

IN THE FLORIDA SUPREME COURT

No. SC20-1543

IN RE: AMENDMENTS TO
RULE REGULATING THE FLORIDA BAR 5-1.1(g).

COMMENTS OF THE INNOCENCE PROJECT OF FLORIDA, INC.

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The Innocence Project of Florida, Inc. (IPF) submits the following comments on proposed amendments to Rule Regulating the Florida Bar 5-1.1(g).

I. IPF's Contributions to the Administration of Justice.

A. Exonerations.

Founded in 2003, IPF has, over the last 17 years, helped to obtain the release of 25 innocent individuals who collectively spent more than 530 years wrongfully incarcerated for crimes they did not commit. After securing the release of five men whose wrongful convictions were overturned based on DNA evidence, IPF prevailed on the Supreme Court of Florida and Florida Legislature to remove the deadline for filing postconviction DNA testing requests, which has led to more than 10,000 requests for assistance.

IPF has accepted and litigated more than 160 cases with viable postconviction claims of actual innocence. Each of these individuals was indigent and without the right to counsel in the postconviction phase. IPF provides high quality legal representation at no cost, which includes not only the costs associated with the actual litigation, but also investigative and expert services. IPF now has two full-time attorneys with almost 25 combined years of

experience in criminal defense and postconviction innocence litigation.

IPF exclusively relied on postconviction DNA testing as a tool to exonerate individuals in Florida's prisons during its first 10 years of existence, with significant success—the exonerations of 14 individuals. Because DNA testing is only a factor in about 10% of all criminal cases, it became clear that IPF needed to expand our reach to all innocent individuals in Florida's prisons. Now in its eighth year of accepting non-DNA cases, IPF depends more heavily on investigating these cold cases, finding and deposing witnesses, and retaining experts to testify about debunked or currently challenged forensic evidence. IPF's non-DNA work includes not only cases where the new evidence suggests someone other than the defendant committed the crime, but also cases where new evidence or advancements in medical or scientific understanding suggest that a crime did not happen in the first instance. More than one-half of IPF's current cases are non-DNA cases.

Most recently, IPF has begun partnering with special conviction integrity units in several Florida State Attorney's Offices. This model of collaborative justice has led to the release of five

innocent individuals:

- On March 28, 2019, IPF achieved the double exoneration of Nathan Myers and Clifford Williams, who each spent nearly 43 years in prison for a Jacksonville murder and attempted murder they did not commit. Their convictions were vacated based on new forensic conclusions that invalidated the state's theory of the case, the significant credible alibi evidence now known, and an identification of the actual perpetrator. IPF achieved this success in conjunction with the Fourth Judicial Circuit, in the first exoneration resulting from a conviction integrity unit's re-investigation of a case.
- In June 2019, IPF secured the release of Edward Taylor on parole after 33 years in prison for a 1986 Jacksonville rape he did not commit. Through a multi-year investigation, IPF discovered significant evidence pointing to an alternative perpetrator and the victim has come forward to concede that she misidentified Mr. Edwards as her attacker. His case is currently under review of the Conviction Integrity Review division of the State Attorney's Office in Jacksonville, which

IPF hopes will result in an agreement to vacate his conviction.

- On April 14, 2020, IPF achieved the release of Leonard Cure after 16 years of wrongful incarceration for a 2003 Broward County armed robbery. A collaborative, joint investigation with the Broward State Attorney Conviction Review Unit determined that Mr. Cure was likely misidentified and that he was at work during the commission of the crime. The State agreed to his immediate release and then to his exoneration on December 14, 2020.
- On September 14, 2020, IPF achieved the exoneration of Robert DuBoise after 37 years of wrongful incarceration, as a result of a collaborative investigation with the Innocence Project in New York and the Hillsborough County State Attorney's Office Conviction Review Unit. This investigation revealed that the bitemark and jailhouse informant testimony leading to Robert's wrongful murder and rape convictions were unreliable, and new DNA evidence both excluded him as the perpetrator and identified the true assailant.

B. Administration of Justice.

IPF is a leading advocate for the implementation of evidence-

based policy reforms designed to prevent future wrongful convictions in Florida. Although this work is not funded through the use of IOTA funds, it has long been a companion to IPF's direct representation of indigent individuals who are wrongfully incarcerated. IPF also provides significant training to lawyers and law students on issues related to litigating wrongful conviction cases, and makes presentations at events throughout the State to raise awareness about wrongful convictions.

