justice Anstead warned, we face arbitrary deadlines cutting off the process supposed to correct constitutional errors and injustices.

In retrospect, much of the historical difficulties in procedure relate to warrant litigation. In fact, of the seventy-five individuals put to death by this State under its post-1976 death penalty regime, only nineteen have been executed on their first warrant. *See* Execution List: 1976 – Present, Florida Department of Corrections, http://www.dc.state.fl.us/oth/deathrow/execlist.html. The State's inability to see most warrant proceedings through to the end in the first instance is the result of denials of process and substantive rights that require redress before executions can be carried out. *See*, *e.g.*, *Hall v. State*, 541 So. 2d 1125 (Fla. 1989)

(stay of execution and new penalty phase granted, on second successive motion and under second warrant, for *Hitchcock* violation); *Marek v. State*, 14 So. 3d 985 (Fla. 2009) (evidentiary hearing and stay of execution granted under warrant on third successive motion, based on newly discovered evidence that the codefendant admitted strangling the victim); *Valle v. State,* 70 So. 3d 530 (Fla. 2011) (stay of execution and evidentiary hearing granted on lethal injection claim under warrant); *Tompkins v. State,* 994 So. 2d 1072, 1094 (Fla. 2008) (Anstead, J., dissenting) (upon denial of evidentiary hearing on fourth and fifth successive motions under warrant, Justice Anstead dissenting to note that the Court should consider the "flagrant misconduct that has been disclosed by the State" as it was "the kind of 'bombshell' disclosure that could change the jury's entire evaluation of a case").[6]

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[6] Governor Martinez issued some hundred death warrants during his four-year term, but it was not until years after Governor Martinez had left office that—in the history of this State's death penalty regime following its 1976 reinstatement—a person had ever been executed on their first warrant. The Florida Department of Corrections reports that every person executed between 1976 up until Michael Durocher on August 25, 1993 had at least two warrants signed. See Execution List: 1976 – Present, Florida Department of Corrections, http://www.dc.state.fl.us/oth/deathrow/execlist.html; see also Brent Kallestad, *Martinez Signs Death Warrant on Woman Inmate*, Associate Press, Mar. 8, 1989, http://www.apnewsarchive.com/1989/Martinez-Signs-Death-Warrant-on-Woman-Inmate/id-b95c15e01ade64c402879505d7002e74 ("No one has been executed in Florida on the first death warrant since capital punishment was restored by the U.S. Supreme Court in 1976."). None of the thirty-one executions occurring prior to August 1993 were the result of successful, initial warrant proceedings. While that figure may be partially attributable to the different warrant procedures of that time, sixteen of the executed individuals, over half, had more than two warrants. See Execution List: 1976 – Present, Florida Department of Corrections,

However, the Legislature attributes this record of failure to a lack of speed in the process, rather than a lack of process in the process. And thus, the Timely Justice Act seeks to accelerate rather than improve capital postconviction procedure.

B. Recent difficulties with issuance of warrants

Recent efforts to speed up the death process and increase the number of executions in Florida have met with similar failures. In recent weeks, "Gov. Rick Scott is signing death warrants at a pace rarely seen in Florida since the death penalty was reinstated in 1976," signing five warrants in 2013 alone. Brendan Farringto, *Fla. gov. steps up pace on signing death warrants*, Associated Press, May 19, 2013, http://www.greenwichtime.com/news/article/Fla-gov-steps-up-pace-on-signing-death-warrants-4529377.php.

> If the sentences are carried out this year for each of the active warrants, it would guarantee at least the most executions in Florida in one year since six people were executed in 2000, Gov. Jeb Bush's second year in office.

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http://www.dc.state.fl.us/oth/deathrow/execlist.html. The State did not manage to successfully execute Willie Darden until its seventh try in 1988. *Id*. There is no procedural explanation for why it should take three, much less seven, attempts for the State to successfully administer a death warrant proceeding. Put simply, the State hardly ever carries out death warrant proceedings as intended. More often, its errors and denials of process derail the proceedings. The Death Penalty Information Center, using figures from the Bureau of Justice, reports that, post-1976, Florida has carried out 68 of 889 imposed death sentences, for a ratio of 0.077 executions per death sentence. See Executions per Death Sentence, Death Penalty Information Center, http://www.deathpenaltyinfo.org/executions-death-sentence. That ratio reflects the impossibility of constitutionally sound executions under the Timely Justice Act's accelerated and rigid time limits.

> The only other year there have been more than four executions since the death penalty reinstatement was in 1984 under Gov. Bob Graham, when eight people were put to death.

Id. According to media reports, the Governor is aware that such a pace strains the courts, stating "'The governor is sensitive to that and is making sure the system operates smoothly,' . . . 'We're making sure we don't do too much at one time.'" *Id*. However, in the past two years, Florida has sentenced more people to death than any other state. Rania Khalek, Florida Lawmakers Pass Bill To Speed Up Executions, Dispatches From The Underclass, May 14, 2013, http://raniakhalek.com/2013/05/14/florida-lawmakers-pass-bill-to-speed-up-executions/. And the effects are already becoming clear, as stays and problems finding counsel have interrupted the warrant proceedings initiated by Governor Scott. *See*, *e.g.*, *Van Poyck v. State*, Case Nos. SC73662, SC13-851), order of May 20, 2013 (Perry, J., dissenting, joined by Pariente, J.) ("I find it unsettling that the majority is intent on not granting a reasonable stay—30 days—for these attorneys, or some other court-appointed lawyers to have time to determine whether there are any justiciable issues that may be legitimately explored prior to the culmination of the pending death warrant signed by the Governor.").

C. The arrival of the Timely Justice Act

The errors that will result from the Timely Justice Act are not unpredictable, unprecedented, or unpreventable. Just like with the Death Penalty Reform Act,

which the Legislature passed ostensibly because "there must be a prompt and efficient administration of justice following any sentence of death ordered by the courts of this state,'" *Allen*, 576 So. 2d at 57 (citing ch. 2000–3, preamble, Laws of Fla.; Fla. CS for HB 1–A, at 3), the Timely Justice Act professes to be designed to support this Court's efforts "to improve the overall efficiency of the capital postconviction process," CS/CS/HB 7083 lns. 852-53 (amending Fla. Stat. § 924.057), with the "intent that capital postconviction proceedings be conducted in accordance with court rules, and that courts strictly adhere to the time frames and postconviction motion content requirements established therein." CS/CS/HB 7083 lns. 854-57. However, that intent cannot be squared with the operable, plain language of the Act, which creates an unconditional timeline that proceeds regardless of successive litigation.

Section 922.052 states:

> (2)(a) The clerk of the Florida Supreme Court shall inform the Governor in writing certifying that a person convicted and sentenced to death, before or after the effective date of the act, has:
>
> > 1. Completed such person's direct appeal and initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court; or
> >
> > 2. Allowed the time permitted for filing a habeas corpus petition in federal court to expire.
>
> (b) Within 30 days after receiving the letter of

> certification from the clerk of the Florida Supreme Court, the Governor shall issue a warrant for execution if the executive clemency process has concluded, directing the warden to execute the sentence within 180 days, at a time designated in the warrant.
>
> (c) If, in the Governor's sole discretion, the clerk of the Florida Supreme Court has not complied with the provisions of paragraph (a) with respect to any person sentenced to death, the Governor may sign a warrant of execution for such person where the executive clemency process has concluded.

CS/CS/HB 7083 lns. 761-80.

The time-certain deadlines, without exceptions for successive litigation or various other issues, create a serious problem, considering that the average person exonerated from death row—the average innocent person wrongly sentenced to death—spends an average of ten years on death row prior to being freed. David A. Lowe, *Abolition in Maryland*, The Nation, May 15, 2013, http://www.thenation.com/article/174309/exonerated-prisoners-are-winning-fight-against-death-penalty#ixzz2Tb0yWHnE. That is a critical fact. Even when the postconviction review process works, it takes ten years on average for it to do so.

> After all, several Florida exonerees were on death row for over a decade before proving their innocence. One example is Juan Melendez, who spent 18 years on death row and lost three appeals in front of the Florida Supreme Court before his release. Had the . . . Act been in place at the time there's a good chance Melendez and others like him would have been killed for crimes they did not commit.

Rania Khalek, *Florida Lawmakers Pass Bill To Speed Up Executions*, Dispatches From The Underclass, May 14, 2013, http://raniakhalek.com/2013/05/14/florida-lawmakers-pass-bill-to-speed-up-executions/.

The State is charging ahead seemingly unconcerned by the potential for unconstitutional executions. And its motivations have been made abundantly clear in its comments to the press quoted in the Introduction above. The citing of scripture is important because it shows that the political debate was not about the procedural workings of the statute, it was about "the moral legitimacy of the death penalty itself." *Florida House OKs bill to speed up capital punishment*, The Tampa Tribune, April 25, 2013, http://tbo.com/news/politics/florida-house-oks-bill-to-speed-up-capital-punishment-b82483569z1.

The Legislature passed a bill which, by its own terms, relates to "the overall efficiency of the capital postconviction *process*," CS/CS/HB 7083 lns. 852-53 (amending Fla. Stat. § 924.057) (emphasis added), but is conceived of as a substantive declaration on the propriety of the death penalty. It is clear that a measured, informed consideration of the past consequences of accelerating the postconviction process was not undertaken. As one lawmaker stated, advocating for the execution of all individuals convicted of any homicide in this State, "'I am

a believer that if you kill someone, we kill you back'"[7] (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 19:25)), expressing a complete lack of appreciation for American death penalty jurisprudence, which allows death for only the "worst of the worst" murders. *Coddington v. State*, 254 P.3d 684, 709 (Okla. 2011) ("the death penalty should be reserved for the 'worst of the worst murderers'"); *see Gregg v. Georgia*, 428 U.S. 153, 182, 187 (1976) (referring to "the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases" and finding that the death penalty "is an extreme sanction, suitable to the most extreme of crimes."). That same lawmaker went on to state, ". . . the innocent life that I look at is the innocent life of the victim . . . . That innocent life didn't get a trial. That innocent life did not get three meals a day. That innocent life didn't spend ten or twelve or fifteen or twenty-five additional years on this planet'" (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 19:25)). The ill-fated view Governor

[7] Because it is indicative of the sophistication of the policy and thought underlying this notion, it must be noted that this statement is actually a quotation of comedian "Ron 'Tater Salad' White," who is described by Texas Monthly as "highlight[ing] . . . how weird the rest of the world looks to a redneck" when he tells his " . . . old joke, about the death penalty, . . . 'If you kill someone in Texas, we will kill you back.'" John Spong, *Ron White Gets the Last Laugh*, Texas Monthly, December 2006, http://www.texasmonthly.com/story/ron-white-gets-last-laugh. In other words, the Timely Justice Act is based in part on a caricature of unsophisticated worldviews.

