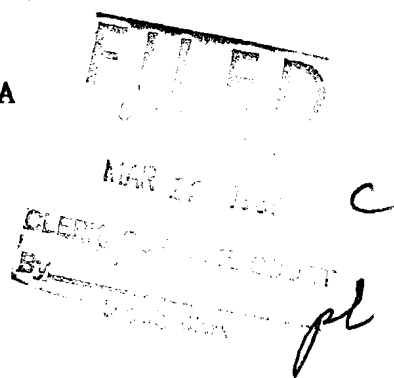


IN THE SUPREME COURT OF FLORIDA

Case No. 69,931

IN RE: Florida Rules of Criminal  
Procedure, Rule 3.851



COMMENTS AND RECOMMENDATIONS

COMES NOW State of Florida, by and through undersigned counsel, and files its comments and suggestions pursuant to this Court's invitation, and would show:

I.

On February 5, 1987, this Court, on its own initiative, determined a new rule of criminal procedure was necessary to provide more meaningful and orderly access to the courts for capital defendants when death warrants are signed. The rule contemplates that the date of execution provided in the warrant should be set at least sixty (60) days from the date of signing. A prisoner under warrant will then have thirty (30) days from the date of the signing of the warrant within which to file all collateral litigation. Failure to file within the thirty (30) days will constitute a procedural bar to any further litigation of collateral issues, unless it is alleged that (1) the facts upon which the claim is based were not known or ascertainable through due diligence prior to the end of the thirty (30) day period, or (2) a fundamental constitutional right was established after that designated period and has been held to be retroactive.

Moreover, the rule shortens the time for rehearing to two days following the trial court's order, and reduces the period of time within which to file a notice of appeal to three days following the denial of rehearing.

II.

The rule provides that procedural bar will result from the failure by the movant to file a petition within the thirty (30) day period. One exception to the imposition of procedural bar is that the facts were unknown to the movant and could not have been ascertained through due diligence prior to the expiration of the thirty (30) days. This exception allows too much latitude. In light of the United States Supreme Court decision in **Kuhlmann v. Wilson**, \_\_\_\_\_ U.S. \_\_\_\_\_, 106 S.Ct. 2616 (1986), it is suggested the following language be added to this exception.

Specifically: that the facts upon which the claim is predicated raise a colorable showing of innocence which were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty (30) day period.

The standard to be applied must be strict and enforcement essential to the operation of the rule. A movant who has failed to timely file claims which do not fall within the exceptions, should be in no better position than the individual who files a successive petition. Indeed, abuse of procedure occurs when a movant fails to file within the first thirty (30) days under this rule, just as it would if a movant failed to raise a claim in his first petition and now sought to raise it in a successive petition. As such, the standard suggested herein specifically delineates in the rule what this Court has recognized in its decisions involving successive collateral litigation. **Witt v. State**, 465 So.2d 510, 511-512 (Fla. 1985), **Christopher v. State**, 489 So.2d 22, 24 (Fla. 1986). This is especially true in both habeas corpus petitions and writs of error coram nobis. **Smith v. State**, 400 So.2d 956 (Fla. 1981), and **Dobbert v. State**, 414 So.2d 518 (Fla. 1982).

Moreover, specific language is also needed to ensure movants do not file piecemeal petitions. A trend has developed where litigants have filed petitions for collateral relief and then repeatedly attempt to supplement the original petition with additional claims. While a per se provision to disallow supplement petitions is not likely, consideration should be given this very real problem.

Perhaps one solution to piecemeal litigation is the elimination of any rehearing period following the disposition of a Rule 3.850 motion pursuant to the new rule. Rule 3.851 is intended to provide a more orderly procedure and allow the courts more time to review collateral claims. Permitting a two (2) day period for rehearing serves no purpose. Normally, matters raised on rehearing to the trial court will also be raised on direct appeal. Where time is of the essence, consideration must be given to ensuring all courts have a reasonable opportunity to air claims presented. The possible delays which result from a rehearing period must give way to the intent or purpose of the new rule. This Court, with regularity, suspends rehearing in collateral review cases where death warrants are outstanding. See **Aldridge v. State**, \_\_\_\_\_ So.2d \_\_\_\_\_, (Fla., decided March 12, 1987) Case No. 70,175.

To further facilitate the orderly operation of Rule 3.851, notices of appeal should be required to be filed immediately upon the filing of a final order by the trial court on a collateral motion for post-conviction relief. Once a notice of appeal has been filed, transcripts can be prepared and briefing schedules assigned. Delaying the filing of a notice of appeal for possibly three (3) days militates against the stated purpose of Rule 3.851.

III.

The proposed Rule 3.851 attempts to resolve recurring problems in cases where death warrants have been signed. With the addition of the aforementioned suggestions and recommendations, the stated purpose of providing a more meaningful and orderly access to the courts when death warrants are signed can be achieved.

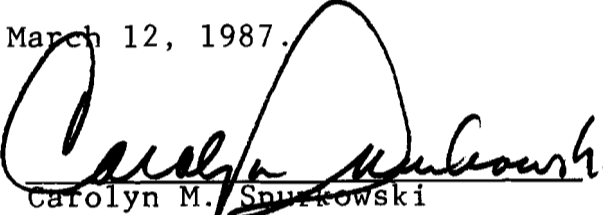
Respectfully submitted

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By 

Carolyn M. Spurkowski  
Assistant Attorney General

I hereby certify these comments and recommendations were filed with the Court on March 12, 1987.

  
Carolyn M. Spurkowski