II. IOTA FUNDING OF IPF.

IPF received its first IOTA grant award in 2006, which allowed IPF to hire its first two staff lawyers. IPF has received a competitive grant award in every year since that time to support its efforts to find and free innocent, indigent individuals trapped in Florida's prisons. This is non-partisan work that falls well within the scope of proper uses of IOTA funds. The Florida Bar Foundation has had the wisdom and foresight to invest in IPF's work and has been a consistent partner in growing our ability to serve our constituency. The availability of IOTA funding has enabled IPF to expand access to the type of vital scientific testing that is essential to proving innocence of a crime many years after conviction. It has also

enabled IPF's advocacy for broader access to postconviction relief mechanisms where new evidence of innocence exists. And it has helped IPF to create, through successful appellate litigation, justice-driven processes for resolving postconviction claims.¹

IPF's direct representation of innocent, indigent persons has transformed the lives of those who have been exonerated and has sensitized the public and Florida's policy makers to the existence of wrongful convictions and the need to make common-sense reforms to prevent these miscarriages of justice before they happen by making police investigations, forensic science and trials more reliable. IPF has leveraged this success to make improvements to the fair and effective administration of justice that would simply not have been possible without awards of IOTA funds. And it consistently has done so in an economically efficient manner.

III. IPF SHOULD BE ALLOWED TO APPLY FOR IOTA GRANTS.

The Task Force's proposed amendments to Rule Regulating The Florida Bar 5-1.1(g) include adding subsection (1)(G), which would define "Qualified Legal Services" as "free legal services

¹ To the extent that IPF also engages in non-litigation policy-reform work, that work is not funded by IOTA grant funds.

provided directly to low-income clients for their civil legal needs in Florida.” The Task Force Report does not identify a rationale for limiting the definition to “*civil* legal needs,” but the Subcommittee Report on Specific Requirements & Reporting notes that “[l]imitations on the use of IOTA funds can be reasonably inferred from the Court-approved mission of the Court-chartered Florida Bar Foundation.” Task Force on Distribution of IOTA Funds Final Report, Appendix F-3.

Among the items included in that mission is to “[e]xpand and improve representation and advocacy on behalf of low-income persons in civil legal matters” and to “[i]mprove the administration of justice.” Appendix F-3 n.2 (quoting Article III, 3.1, The Florida Bar Foundation, Inc. Amended and Restated Articles of Incorporation). Whether under either or both of these aspects of the Foundation’s mission, the Foundation has, as noted above, awarded IOTA grants to the IPF for the past 15 years.

As to the Foundation’s mission to expand the availability of legal services “on behalf of low-income persons in civil legal matters,” included under that rubric should be post-conviction representation in criminal cases. Florida Rule of Criminal

Procedure 3.850, in its original incarnation as Criminal Procedure Rule No. 1, was promulgated to supplant habeas corpus as a vehicle for post-conviction challenges to convictions. *Roy v. Wainwright*, 151 So. 2d 825, 828 (Fla. 1963). The rule “is a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus.” *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988).

“[H]abeas corpus [is] an original . . . civil remedy for the enforcement of the right to personal liberty, rather than . . . a stage of the state criminal proceedings . . . or as an appeal therefrom.” *Woodford v. Ngo*, 548 U.S. 81, 91 n.2 (2006) (alternations in original); accord *Darling v. State*, 45 So. 3d 444, 450 (Fla. 2010) (habeas corpus is at least “technically civil in nature”); *State ex rel. Lee v. Buchanan*, 191 So. 2d 33, 34 (Fla. 1966) (“proceeding in habeas corpus is civil rather than criminal in nature, even though sought in behalf of one charged with or convicted of a crime”). In light of the nature of post-conviction remedies as a replacement for habeas corpus, those remedies are also civil, albeit “*quasi-criminal in nature* because they are heard and disposed of by courts with criminal jurisdiction.” *Darling*, 45 So. 3d at 450 (original

emphasis).²

To avoid any uncertainty going forward, however—and to ensure that IPF’s funding by the Foundation is not impeded—IPF would urge the Court to adopt the Consensus Rule presented by the Past Florida Bar Foundation Presidents. That revision of the proposed Task Force rule clarifies, in accompanying comments, that the use of the word “civil” in the definition of Qualified Legal Services is not intended to exclude post-conviction litigation on behalf of criminal defendants and, in particular, IPF’s exoneration work. That small revision would ensure that IPF’s access to IOTA funding would not be affected by adopting a revised rule—and that IPF’s extraordinarily important work in freeing innocent Floridians from wrongful imprisonment will continue unabated.

² As noted in *Roy*, Rule No. 1 was derived from the federal post-conviction statute, 28 U.S.C. § 2255. 151 So. 2d at 828. “[A] § 2255 motion is a civil action separate and apart from a prisoner’s criminal case.” *United States v. Cuya*, 964 F.3d 969, 972 (11th Cir. 2020).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that, on February 10, 2020, the foregoing was filed with the Clerk of Court, via the Florida Courts E-Filing Portal, which will serve a notice of electronic filing to all counsel of record.

/s/ Elliot H. Scherker
Elliot H. Scherker

CERTIFICATE OF COMPLIANCE

I certify that that submission complies with the typeface and type style requirements of Florida Rule of Appellate Procedure 9.045(b) Fed. R. App. P. 27(d)(1)(E) because it has been prepared using Microsoft Word 2010 in Bookman Old Style, 14-point font.

/s/ Elliot H. Scherker
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