Bush expressed at the time of the botched execution of Allen Lee Davis, justifying acts of cruel and usual punishment by comparing them to the moral standard of murder, resonates forward into those words. Justice Shaw's warnings to the contrary have been ignored.

Lawmakers stated other views during the floor debate that are contradictory to the constitutional law of this State. The House floor debate was based on the notion that there is "mutuality of jurisdiction when it comes to rules" (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 0:35)), such that the bill was intended to "change the structure, . . . to expedite the process" (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 14:23)), even though the Legislature has no rulemaking power over judicial process. A lawmaker expressed the view that "[w]hen somebody is guilty without a doubt they should get the death penalty; when somebody is guilty within a reasonable doubt they should get life" (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 30:04)). The sponsor of the bill asserted that it would only speed up the process in cases "where guilt or innocence is not in question" (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 46:23)), as opposed to those based on other matters like

ineffective assistance of counsel, nondisclosed evidence, mental retardation, etc.

Underlying this debate is an unfounded principle. One lawmaker said the bill cuts down on convicted violent criminals being able to bring frivolous motions to delay inevitable executions: "'Members, we're not speeding up the death penalty, we're just slowing down fraud.'" Jessica Palombo, *Fla. House Passes 'Timely Justice Act' To Cut Death Row Wait Time*, WFSU, April 25, 2013, http://news.wfsu.org/post/fla-house-passes-timely-justice-act-cut-death-row-wait-time. Another lawmaker stated during the floor debate that ". . . the collateral attacks that occur . . . really amounts to gamesmanship that re-victimizes the survivors of the murder victim" (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 18:17)), dismissing out of hand this Court's entire postconviction system and all U.S. Supreme Court precedents that create rights only cognizable in postconviction. That is at the heart of the retaliation to this Court's rules governing successive motions: the notion that they are frivolous and brought for delay. However, that view does not comport to reality. There is a long history of successive proceedings resulting in relief and evidentiary hearings being granted based on findings that legitimate successive claims were not precluded by the record. *See*, *e.g.*, *Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (stay of execution and new penalty phase granted, on second successive motion and under second

warrant, for *Hitchcock* violation); *State v. Mills*, 788 So. 2d 249, 250 (Fla. 2001) (new penalty phase granted after evidentiary hearing on second successive motion because newly discovered evidence revealed codefendant was triggerman); *Johnson v. State*, 44 So. 3d 51, 53 (Fla. 2010) (new penalty phase granted on successive motion because "the record here is so rife with evidence of previously undisclosed prosecutorial misconduct that we have no choice but to grant relief"); *Marek v. State*, 14 So. 3d 985 (Fla. 2009) (evidentiary hearing and stay of execution granted under warrant on third successive motion, based on newly discovered evidence that the codefendant admitted strangling the victim); *Hall v. State,* 109 So. 3d 704, 718 (Fla. 2012) (Perry, J., dissenting) (relief denied after evidentiary hearing on successive *Atkins* claim with two justices separately dissenting to recognize meritorious successive claim, stating "[i]f the bar against executing the mentally retarded is to mean anything, Freddie Lee Hall cannot be executed"); *Mungin v. State*, 79 So. 3d 726, 737 (Fla. 2011) (remanded for successive evidentiary hearing on *Brady* and *Giglio* violations because the Court was "troubled by the possibility that a false police report was submitted and then relied on by defense counsel"); *Smith v. State,* 75 So. 3d 205 (Fla. 2011) (remanded for successive evidentiary hearing on *Brady* violation and newly discovered evidence regarding expert testimony on comparative bullet lead analysis); *Rivera v. State,* 995 So. 2d 191, 192 (Fla. 2008) (remanded for

evidentiary hearing on second successive motion on *Brady* and *Giglio* violations, as well as newly discovered DNA evidence); *Tompkins v. State,* 994 So. 2d 1072, 1094 (Fla. 2008) (Anstead, J., dissenting) (upon denial of evidentiary hearing on fourth and fifth successive motions under warrant, Justice Anstead dissenting to note that the Court should consider the "flagrant misconduct that has been disclosed by the State" as it was "the kind of 'bombshell' disclosure that could change the jury's entire evaluation of a case"); *Lightbourne v. Dugger*, 549 So. 2d 1364, 1365 (Fla. 1989) (evidentiary hearing granted under warrant on a *Brady* violation). Relief has been granted many times on successives, even under warrant, and courts have repeatedly recognized, even when denying relief ultimately, the potential for meritorious claims in need of evidentiary development. In the face of this long history of successful successive motions, it is clear that the notion of frivolity arises from the mere lack of appreciation for the utmost need for zealous advocacy required in capital postconviction defense, not from historical fact.

D. Conclusion

While the violations of Separation of Powers and Due Process inherent in the Timely Justice Act exist regardless of the sordid history of Florida's death penalty procedure, that history is nevertheless important to this Court's consideration of this case. It shows that the matter is soundly established within this Court's sole purview. It shows the exhaustive efforts of this Court to balance

the concerns of fairness and justice with the need for finality in postconviction proceedings in death penalty cases. It shows the need for extensive due process in the capital postconviction and warrant-issuance processes to avoid the tragic and shameful errors of the past. "By one estimate, 90 inmates would be executed within the first six months of its signing." Jessica Palombo, *Fla. House Passes 'Timely Justice Act' To Cut Death Row Wait Time*, WFSU, April 25, 2013, http://news.wfsu.org/post/fla-house-passes-timely-justice-act-cut-death-row-wait-time. The lack of wisdom, propriety, and constitutionality in that likely flood of death warrants is apparent in this State's history.

CLAIMS FOR RELIEF

CLAIM I

THE WARRANT-ISSUANCE PROVISION OF THE TIMELY JUSTICE ACT VIOLATES ARTICLE II § 3 OF THE FLORIDA CONSTITUTION BY USURPING, INTERFERING WITH, AND REASSIGNING TO THE GOVERNOR JUDICIAL POWERS HELD SOLELY BY THIS COURT

I. Introduction

The principle of Separation of Powers is embodied in Article II § 3 of the Florida Constitution, which states that "[n]o person belonging to one branch [of government] shall exercise any powers appertaining to either of the other branches . . . ." This Court adheres to a "strict separation of powers doctrine" which "'encompasses [the] two fundamental prohibitions" that "no branch may encroach

upon the powers of another" and "no branch may delegate to another branch its constitutionally assigned power." *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004) (citing *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 264 (Fla. 1991)). Florida Statutes § 922.052, as amended by the Timely Justice Act, violates the constitutional principle of Separation of Powers in three distinct but related ways.

The Timely Justice Act amends Florida Statutes § 922.052 to make issuance of death warrants automatic upon completion of initial postconviction proceedings. Section 922.052 requires the Clerk of the Florida Supreme Court to provide a certification to the Governor upon completion of federal habeas proceedings[8] and the Governor within 30 days to sign a warrant scheduling an execution date within 180 days. The Governor is given sole discretion to determine if the Clerk of the Florida Supreme Court has performed its task correctly, and, if not, to issue a death

[8] The provision contemplates completion of the "appeal" from the initial habeas corpus proceeding in federal court, making it appear that only review in the U.S. Court of Appeals for the Eleventh Circuit, and not certiorari review in the U.S. Supreme Court, is provided for under the provision, since appellate review and certiorari review are separate matters and not interchangeable. *See City of El Paso v. Simmons*, 379 U.S. 497, 503 (1965) (demonstrating the difference between appeals and cert review by finding that "if an appeal is proper and has been taken, certiorari will not thereafter be available; where the appeal is not proper, this Court will still consider a timely application for certiorari" and "[a]ccordingly [] dismiss[ing] the appeal and grant[ing] the writ of certiorari."). As the Legislature in the Timely Justice Act has made profoundly critical decisions determining what judicial vehicles are available to capital defendants prior to the State taking the ultimate punitive act of terminating their lives, it is troubling that the provision demonstrates a lack of understanding of the vehicles involved and their names.

warrant without a prior certification.

First, the provision infringes on this Court's rulemaking authority by usurping it. This violation is constitutionally indistinguishable from the Legislature's 2000 attempt to reform Florida's death penalty system by arbitrarily speeding it up—the Death Penalty Reform Act—which this Court struck down as unconstitutional. *See Allen v. Butterworth*, 756 So. 2d 52, 66-67 (Fla. 2000).

Second, the provision infringes on this Court's judicial power because it conflicts with case law and interferes with the operation of court rules. Even if § 922.052 did not represent a brazen attempt to exercise the judicial power of rulemaking, it would still be unconstitutional because it conflicts with and undermines that power and the power of judicial review over constitutional matters.

Third, the provision infringes on this Court's constitutional authority to oversee and direct the Clerk by requiring the Clerk to adhere to a certification procedure dictated by the Legislature and by placing the Governor in an oversight role in which he assesses the Clerk's compliance.

Fourth, the provision infringes the Governor's power by placing time limits on his authority to schedule executions under warrants issued in response to certifications from the Clerk of this Court. While there is no time limitation on his authority to schedule executions under warrants issued independently, the

Legislature infringes the Governor's power in that regard by making that authority contingent on and controlled by the Clerk's assessment of the completion of initial proceedings in other jurisdictions.

Each of these violations require that the warrant-issuance provision of the Act be struck down. At a minimum, and even though mitigating the effects of the Separation of Powers violation does not cure the constitutional problem, the Court should recognize that the automatic-warrant provision, which schedules executions without regard for judicial proceedings, must be subject to exceptions being carved out by the judiciary to accommodate constitutional requirements (such as for cases with unresolved successive proceedings pending under this Court's Florida Rules of Criminal Procedure 3.851(d)(2) and (e)(2)).

II. Infringement of the judicial rulemaking authority

Article V § 2(a) of the Florida Constitution vests in this Court exclusive authority to "adopt rules for the practice and procedure in all courts," and Article II § 3 provides that "powers constitutionally bestowed upon the courts may not be exercised by the Legislature." *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005). Thus, if § 922.052 is a rulemaking provision, it is unconstitutional.

To determine if it is a rulemaking provision, we ask whether it is procedural or substantive in nature. This Court has defined those terms:

> The terms practice and procedure "encompass the course, form, manner, means, method, mode, order, process or

> steps by which a party enforces substantive rights or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." *In re Fla. Rules of Criminal Procedure*, 272 So. 2d 65, 66 (Fla. 1972) (Adkins, J., concurring). In other words, practice and procedure is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis*, 147 Fla. 22, 2 So. 2d 116 (1941).
>
> On the other hand, matters of substantive law are within the Legislature's domain. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So. 2d 236 (Fla. 1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property. *Adams v. Wright*, 403 So. 2d 391 (Fla. 1981).

State v. Raymond, 906 So. 2d 1045, 1048-49 (Fla. 2005); *see also State v. J.A., Jr.*, 367 So. 2d 702, 703 (Fla. 2d DCA 1979) (stating that substantive law prescribes duties and rights while procedural law concerns the means and methods to apply and enforce those duties and rights).

It is axiomatic that a provision that sets time deadlines relating to judicial proceedings relates to the means and methods of litigation rather than rights and duties. The Legislature is requiring the Clerk (and the executive branch office of the Governor) to take actions on a fixed timeline that depends on an assessment of the progression of judicial proceedings and does not contemplate the pendency of certain other judicial proceedings, like successive litigation. We need not speculate

as to this, because this Court has already determined that timeframes are the stuff of process and rulemaking. In *Allen v. Butterworth*, in the capital rulemaking context, this Court found the Death Penalty Reform Act procedural and thus a violation of Separation of Powers. 756 So. 2d 52, 62 (Fla. 2000). Part of what made the Death Penalty Reform Act's capital postconviction rule regime procedural in nature was that it "drastically limit[ed] the claims that can be raised in a successive motion" and "set deadlines for postconviction motions." *Id*. at 56, 62.

Section 922.052 does both of those things. Because the warrant-issuance provision is absolutely unconditional, meaning once the "initial proceedings" (a term which involves definitional problems, discussed below) are completed a process with fixed deadlines is set in motion regardless of what is happening with the case or defendant, it necessarily creates a fixed deadline for litigation of any successive claim. In other words, the provision gives litigation an arbitrary deadline and cuts it short based on an unqualified legislative procedural rule. The rule recognizes proceedings it deems "initial" and rejects successive proceedings, even though the merit of the claims is in no way related to the type of procedural vehicle. Meritorious successive claims are just as possible as meritorious initial

claims.[9] In that manner, the provision also drastically limits the claims that can be meaningfully raised in a successive manner. Some claims are not ripe until the time a warrant is signed.[10] To whatever extent litigation of those claims may

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[9] It should be noted that while the floor debate for the Timely Justice Act proceeded under the view that only innocence is a legitimate reason to grant relief, there are myriad constitutional reasons to preclude executions beyond actual innocence. The sponsor of the bill explained that the bill was based on the following notions: "It's a blight on our whole justice system that we have folks hanging around for decades when there is no dispute about guilt or innocence;" "When we've tested all the evidence, heard from all the witnesses, and we're left with just the frivolous motions, I think we have a responsibility to act;" the bill will "in no way prejudice someone's ability to make a claim of innocence or bring new evidence forward;" imagine "having to sit through thirty-two, thirty-three years of fights over whether or not a record was produced twenty hours after it should have been produced, when the killer has confessed;" we "want to put these monsters to death;" the only people that the Timely Justice Act will put to death sooner are "those where guilt or innocence is not in question." These views are contrary to a vast corpus of constitutional law creating prohibitions on execution for other reasons than innocence and creating rights that cannot be violated to obtain a death sentence. *See*, *e.g.*, *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986), *Strickland v. Washington*, 466 U.S. 668 (1984); *Brady v. Maryland*, 373 U.S. 83 (1963).

Further, it must be remembered that "innocence doesn't prove itself," meaning the notion that we can parse out innocent death row inmates from non-innocent ones and provide different procedural protections to those two groups is a misconception. Dan Sullivan, *As state hastens executions, doubt cast on guilt of death row inmate*, Tampa Bay Times, June 1, 2013, http://www.tampabay.com/news/courts/criminal/as-state-hastens-executions-doubt-cast-on-guilt-of-death-row-inmate/2124123 (quoting the Innocence Project's Nina Morrison). Claims born out of innocence are just as susceptible to being considered desperate attempts at delay as claims of constitutional error.

[10] Consider, for example, claims of incompetence to be executed. In *Griffin v. State*, this Court found that "[w]hile Griffin is under a death sentence, no death warrant has been signed and his execution is not imminent. Thus, the issue of

require time beyond the Legislature's arbitrary deadlines, the resolution of constitutional claims is curtailed.

Section 922.052 limits and creates deadlines for successive postconviction motions by completely ignoring that they exist. In that way, it is an even greater infringement on this Court's power over postconviction procedure than the Death Penalty Reform Act's attempt to create time limits for successive litigation: it does not merely alter the rules for a procedural vehicle acknowledged and relied on by this Court; it rejects it entirely.

It is critical to note, with regard to this and the following types of Separation of Powers violations, that this Court's ability to issue stays to facilitate litigation

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Griffin's sanity for execution is not ripe . . . ." 866 So. 2d 1, 21-22 (Fla. 2003). Further, claims associated with the due process afforded during Florida's secret and often changing clemency process may be necessarily raised after the Governor's final action on the matter. Claims regarding the cruel and unusual nature of an execution due to the extent of punishment and mistreatment to which a defendant was subjected prior to execution may necessarily be raised after the full extent of that punishment is known.

It is noteworthy that Florida Statutes § 922.07 gives the Governor the authority and obligation to stay an execution due to claim of incompetence: "[w]hen the Governor is informed that a person under sentence of death may be insane, the Governor shall stay execution of the sentence . . . ." However, investing the executive branch with that authority does nothing to correct the problem of depriving the judiciary of its authority to determine the process under which it resolves constitutional claims. While Florida Rule of Criminal Procedure 3.811(c) permits courts to stay executions for reason of incompetence after the Governor has reached a determination on the issue, the unqualified and brief time limit of § 922.052 may not allow for that provision to become operable prior to the execution date.

not accounted for in the Timely Justice Act in no way cures the constitutional problem. We cannot say *the rules and timeframes on successives are not violated by the Legislature's new time limits on successives because stays of execution can be granted until successive litigation is completed*, because the Florida Constitution provides not that one branch of government cannot exercise the powers of another branch *unless some power exists that can mitigate the harm caused by the encroachment*; it provides that one branch of government *cannot exercise the powers of another branch*. Even if this Court has some way to counteract the effects of the encroachment on its rulemaking authority, the encroachment exists all the same. Its rulemaking power is compromised and reduced, regardless of whether the consequences of the encroachment can be neutralized through the exercise of its power to grant stays. There is precedent for this view. Neither in *Allen v. Butterworth* nor *Jackson v. Florida Dep't of Corrs.*, 790 So. 2d 381, 384 (Fla. 2000) (finding legislative actions cannot "conflict with or interfere with the procedural mechanisms of the court system") were the constitutional infirmities cured by the fact that the Court could stay proceedings or interpret the legislative actions at issue in a way that would alleviate consequences of the encroachment. This is true of any case where this Court has found an interference with its rulemaking authority. This Court's power to effect the same result as its rules by issuing individual stays and other rulings does not cure the

legislative encroachment.

Thus, in the standard *Allen v. Butterworth* model, the provision is unconstitutional. That, however, is not the only Separation of Powers problem.

III. Infringement of judicial power by conflicting with case law and court rules

Another related but distinct way that § 922.052 violates Separation of Powers is by undermining or being contrary to existing case law and court rules. In other words, even if a legislature does not attempt to usurp rulemaking authority, it can infringe on the power by passing laws that *interfere* with the products of that authority. And it can violate the general judicial power by interfering with judicial decisions on constitutional matters that supersede legislative power.

As for interference with the rulemaking power, this Court has made clear that if procedural provisions of a statute "conflict with or interfere with the procedural mechanisms of the court system, they are unconstitutional under both a separation of powers analysis, and . . . pursuant to the rulemaking authority vested in [the Florida Supreme Court] by the Florida Constitution." *Jackson v. Florida Dep't of Corrs.*, 790 So. 2d 381, 384 (Fla. 2000). "It is a well-established principle that a statute which purports to create or modify a procedural rule of court is constitutionally infirm." *State v. Raymond*, 906 So. 2d 1045, 1048 (Fla. 2005). *Jackson v. Florida Department of Corrections* is an illustrative precedent for how this principle can be violated:

> This Court has already promulgated a rule which regulates the procedure and practice utilized by the courts in considering whether to grant an inmate's request to proceed in forma pauperis. *See*, *e.g.*, Fla. R. App. P. 9.430. The statute adds new procedures to the ones already in the rule and they conflict with it. Thus, we conclude that this legislatively imposed "procedure" is interfering with and intruding upon the procedures and processes of this Court and conflicts with this Court's own rule regulating the procedure for indigency determinations (rule 9.430). Under such circumstances, this Court has the authority, perhaps even the duty, to declare the copy requirement portion of the Prisoner Indigency Statute void and state that the judiciary will not comply with it or require that inmates comply with it.

790 So. 2d 381, 385-86 (Fla. 2000). Like the indigency rules at issue in *Jackson*, § 922.052 "adds new procedures to the ones already in the rule [which] conflict with it." *Id*.

Florida Rule of Criminal Procedure 3.851 (d)(2) and (e)(2) permit successive motions to be filed beyond the initial time period of the rule in the event of newly discovered evidence or the establishment of a constitutional right. There is an extensive procedure described in the rule governing the litigation of successive motions.[11] There are restrictions and concessions to account for constitutional

[11] Rule 3.851(e)(2) reads:

> (2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence. A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include:

requirements. A primary reason this Court adopted the Rule was "in order to provide a more orderly procedure and give the courts a more reasonable time to consider postconviction and collateral relief claims . . . after a death warrant is

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> (A) all of the pleading requirements of an initial motion under subdivision (e)(1);
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> (B) the disposition of all previous claims raised in postconviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions;
>
> (C) if based upon newly discovered evidence, Brady v. Maryland, 373 U.S. 83 (1963), or Giglio v. United States, 405 U.S. 150 (1972), the following: . . . .

Rule 3.851(d)(2) reads:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:
>
> > (A) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
> >
> > (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
> >
> > (C) postconviction counsel, through neglect, failed to file the motion.

signed." *In re Florida Rules of Criminal Procedure, Rule 3.851*, 503 So. 2d 320 (Fla. 1987). However, § 922.052 rejects this Court's entire system of rules and case law relating to successive motions. It does so even though successive litigation has proven a fundamental component of capital litigation in Florida, not only being entertained in numerous cases, but leading to stays of execution due to the overriding importance of the claims,[12] and also resulting in relief being granted by this Court.[13] In those instances of relief, where this Court prevented the unconstitutional execution of an individual by the State of Florida, § 922.052 would have operated to cut the proceedings off before they could result in relief being granted on the constitutional errors.

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[12] Consider, for example, *King v. Moore*, 824 So. 2d 127 (Fla. 2002) and *Bottoson v. Moore*, 824 So. 2d 115 (Fla. 2002), where this Court stayed executions pending consideration of the implications of the then-recent U.S. Supreme Court constitutional decision in *Ring v. Arizona*, 536 U.S. 584 (2002), stating that "to afford an opportunity for appropriate consideration of the multiple issues in this matter generated by recent decisions of the Supreme Court of the United States, [the Court] grants a temporary stay of execution until further order of this court." *King*, 824 So. 2d at 127. *See also Darden v. State*, 521 So. 2d 1103, 1105 (Fla. 1988) (acknowledging that "[i]f this were the first time Darden presented this *Caldwell* claim to this Court, such a stay [of execution] may be warranted); *Medina v. State*, 690 So. 2d 1241, 1246 (Fla. 1997) (granting stay of execution where "it was an abuse of discretion not to have an evidentiary hearing pursuant to rule 3.812 in view of the conflicting opinions of the experts" regarding competence).

[13] *See*, *e.g.*, *Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (stay of execution and new penalty phase granted, on second successive motion and under second warrant); *see also Marek v. State*, 14 So. 3d 985 (Fla. 2009) (evidentiary hearing and stay of execution granted under warrant on third successive motion).

Because the provision requiring a warrant after conclusion of initial proceedings with no concession made for successive litigation interferes with this Court's standards for when successive litigation is proper to adjudicate fully, it fits the *Jackson* model for legislative encroachment-by-interference. *See also State ex rel. Buckwalter v. City of Lakeland*, 150 So. 508, 512 (1933) (finding that legislative act improperly attempted to interfere with judicial power to issue writs of mandamus and to limit scope of writ of mandamus) and *Brinson v. Tharin*, 127 So. 313, 316 (1930) (Court's power to issue writ of certiorari cannot be extended, limited, or regulated by statute).[14]

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[14] *Brinson* shows that the Timely Justice Act's interference with successive litigation creates another, independent basis for relief. In addition to violating Separation of Powers, the Timely Justice Act violates the prohibition on suspending the writ of habeas corpus. In *Allen v. Butterworth*, this Court found that the interference with time limitations of successive litigation unconstitutionally suspended the writ of habeas corpus:

> the writ of habeas corpus is explicitly derived from text of the Florida Constitution, which provides that the writ "shall never be suspended unless, in case of rebellion or invasion, suspension is essential to the public safety." Art. I, § 13, Fla. Const. As this Court explained in *Haag v. State*, 591 So.2d 614, 616 (Fla. 1992), "[a] basic guarantee of Florida law is that the right to relief through the writ of habeas corpus must be 'grantable of right, freely and without cost.' " (quoting article I, section 13 of the Florida Constitution). While the right to habeas relief "is subject to certain reasonable limitations consistent with [its] full and fair exercise," it "should . . . be fairly administered in favor of justice and not bound by technicality." *Id*.

Further, § 922.052 would interfere with federal litigation deemed by this Court to properly supersede an execution schedule. For instance, in *Bolender v. State*, denying relief, this Court nevertheless held that Bolender's execution should be "temporarily stayed . . . to allow Bolender to seek relief in federal court." 658 So. 2d 82, 85-86 (Fla. 1995). This Court recognized the authority for and prioriety of federal review. Additionally, when this Court reconstituted its postconviction review committee in 1994, part of the reason was to accommodate and reconcile federal postconviction litigation with state litigation. This Court described the reconstituted committee as tasked with "improving administrative coordination with the federal courts." *Allen*, 756 So. 2d at 57. However, because § 922.052 denies the existence of successive litigation, federal review of successive litigation is also denied by that provision. If a successive federal habeas corpus or appeal is pending, or federal proceedings become bifurcated such that certain claims are resolved prior to others, § 922.052 will represent a denial by this State of the authority for and propriety of federal courts reviewing the capital cases of this State.

There is also potential for § 922.052 to interfere with initial proceedings

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756 So. 2d at 61. By cutting off successive litigation, the warrant-issuance provision unconstitutionally suspends the writ of habeas corpus.

under various scenarios.[15] For instance, if initial proceedings become bifurcated in state or federal court, if there is an interlocutory appeal that results in a denial of certiorari review in the U.S. Supreme Court prior to initial federal review of other claims, if the defendant becomes involved in an initial proceeding like the instant petition that is separate from his individual litigation but nevertheless not successive in nature, if an initial federal action under 42 U.S.C. § 1983 is brought challenging lethal injection procedures or lack of due process in clemency, etc. In short, capital postconviction procedure is not black-and-white and this Court has created rules for various scenarios that are ignored by § 922.052. As the U.S. Supreme Court has recognized in the federal habeas context, "[t]he phrase 'second or successive' is not self-defining." *Panetti v. Quarterman*, 551 U.S. 930, 943 (2007). It requires interpretation and reference to case law and rules.

Further, there are some claims, created and recognized by the U.S. Supreme Court, that cannot be brought in an initial proceeding, must be brought in successive warrant litigation, but are nevertheless considered initial in nature

[15] It should be noted that the U.S. Supreme Court has recognized that initial proceedings are not and cannot always be treated as proper and effective. In *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), the U.S. Supreme Court recognized the need for equitable relief from state procedural bars, such as the bar on untimely successive 3.851 motions, in federal habeas proceedings. While the Legislature relies on initial proceedings as the exclusive and entire means by which constitutional errors can be redressed in capital cases, it is a fact that initial proceedings are sometimes flawed and ineffective such that future courts should look past rigid procedural rules in order to cure injustices.

because it is the first instance in which those claims are ripe. For example, the U.S. Supreme Court has found that *Ford*[16] claims are not "'second or successive' [when] . . . filed as soon as that claim is ripe," *Panetti*, 551 U.S. at 945. Because the claim is not ripe until a defendant faces execution under warrant, a *Ford* claim raised under warrant is *initial* even though it comes later in time than the first round of collateral litigation. Similarly, changes in constitutional law made retroactive, such as *Atkins v. Virginia*, 536 U.S. 304 (2002), *see In re Turner*, 637 F.3d 1200, 1203 (11th Cir. 2011), prohibiting execution of the intellectually disabled, create rights and vest those rights in defendants that have had initial proceedings just as much as those who have not. Florida defendants that have had their initial collateral proceedings must nevertheless be permitted to put forth new rights applied to them retroactively.

As this Court has recognized by creating rules like Florida Rule of Criminal Procedure 3.811, which creates a procedure for determining sanity to be executed which occurs after the signing of a warrant, some matters transcend the need for finality, namely constitutional rights that defendants must have an opportunity to advance after their warrants are signed.

The term *initial* is no more self-defining than its counterpart term,

[16] In *Ford v. Wainwright*, the U.S. Supreme Court recognized a constitutional prohibition on executing the insane while finding Florida's procedure for assessing sanity was constitutionally inadequate. *See* 477 U.S. 399, 417 (1986).

successive. Both are not dictated only by time and sequence.

This Court has made clear that "the legislature cannot enact a statute that overrules a judicially established legal principle enforcing or protecting a federal or Florida constitutional right." *Munoz v. State*, 629 So. 2d 90, 98 (Fla. 1993). A fascinating way to conceive of this rule is found in *Bush v. Schiavo*, where this Court quoted the U.S. Supreme Court's statement that "the power of the judiciary is 'not merely to rule on cases, but to decide them . . . .'" *Id*. at 330 (citing *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995)). The implication is that the power to *decide* cases, as opposed to the lesser power to *rule* on cases, means that the court system gets to have their ruling count as the final word on the matter. The Legislature cannot cutoff successive litigation involving constitutional claims without violating this principle. This Court must have the last word in successive litigation.

There is a powerful and ancient line of legal tradition supporting this argument, because a legislature usurping judicial power—that particular type of government overreach—is a primary and fundamental basis for the Separation of Powers principle. It is at the heart of the concern:

> The framers of the Constitution of Florida, doubtless, had in mind the omnipotent power often exercised by the British Parliament, the exercise of judicial power by the Legislature in those States where there are no written Constitutions restraining them, when they wisely prohibited the exercise of such powers in our State.

> That Convention was composed of men of the best legal minds in the country—men of experience and skilled in the law—who had witnessed the breaking down by unrestrained legislation all the security of property derived from contract, the divesting of vested rights by doing away the force of the law as decided, the overturning of solemn decisions of the Courts of the last resort, by, under the pretence of remedial acts, enacting for one or the other party litigants such provisions as would dictate to the judiciary their decision, and leaving everything which should be expounded by the judiciary to the variable and ever-changing mind of the popular branch of the Government.

Trustees Internal Improvement Fund v. Bailey, 10 Fla. 238, 250 (1863) (*see also Bush v. Schiavo*, 885 So. 2d 321, 329-30 (Fla. 2004)). Federal Separation of Powers has similarly powerful underpinnings on this point:

> Indeed, the desire to prevent Congress from using its power to interfere with the judgments of the courts was one of the primary motivations for the separation of powers established at this nation's founding:
>
> This sense of a sharp necessity to separate the legislative from the judicial power, prompted by the crescendo of legislative interference with private judgments of the courts, triumphed among the Framers of the new Federal Constitution. The Convention made the critical decision to establish a judicial department independent of the Legislative Branch . . . . Before and during the debates on ratification, Madison, Jefferson, and Hamilton each wrote of the factional disorders and disarray that the system of legislative equity had produced in the years before the framing; and each thought that the separation of the legislative from the judicial power in the new Constitution would cure them. Madison's Federalist No. 48, the famous description of the process by which "[t]he

> legislative department is every where extending the sphere of its activity, and drawing all power into its impetuous vortex," referred to the report of the Pennsylvania Council of Censors to show that in that State "cases belonging to the judiciary department [had been] frequently drawn within legislative cognizance and determination." Madison relied as well on Jefferson's Notes on the State of Virginia, which mentioned, as one example of the dangerous concentration of governmental powers into the hands of the legislature, that "the Legislature . . . in many instances decided rights which should have been left to judiciary controversy."

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 221–22 (1995).

This deep-seeded principle is violated by § 922.052, because it interferes with, undermines, and displaces precedents and rules of this Court. For instance, consider that in *State ex rel. Russell v. Schaeffer*, 467 So. 2d 698 (Fla. 1985) this Court described the procedural requirements for a circuit court to issue a stay of execution based on the potential merit of successive claims (finding no merit to Schaffer's stay motion, "while Waterhouse's application for stay contained enough facts to show, on its face, that he might be entitled to relief under rule 3.850 and that his application for stay could be treated as a 3.850 motion subject to amendment"). Consider that this Court has honed a standard for when successive relief is appropriate based on new evidence. *Gore v. State*, 91 So. 3d 769, 774 (Fla. 2012) ("To obtain relief on the basis of newly discovered evidence, a defendant must satisfy a two-prong test . . . ."). This Court's rules designed to address post-warrant litigation, like Florida Rule of Criminal Procedure 3.811 (providing

procedure for determinations of sanity at time of execution), are displaced by a time-certain deadline that may cutoff the operation of those rules. Any constitutional matter that this Court might grant relief on under warrant is placed in jeopardy by § 922.052. *See*, *e.g.*, *Hall v. State*, 541 So. 2d 1125 (Fla. 1989) (stay of execution and new penalty phase granted, on second successive motion and under second warrant); *see also Marek v. State*, 14 So. 3d 985 (Fla. 2009) (evidentiary hearing and stay of execution granted under warrant on third successive motion).

Against this historical backdrop, it is clear that, when the Legislature restricts this Court's authority to reach final ruling on constitutional matters by creating a time-certain limit on capital litigation and rejects procedural vehicles recognized by this Court as necessary components to ensuring the constitutionality of capital convictions and death sentences, it violates this Court's authority to be the ultimate interpreter of the Florida Constitution.

IV. Infringing this Court's authority to oversee its Clerk

The Clerk of the Florida Supreme Court is a constitutional officer whose oversight is determined by the Florida Constitution. "The supreme court shall appoint a clerk . . . who shall hold office during the pleasure of the court and perform such duties as the court directs." Fla. Const. Art. V, § 3(c). Thus, the provision that requires the Clerk to certify completed cases to the Governor and for the Governor to review the certification (regardless of the other constitutional

problems with that certification process) violates Separation of Powers in two ways: (a) by implicitly usurping for the Legislature the power to direct the Clerk and (b) by explicitly granting the Governor an oversight role by providing that "[i]f, in the Governor's sole discretion, the clerk of the Florida Supreme Court has not complied with [the certification provision] with respect to any person sentenced to death, the Governor may sign a warrant . . . ." Fla. Stat. § 922.052(2)(c).

With regards to the implicit legislative infringement on the power to oversee the Clerk, it is well-settled that "the legislature cannot take actions that would undermine the independence of Florida's judicial . . . offices," like the constitutional office of the Clerk. *Office of State Attorney v. Parrotino*, 628 So. 2d 1097, 1099 (Fla. 1993).

> Under the express separation of powers provision in our state constitution, 'the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power,' and 'the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three coequal branches.'

Bush v. Schiavo, 885 So. 2d 321, 330 (Fla. 2004). When it comes to the legislature directing the actions of clerks of court, the law is clear:

> . . . [C]lerks of the circuit courts,[17] when acting under

[17] There is no basis to find that the Clerk of the Florida Supreme Court, explicitly placed under the supervision of the Florida Supreme Court by Article V § 3(c),

> the authority of their article V powers concerning judicial records and other matters relating to the administrative operation of the courts, are an arm of the judicial branch and are subject to the oversight and control of the Supreme Court of Florida, rather than the legislative branch.

Times Pub. Co. v. Ake, 660 So. 2d 255, 257 (Fla. 1995). Thus, in *Johnson v. State* the Florida Supreme Court struck down the Legislature's attempt to require clerks to destroy records of expunged charges, finding that "[t]o permit a law to stand wherein the Legislature requires the destruction of judicial records would permit an unconstitutional encroachment by the legislative branch on the procedural responsibilities granted exclusively to this Court." *Johnson v. State*, 336 So. 2d 93, 95 (Fla. 1976). The Legislature simply cannot tell the Clerk of the Florida Supreme Court what to do with its records or whether and how to keep them. "[A]s the head of the judicial branch, [the Florida Supreme Court] has the exclusive responsibility for determining how records in the court system are filed and maintained." *Amendments to the Rules of Judicial Admin.—Rule 2.090—Elec. Transmission & Filing of Documents*, 681 So. 2d 698, 699 (Fla. 1996).

With regard to the Governor assessing whether the Clerk has complied with the certification provision, it is well-settled that "[t]he judicial branch cannot be

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would be treated any differently than circuit court clerks when it comes to independence from legislative control.

subject in any manner to oversight by the executive branch."[18] *Children A, B, C, D, E, & F*, 589 So. 2d at 269. That principle is unqualified. The Governor does not oversee the Clerk of this Court. "[T]he judiciary [is] a co-equal branch of government and not an 'agency'" such that it is subject to executive control.[19] *Times Pub. Co. v. Ake*, 660 So. 2d 255, 257 (Fla. 1995) (approving of holding of lower court to that effect). And, as the Clerk is an officer of the judiciary, it is

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[18] This principle relates to the concerns recently expressed by Chief Justice Polston, joined by Justice Canaday, in dissent from the decision in *Public Defender, Eleventh Judicial Circuit of Florida, et al. v. State*, Case No. SC10-1349 (Fla. May 23, 2013), stating that the decision may have the result that "the judiciary will essentially be managing the Public Defender's Office." *Id*. at 50 (Polston, C.J., joined by Canaday, J., dissenting).

> This ongoing judicial involvement in overseeing the internal affairs of the Public Defender's Office is not only impractical but also creates constitutional separation of powers problems. See art. II, § 3, Fla. Const. ("No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein."); art. V, § 18, Fla. Const. ("In each judicial circuit a public defender shall be elected for a term of four years, *who shall perform duties prescribed by general law*.") (emphasis added).

Id. at 51.

[19] It is noteworthy, however, that even if the Office of the Clerk of the Florida Supreme Court were an agency, opinions of the Attorney General would suggest the Governor still would not have oversight power. *See*, *e.g.*, Op. Att'y Gen. Fla. 81–49 at 1 (1981) (opining that section 1(a) of article IV of the Florida Constitution did not confer upon the governor "any power of direct control and supervision over all state agencies . . . ."

important to recall that this Court has ruled that "'purely judicial acts . . . are not subject to review as to their accuracy by the Governor." *In re Advisory Opinion to the Governor*, 213 So. 2d 716, 720 (Fla. 1968). Put simply, the Governor cannot be permitted to oversee the Clerk in any way without infringing upon the Florida Supreme Court's constitutional authority to do so. The Governor cannot give the Clerk directives or pass on the quality of the Clerk's performance.

Further, the provision requiring the clerk to monitor capital litigation through federal courts after this Court is divested of jurisdiction in each case under the Clerk's review places an obligation on the Clerk outside the scope of its authority and purview. In the multiple federal districts of Florida, through the Eleventh Circuit Court of Appeals, and to the United States Supreme Court, the Clerk must monitor hundreds of cases, each with procedural nuances, potential bifurcations, potential interlocutory proceedings, potential remands. After the case is out of the Clerk's jurisdiction, the Clerk will have to follow the procedural nuances of collateral proceedings in other jurisdictions at the order of the Legislature. Such a requirement is contrary to this Court's authority to direct the Clerk and jurisdictional reach.

V. Infringing the Governor's power to issue warrants

The inability of the Governor to oversee the Clerk means that the warrant-issuance provision violates not only this Court's power, but also the Governor's

power, because his discretion to sign warrants is limited to instances where the Clerk issues a certification or in determined to have failed to properly comply with the requirement that it issue a certification. That is because in *Gore v. State* this Court incorporated the Governor's warrant signing power into his constitutionally plenary clemency power:

> Our analysis in the previous section [regarding the clemency power] applies equally to this claim. The same principles—the Governor's unfettered discretion under the Florida Rules of Executive Clemency, see Fla. R. Exec. Clem. 4, and separation of powers concerns—arise again in the context of a claim that the Governor's decision to sign Gore's warrant was arbitrary and standardless.

91 So. 3d 769, 780 (Fla. 2012). "The Florida Rules of Executive Clemency expressly provide that '[t]he Governor has the unfettered discretion to deny clemency at any time, for any reason,'" and this Court constitutionalized the scope of that power by finding that "this Court has repeatedly declined to interject itself into what is, under the Florida Constitution, an executive function." *Id*. at 779. The Court made this principle—that the Governor's warrant signing power is part of the Governor's clemency power—even more concrete in *Valle v. State*, describing its findings in *Marek v. State*:

> In *Marek v. State*, 8 So. 3d 1123, 1129–30 (Fla. 2009), we rejected a similar constitutional challenge to Florida's clemency process and declined to "second-guess" the application of the exclusive executive function of clemency. While our decision in *Marek* was pending,

> Marek filed another successive postconviction motion, specifically contending that the manner in which the Governor determined that a death warrant should be signed was arbitrary and capricious. This Court affirmed the denial of relief, explaining in more detail:
>
> > Marek argues that Florida's clemency process, *particularly the Governor's authority to sign warrants*, is unconstitutional because it does not provide sufficient due process to the condemned inmate . . . However, Marek did raise this claim in his second successive postconviction proceeding. In that proceeding, Marek analogized the Governor's decision to sign his death warrant to a lottery and contended that Florida's clemency process was one-sided, arbitrary, and standardless. This Court rejected Marek's challenges as meritless. The current claim raises the same legal challenge this Court previously considered.

Valle v. State, 70 So. 3d 530, 551 (Fla. 2011) (citation omitted) (emphasis in original). This Court later described its *Valle* decision as "holding that under the doctrine of separation of powers it is not this Court's prerogative to second-guess the executive in matters of clemency, thus rejecting claim that the Governor's absolute discretion to sign death warrants renders Florida's death penalty structure unconstitutional." *Carroll v. State*, SC13-738, 2013 WL 1976326, *4 (Fla. May 15, 2013). Thus, in *Valle*, citing Separation of Powers concerns, this Court affirmed that it treated the warrant-issuance claim in *Marek* as identical to the clemency claim because they arise from the same power and have the same effect. Today,

there is no basis to treat as different the Legislature's violation of Separation of Powers in limiting that power. This Court treats the warrant-issuance power as part of the clemency power, and regards it as a constitutionally mandated executive power.

Finally, in *Carroll v. State*, *in the context of denying a challenge to the Governor's warrant-signing authority*, this Court stated, "[t]he clemency process in Florida derives solely from the Florida Constitution and we have recognized that the people of the State of Florida have vested 'sole, unrestricted, unlimited discretion exclusively in the executive in exercising this act of grace.'" SC13-738, 2013 WL 1976326, *5 (Fla. May 15, 2013) (citing *Sullivan v. Askew*, 348 So. 2d 312, 315 (Fla. 1977)). That statement leaves no doubt as to the constitutionalization of the Governor's warrant-signing power under the Florida Constitution.[20]

Viewing the Governor's warrant-signing power as part of the clemency power is also justified by the workings of the Timely Justice Act, which provide that the automatic process which takes place following the conclusion of "initial proceedings" is conditioned on the defendants having received clemency. It provides that a warrant *shall* issue only "if the executive clemency process has

[20] While the constitutionalization of this power does not shield it from scrutiny under the U.S. Constitution and it is still subject to challenge in that regard, it is not subject to legislative action.

concluded." CS/CS/HB 7083 lns. 772-73. Thus, in the usual warrant-issuance procedure under the Timely Justice Act, the Governor will determine when warrants are signed not through his signing power, but through his clemency power.[21]

Accordingly, by passing the Timely Justice Act, the Legislature violates the Governor's constitutionally plenary clemency power when it restricts the time limit under which he can schedule executions and the instances in which he can sign warrants because his warrant-signing power, as an analogue to his clemency power, is plenary. Time and time again this Court has declined to infringe what it believes to be the Governor's plenary authority to sign death warrants, not due to any statutory authority granted to the Governor by the Legislature, but by holding that the Florida Constitutional vests that power in the Governor and makes it

[21] Note that this does not significantly diminish the initial flood of warrants triggered by the effective date of the act because many of those individuals have had clemency proceedings. If the Governor chooses to create a new, final clemency proceeding that would discount the prior proceedings, it would be contrary to the letter of the law of the Timely Justice Act and it would recognize that the many individuals executed under the old procedure, without a final clemency process, would have been denied the same consideration that later individuals received. This Court has used the legitimacy of the old clemency procedures to discount the need for clemency at the time of execution. *See Gore*, 91 So. 3d at 779 (explaining the denial of relief in *Bundy v. State*, 497 So. 2d 1209 (Fla. 1986) as attributable to the fact that the "defendant under an active death warrant contended that he must be allowed time to prepare and present a second petition for clemency, even though he had already received an earlier clemency proceeding.").

plenary. Of course, the same Separation of Powers concerns restrict the Legislature from infringing that power.

While the Governor's prior limitless power has been challenged often as unconstitutionally arbitrary, the way to cure that unconstitutionality is not through a Separation of Powers violation. It is for this Court, through its paramount power of judicial review on constitutional matter, and not the Legislature, through its political process, to restrict the Governor's power to issue death warrants.[22]

CLAIM II

THE WARRANT-ISSUANCE PROVISION OF THE TIMELY JUSTICE ACT VIOLATES THE GUARANTEES OF DUE PROCESS AND EQUAL PROTECTION IN THE STATE AND FEDERAL CONSTITUTIONS AND IS CRUEL AND UNUSUAL IN VIOLATION OF THE EIGHTH AMENDMENT

In addition to the Separation of Powers violations inherent in the Timely Justice Act, there are due process and equal protection violations reminiscent of problems with diminished process in Florida's history. In *Allen v. Butterworth*, this Court found not only a Separation of Powers violation, but violations of the rights

[22] Note that this is the case even though, in the context of sanity determinations, this Court has found that "[t]he execution of capital punishment is an executive function and the legislature was authorized to prescribe the procedure to be followed by the governor in the event someone claims to be insane." *Goode v. Wainwright*, 448 So. 2d 999, 1001 (Fla. 1984). The procedure related to sanity is a separate matter from the constitutional power of the Governor to pass on clemency and issue death warrants.

of due process and equal protection in the Death Penalty Reform Act. "The successive motion standard of the Death Penalty Reform Act prohibits otherwise meritorious claims from being raised in violation of due process. Additionally, the successive motion standard applies only to capital prisoners in violation of the principles of equal protection." *Allen*, 756 So. 2d at 54. There was little discussion of these violations in the *Allen v. Butterworth* opinion, because their unconstitutionality was plain. This Court simply acknowledged that it is "mindful that [its] primary responsibility is to . . . ensure that the death penalty is fairly administered in accordance with the rule of law . . ." and that this is "particularly important in a capital case because, as we have said, death is different.'" *Id*. at 59 (citing *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995)).

> The United States Supreme Court has also repeatedly emphasized that the Eighth Amendment requires a heightened degree of reliability in capital cases:
>
> > [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100–year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. (citing *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)). In other words, the well-established principle that there is a heightened requirement of due process

in the capital context is so axiomatic that little analysis is necessary to find that a legislative interference with the time limitations of judicial proceedings is unconstitutional. And this Court treated as equally axiomatic the fact that the State cannot limit the claims of capital defendants to a greater degree than non-capital defendants. *See id*. at 54.

The warrant-issuance provision of the Timely Justice Act, found in § 922.052, like the Death Penalty Reform Act, creates a time-certain deadline for capital litigation. As with the Death Penalty Reform Act, the Legislature cannot create time limits that restrict capital proceedings in a manner that limits adjudication of constitutional claims. As with the Death Penalty Reform Act, creating a limiting provision that applies only to capital, but not non-capital defendants, violates the doctrine of equal protection.

The due process problems with § 922.052 are myriad. The Clerk of this Court is tasked with certifying cases that have completed initial proceedings:

> (2)(a) The clerk of the Florida Supreme Court shall inform the Governor in writing certifying that a person convicted and sentenced to death, before or after the effective date of the act, has:
>
> > 1. Completed such person's direct appeal and initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court; or
> >
> > 2. Allowed the time permitted for filing a habeas corpus petition in federal court to expire.

CS/CS/HB 7083 lns. 761-69. However, this provision suffers from definitional, jurisdictional, and ambiguity problems that will make the Clerk's task untenable.

First, its vague description of initial proceedings fails to contemplate the complexity of capital postconviction procedure. It is not always as simple as a single procedure that results in a single decision. There can be bifurcations, mixed petitions that result in partial remands, interlocutory appeals, class proceedings like the instant petition that might result in final orders incidental to a defendant's individual case. There can be successive state proceedings that lead to successive federal proceedings happening on different timelines than prior claims. With all the nuance and complexity, it is all but impossible for the Clerk to comply with the monitoring requirement. That is demonstrated by the fact that the office of the Capital Clerk of this Court, despite proving time and time again to be exceedingly proficient, helpful, and knowledgeable in managing capital proceedings in this Court, has, likely in anticipation of the Timely Justice Act, circulated a list representing the procedural posture of Florida's capital cases, which contained numerous errors as to which defendants had completed their initial proceedings, which defendants had federal appeals pending, which defendants had exceeded their deadline for filing federal habeas petitions, and, as a result, which defendants would be warrant-eligible under the Timely Justice Act. However, the problem was not in the Clerk's Office. The problem is that *there is no system in place for*

notifying the Clerk of developments. Federal courts are not required to notify the Clerk when proceedings take a turn. There is no mechanism in place for defense counsel or the Attorney General to do so. Florida circuit courts need not notify the Clerk when a successive motion is filed in a capital case prior to the appeal of the disposition of that motion. Further, there is no allowance for the parties to litigation to be heard on the matter. The touchstone of due process is notice and reasonable opportunity to be heard, "'notice and opportunity for hearing appropriate to the nature of the case.'" *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 542 (1985) (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). The lack of opportunity for a defendant to be heard regarding determinations as to the status of his litigation violates this fundamental principle.

Again, "[t]he phrase 'second or successive' is not self-defining." *Panetti*, 551 U.S. at 943. It is not something that the Clerk can identify simply without interpretation and judgment. As discussed above, *Panetti* recognizes claims that cannot be part of the first round of collateral litigation that are nevertheless *initial* in nature. *In re Turner*, among many cases, recognizes claims based on new retroactive rights as being outside bans on successive filings. Florida defendants that have had their initial collateral proceedings must be permitted to put forth new rights applied to them retroactively and claims only ripe after their initial proceedings have past.

The terms *initial* and *successive* are not self-defining such that the Clerk can simply categorizes claims based on their sequence in collateral litigation. There are definitional issues and a need for judgment and interpretation that the Legislature failed to appreciate. These terms are matters of jurisprudence, analysis, and contestation.

Further, the Legislature's failure to comprehend the complexity of capital procedure is apparent in its use of erroneous terminology in § 922.052. The provision requires the Clerk to make certifications to the Governor upon completion of the "appeal" from the initial habeas corpus proceeding in federal court, making it appear that only review in the U.S. Court of Appeals for the Eleventh Circuit, and not certiorari review in the U.S. Supreme Court, is provided for under the provision. Appellate review and certiorari review are separate matters and not interchangeable. *See City of El Paso v. Simmons*, 379 U.S. 497, 503 (1965) (demonstrating the difference between appeals and cert review by finding that "if an appeal is proper and has been taken, certiorari will not thereafter be available; where the appeal is not proper, this Court will still consider a timely application for certiorari" and "[a]ccordingly [] dismiss[ing] the appeal and grant[ing] the writ of certiorari."). The Legislature in the Timely Justice Act has made profoundly critical decisions determining what judicial vehicles are available to capital defendants prior to the State taking the ultimate punitive act of terminating their

lives, yet it seems the Legislature does not have an understanding of those vehicles and their names. Unless, that is, we must presume that the Legislature intended to cut off U.S. Supreme Court review of Florida death cases, which would present concerns of federalism, constitutionality, and fairness beyond those addressed herein.

A further equal protection problem is created by the fact that defendants whose initial proceedings were completed prior to the Timely Justice Act had the benefit of raising successive motions under 3.851 unencumbered by Time Justice Act time restraints. Defendants whose initial proceedings will be completed after the effective date of the Timely Justice Act will not have that same opportunity. As described above, defendants have been granted relief pursuant to successive motions; they are not inconsequential. Permitting certain capital defendants to have a method of vindicating rights that other capital defendants do not have, violates the precept of equal protection.

The essential violation of due process that will result from the enactment of the Timely Justice Act is the diminishment of process through overburdening the court system, which, as described above, has had tragic consequences throughout the history of Florida's use of the death penalty.

That result also creates an Eighth Amendment violation. The Eighth Amendment prohibition of cruel and unusual punishment forbids arbitrary

imposition of the death penalty and requires that capital sentencing schemes ensure reasonableness, fairness and consistency in sentencing. *Furman v. Georgia*, 408 U.S. 238, 310 (1972). Although there are already serious doubts about the degree of constitutional protection and fairness in Florida's death penalty scheme,[23] §

[23] In 2001, the ABA created the Death Penalty Moratorium Implementation Project to collect and monitor data on the death penalty. *American Bar Association, Evaluating Fairness and Accuracy in State Death Penalty Systems: The Florida Death Penalty Assessment Report* at 1 (2006). In September of 2006, the ABA published a report containing the Florida State Assessment Team's conclusions as to Florida's death penalty scheme and its recommendations for improvement. The Report reflects that the ABA was "convinced that there is a need to improve the fairness and accuracy in the death penalty system" as the State of Florida "fails to comply or is only in partial compliance with" certain minimum safeguards and policies to ensure fairness and "many of these shortcomings are substantial." *Id*. at i. These concerns resonate in Justice Anstead's observation that "we appear to have reached the outer limits of our authority to restrict the constitutional process under habeas corpus for catching serious mistakes in capital cases." *Amendments*, 797 So. 2d at 1222 (Anstead, J., concurring). Further, while the U.S. Supreme Court "has recognized the significant safeguard the *Tedder* standard affords a capital defendant in Florida," stating, "[w]e are satisfied that the Florida Supreme Court takes that standard seriously and has not hesitated to reverse a trial court if it derogates the jury's role," *Harris v. Alabama*, 513 U.S. 504, 510-11 (1995) (internal citations omitted), certain courts have found that the jury's involvement in the factfinding on which Florida capital sentences are based is constitutionally insufficient. *See Evans v. McNeil*, Case No. 08-14402-CIV, 2011 WL 9717450 (S.D. Fla. June 20, 2011), *reversed by Evans v. Sec'y, Florida Dep't of Corrs.*, 699 F.3d 1249 (11th Cir. 2012) ("[a]s the Florida sentencing statute currently operates in practice . . . the process completed before the imposition of the death penalty is in violation of *Ring* in that the jury's recommendation is not a factual finding sufficient to satisfy the Constitution."); *Jennings v. Crosby*, 392 F. Supp. 2d 1312, 1335 (N.D. Fla. 2005) (noting that the fact "[t]hat *Ring* does not apply retroactively does not mean that the Florida death penalty sentencing scheme ultimately will survive *Ring*."); *see also State v. Steele*, 921 So. 2d 538, 540 (Fla. 2005) (recognizing "Need for Legislative Action" on the issue). It is in the face of

922.052 diminishes greatly the warrant-stage protections that, as described above, so often catch errors and are essential to preventing unconstitutional executions. While the evolution of American standards of decency move away from capital punishment, *see* Alan Greenblatt, *The Death Penalty's Slow But Seemingly Sure Decline*, NPR, June 21, 2013, http://www.npr.org/2013/06/21/193902745/the-death-penaltys-slow-but-seemingly-sure-decline (noting that this year "Maryland became the sixth state in as many years to abolish the death penalty"), Florida moves in the other direction, past the threshold of minimal protection that the Eighth Amendment requires.

CLAIM III

THE DISCIPLINARY SUSPENSION PERIOD IMPOSED BY FLORIDA STATUTES § 27.7045 VIOLATES THE PRINCIPLES OF SEPARATION OF POWERS, DUE PROCESS, AND EQUAL PROTECTION, AS WELL AS THE EIGHTH AMENDMENT.

Florida Statutes § 27.7045, created by the Timely Justice Act, imposes a disciplinary requirement on state-employed and court-appointed attorneys under which those attorneys are precluded from representing capital defendants for a period following two court findings that they performed deficiently, in violation of their capital clients' rights, and their clients were prejudiced such that relief was

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questionable protections and serious doubts that the Timely Justice Act reduces protections at the warrant stage of capital litigation.

appropriate. If a court makes those requisite findings, an attorney is prohibited from representing any person charged with and/or convicted of a capital offense for a period of five years. Section 27.7045 states:

> Notwithstanding another provision of law, an attorney employed by the State or appointed pursuant to s. 27.711 may not represent a person charged with a capital offense at trial or on direct appeal or a person sentenced to death in a postconviction proceeding if, in two separate instances, a court, in a capital postconviction proceeding, determined that such attorney provided constitutionally deficient representation and relief was granted as a result. This prohibition on representation shall be for a period of 5 years . . . .

CS/CS/HB 7083 lns. 252-64. The suspension provision violates the principle of Separation of Powers because it encroaches on this Court's exclusive constitutional authority to regulate and discipline attorneys authorized to practice law in this State.

The Florida Constitution prohibits the Legislature from "exercise[ing] any powers appertaining to either of the other branches unless expressly provided herein," Fla. Const. Art. II, § 3. Article V § 15, and provides that "[t]he Supreme Court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." *The Florida Bar v. Massfeller*, 170 So. 2d 834, 838 (Fla. 1964). Thus, it is the exclusive province of this Court to determine if an attorney sanction is necessary and, if so, to determine

the appropriate disciplinary measures. That power is explicitly provided to this Court by the Florida Constitution, and it is exclusive.

> The authority to impose or withhold attorney discipline is a power which reposes by Constitution in this Court. Article V, Section 15, Florida Constitution. I know of no way in which the legislature by statute, or an official of the executive branch by promise or conduct, could legitimately exercise that power on our behalf.

Ciravolo v. The Florida Bar, 361 So. 2d 121, 126 (Fla. 1978) (Adkins, J., concurring in result). *See also Zeller v. The Florida Bar*, 909 F. Supp. 1518, 1521 (N.D. Fla. 1995); R. Regulating Fla. Bar 1-2 ("The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.").

Because there can be no doubt that prohibiting attorneys from practicing law based on their failure to perform adequately is disciplinary in nature, the provision is plainly unconstitutional.

In *Ciravolo v. The Florida Bar*, this Court addressed whether a Florida prosecutor had the power to grant statutory immunity from bar disciplinary proceedings to an attorney-witness who had been served with a subpoena. In that context, this Court determined that pursuant to Article II § 3 and Article V § 15, it was a violation of the Separation of Powers doctrine to encroach upon this Court's exclusive jurisdiction to regulate the conduct of attorneys in this State. 361 So. 2d

121, 124-25 (1978). Courts have plenary power to refer attorneys who may have violated their ethical duties in their representation of capital defendants to the Florida Bar for investigation and possible discipline. *See*, *e.g.*, *The Florida Bar v. Sandstrom*, 609 So. 2d 583, 584 (Fla. 1992) (imposing sanctions after a bar hearing, following a finding that Sandstrom failed to provide adequate representation in a first-degree murder case); *Smith v. State,* 998 So. 2d 516, 530 n.15 (Fla. 2008) (noting that the appellate attorney's performance in a capital case was so poor that this Court referred that attorney to the Florida Bar). Thus, not only is attorney discipline the sole province of the judiciary, but the very matters addressed by § 27.7045—inadequate performance of capital defense counsel—is an area where the disciplinary rules are actively used to ensure compliance with ethical obligations of competency. Courts have acted pursuant to their authority in this field such that the Legislature's interference is not only unconstitutional, it is duplicative and contrary to judicial determinations of appropriate discipline.

Bar disciplinary proceedings are remedial in nature and designed to protect the integrity of the courts. *DeBock v. State*, 512 So. 2d 164, 166 (Fla. 1987) (citing *Florida Bar v. Massfeller*, 170 So. 2d 834 (Fla. 1964)). However, this Court has recognized that "pursuant to the police power, the legislature can enact *penal* statutes that affect the legal profession." *State v. Palmer*, 791 So. 2d 1181, 1184 (Fla. 2001) (citing *Pace v. State*, 368 So. 2d 340 (Fla. 1979)) (emphasis added).

For example, in *Palmer*, this Court found that the Florida Constitution does not prohibit the Legislature from criminalizing the unauthorized practice of law by a disbarred attorney. *See Palmer*, 791 So. 2d at 1182. The rationale behind permitting the Legislature to enact penal legislation that would punish criminal conduct is a matter of public policy, to protect the public welfare.

However, the rationale of the five-year suspension is clear: it is intended to remedy inadequate performance and promote effective representation. That rationale need not be presumed. The new protections, including this provision in particular, were much lauded during the floor debate for the Timely Justice Act as promoting due process in the fact of accelerating warrant litigation. While it is certainly important to ensure that defendants who are facing the death penalty receive constitutionally competent representation, it cannot be construed as designed to protect the public welfare like the criminal code. Thus, because the mandatory removal provision is a *disciplinary* action and *not* a penal action, § 27.7045 cannot be considered penal in accordance with *Pace* and *Palmer*.

The judicial branch has the exclusive, enumerated power to regulate the admission and discipline of persons admitted to practice law in the State of Florida. Thus, sanctions and discipline imposed upon attorneys practicing law in this State are the exclusive province of the Judicial Branch and any statute usurping this authority violates Article II § 3 and Article V § 15 of the Florida Constitution.

Because § 27.7045 violates the exclusive power of this Court to discipline attorneys, it must be struck as unconstitutional.[24]

[24] There will also be Equal Protection and Due Process problems with § 27.7045 in individual cases. On its face, it appears that the purpose of the suspension provision is to encourage attorneys who represent defendants in capital trials to provide competent and effective representation. However, the disciplinary removal provision only applies to attorneys twice found to have provided constitutionally deficient representation. Causing one unconstitutional death sentence is inconsequential. The provision also applies only to those attorneys who were state-employed or court-appointed. Private and *pro bono* attorneys are not subject to the same disciplinary threat. Their clients are represented by attorneys not subject to suspension under § 27.7045. Their attorneys have different professional standards. The provision also applies only in those instances where "relief was granted as a result" of the constitutionally deficient performance. Therefore, even in cases where an attorney's representation was admittedly substandard, § 27.7045 does not apply where there was no prejudice to the defendant. *See*, *e.g.*, *Sochor v. Sec'y Dep't of Corrs.*, 685 F.3d 1016, 1033 (11th Cir. 2012) ("Sochor has not established a reasonable probability that he was prejudiced by his lawyer's failure to present at sentencing the evidence Sochor produced at his postconviction evidentiary hearing."). Thus, the provision arbitrarily applies and does not apply based on a court finding that has nothing to do with the attorney's performance.

Further, the provision is likely to result in chaos in ineffective assistance of counsel litigation, which would render the removal provision unconstitutional as applied in individual cases. Being unconstitutionally ineffective and being incompetent and thus subject to disciplinary action are two completely different matters, with different standards and justifications. The provision confuses constitutional standards, which are resolved in capital postconviction evidentiary hearings, with ethical disciplinary proceedings, which require separate hearings, notice, and opportunity for the attorneys to defend themselves. As defense attorneys' interests are put at odds with their clients' and evidentiary hearings are interrupted by mini-hearings where courts conduct disciplinary inquiries and make findings to satisfy § 27.7045, chaos is likely to result that will diminish due process. The Legislature's conflation of those matters muddies both.

CLAIM IV

THE TIMELY JUSTICE ACT'S AMENDMENT OF § 27.7081 TO CREATE TIME LIMITATIONS AND PROCEDURES GOVERNING THE PRODUCTION OF PUBLIC RECORDS IN CAPITAL CASES VIOLATES ARTICLE II § 3 OF THE FLORIDA CONSTITUTION BY USURPING THIS COURT'S RULEMAKING POWER

This Court has long recognized that the Legislature "has the prerogative to place reasonable restrictions" on the right of public records access." *Henderson v. State*, 745 So. 2d 319 (Fla. 1999). However, while the Legislature has the authority to define the substantive right to public records, "the adoption of time limitations and procedures governing the production of public records in capital cases is within the exclusive province of this Court." *Allen*, 756 So. 2d at 66. The Legislature's adoption of time limitations and procedures for capital defendants to obtain public records violates the Separation of Powers doctrine and due process guarantees.

There can be no doubt that Florida Statutes § 27.7081, as amended by the Timely Justice Act, establishes time limitations and procedures regarding public records production. Indeed, the title of the Act confirms its intent to establish "procedures for public records production in postconviction capital proceedings." Moreover, the language of the Act mirrors that of Florida Rule of Criminal Procedure 3.852 almost verbatim, demonstrating the intent to displace the rule.

Thus, the Act infringes on this Court's authority to limit the time in which capital defendants may seek records disclosure, the time in which agencies may respond to demands, and the time in which to raise objections to demands for production. The Act also limits a capital defendant's right of access to public records and prescribes the procedures by which defendants must seek additional records and agencies must object to production—matters within the exclusive province of this Court.

The Act also denies defendants due process by restricting access to the courts. Unlike Rule 3.852, which the Act seeks to displace, the Act makes no provisions for defendants or agencies to be heard on public records demands or objections. Rule 3.852(g)(3) which governs defendants' demands for additional public records from agencies who provided records after notice from the State of the affirmance of the death sentence, requires the circuit court to conduct a hearing on any agency objections to production. The corresponding provision of the Act makes no allowance for a hearing and anticipates that the court will make a ruling on the agency objections without allowing the defendant to be heard. Similarly, Rule 3.852(l), which governs the scope of production and resolution of disputes, requires that the circuit "shall" hold hearings to resolve motions to compel and objections to production, whereas the corresponding provisions of the Act make no allowance for the agencies or defendants to be heard. This attempt by legislature to restrict access to the courts and the right to be heard is a denial of fundamental due

process.

Additionally, while the Act mirrors much of the language of Rule 3.852 imposing time limitations and procedures, it notably excludes any procedure by which capital defendants may seek public records once the Governor has signed a death warrant. The current Rule 3.852(h)(3) "is intended [to permit] an update of information previously received or requested" upon the issuance of a warrant. *Sims v. State*, 753 So. 2d 66, 70 (Fla. 2000). The Act makes no such provision for obtaining updated records, leaving defendants facing imminent execution with no means to obtain records which could determine whether they live or die. This violates due process and is fundamentally unfair.

This Court recognized the importance of post-warrant access to public records when it promulgated Rule 3.852(h)(3), and the need for post-warrant records production has been demonstrated by several cases where courts—including this Court—have ordered further proceedings, granted evidentiary hearings, issued stays and granted relief on claims based on information disclosed only after a warrant was signed. For example, in *State v. Mills*, 788 So. 2d 249 (Fla. 2001), counsel made several demands for additional records pursuant to Rule 3.852 after Governor Bush signed Mills's death warrant. While Mills was denied access to many of the records requested, records that were disclosed in response to the post-warrant demands revealed that impermissible *ex parte* communications

occurred between the State and sentencing judge during Mills's initial postconviction proceedings. After an evidentiary hearing, the Honorable O. H. Eaton ordered additional hearings and stayed Mills's execution. The stay of execution was the direct result of records disclosure pursuant to Rule 3.852(h)(3).[25] The amendment to § 27.7081 is contrary to this Rule and thus interferes with this Court's power to determine what procedures are appropriate for warrant litigation.

Moreover, there are claims, such a claim that execution is cruel and unusual because a defendant is insane, *see Ford v. Wainwright*, 477 U.S. 399 (1986), which are not ripe for adjudication until a death warrant is signed. *See, e.g., Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001) (stating that it is premature for a death-sentenced individual to present a claim of incompetency or insanity, with regard to his execution, if a death warrant has not been signed). Litigation of such claims require counsel to obtain, at the very least, updated medical, psychological and classifications records from the Department of Corrections, in addition to various relevant records from additional agencies which, depending on the circumstances of each case, would lead to the discovery of evidence in a post-warrant proceeding. Denial of access, or any means of obtaining access to records under such circumstances, would inevitably disrupt due process by foreclosing the defendant's right to pursue an Eighth Amendment claim.

[25] Mills was granted penalty-phase relief on a separate newly-discovered evidence claim and subsequently sentenced to life in prison.

As it did in *Allen v. Butterworth*, this Court should strike down the provisions of the Timely Justice Act which seek to displace Rule 3.852 by amending § 27.7081. Those provisions encroach on this Court's rulemaking authority under Article V § 2(a) of the Florida Constitution. Moreover, this Court should reaffirm its commitment to due process and remain "mindful that [its] primary responsibility is to follow the law in each case and to ensure that the death penalty is fairly administered in accordance with the rule of law and both the United States and Florida Constitutions" and that this is "particularly important in a capital case because, as we have said, death is different.'" *Id*. at 59 (citing *Crump v. State*, 654 So. 2d 545, 547 (Fla. 1995)).

CLAIM V

THE TIMELY JUSTICE ACT'S AMENDMENT OF § 27.703(1) TO CHANGE THE RULES WITH WHICH MEMBERS OF THE FLORIDA BAR MUST COMPLY IN ORDER TO FOLLOW THEIR ETHICAL OBLIGATION TO REPRESENT THEIR CLIENTS WITHOUT CONFLICTS VIOLATES ARTICLE II § 3 OF THE FLORIDA CONSTITUTION BY USURPING THIS COURT'S RULEMAKING POWER

The Timely Justice Act amended Florida Statutes § 27.703(1) to read:

> 1) The capital collateral regional counsel shall not accept an appointment or take any other action that will create an actual conflict of interest. If, at any time during the representation of a person, the capital collateral regional counsel alleges that the continued representation of that person creates an actual conflict of interest, the

> sentencing court shall, upon determining that an actual conflict exists upon application by the regional counsel, designate another regional counsel. . . . An actual conflict of interest exists when an attorney actively represents conflicting interests. A possible, speculative, or merely hypothetical conflict is insufficient to support an allegation that an actual conflict of interest exists.

Section 27.703 previously read "if at any time during the representation of a person, capital collateral regional counsel determines that the continued representation of that person creates a conflict of interest, the sentencing court shall, upon application by the regional counsel, designate another regional counsel." It seems the new language, requiring that a sentencing court must only appoint new counsel "upon determining that an actual conflict of interest exists upon application by the regional counsel," indicates that it is necessary for sentencing courts to engage in specific fact finding.

The Legislature's intent in requiring disclosure of any facts upon which counsel relies in alleging a conflict of interest is in direct conflict with this Court's authority and violates Separation of Powers. To the extent a sentencing court is making specific findings of fact to determine that an actual conflict exists, the statute conflicts with the Rules Regulating the Florida Bar. Rule 4-1.6 governs the disclosure of the sort of confidential attorney-client communications that underlie attorney-client conflicts:

> (a) Consent Required to Reveal Information.

A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information.

A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information.

A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies.

> When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.
>
> (e) Limitation on Amount of Disclosure.
>
> When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

It is within the sole authority of the judiciary to regulate the conduct of attorneys. As such, the Florida Legislature has no authority to legislate the ethical duties and obligations of attorneys, particularly in a way contrary to the judiciary's rules.

In reviewing the obligations of an attorney who has asserted a conflict of interest, this Court has determined that it is inappropriate for a court to require disclosure of the specific details of a conflict of interest. *See Wyatt v. State*, Case No. SC00-1828 (December 13, 2001) (order quashing the trial court's granting of the State's motion for in-camera hearing to compel Wyatt to disclose the factual circumstances creating a conflict between he and his postconviction counsel). Section 27.703(1) is contrary to that finding and contrary to this Court's assessment of the ethical obligations of capital defense attorneys.

CONCLUSION

Notwithstanding other constitutional and ethical problems inherent in the Timely Justice Act, the provisions challenged herein create a definite basis and

urgent need for judicial intervention. The Petitioners request that this Court strike down the provisions of the Act amending Florida Statutes §§ 922.052, 27.7045, 27.7081, and 27.703(1). Further, the Petitioners ask that this Court immediately enjoin the enforcement of those provisions until this challenge is fully reviewed.

The Legislature discussed during the House floor debate the possibility that the Timely Justice Act would likely result not in more speed but in more delay, by creating constitutional deficiencies in the system, and that courts would have to issue stays to review the Act's functioning. (Audio Recording of House Floor Debate, Regular Session, April 25, 2013, CS CS HB 7083 (statement of legislator beginning 34:15) (stating that the bill will "lead to more delay" and "[t]he reality is . . . somebody's probably going to issue a stay")), and the Legislature accepted that possibility in pushing its reforms through. Thus, there is not only a necessity but an expressed expectation for this Court's intervention.

Respectfully Submitted,

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COUNSEL FOR PETITIONERS[26]

[26] Registry attorneys appointed to represent listed Petitioners note that their contracts with the Department of Financial Services are terminated by the Timely Justice Act on June 30, 2013. New contracts with the Justice Administration Commission will be necessary for there representation to continue in the future.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to PAMELA JO BONDI, ATTORNEY GENERAL, by e-mail and in paper form by mail, in accordance with Florida Rule of Appellate Procedure 9.420(c) and Florida Rule of Judicial Administration 2.515(c)(2), on this 26th day of June, 2013.

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