IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,931

In Re: Florida Rules of Criminal Procedure, Rule 3.851

COMMENTS AND RECOMMENDATIONS

The FLORIDA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION, by and through undersigned counsel, respectfully submits the following comments and recommendations on proposed Rule 3.851 of the Florida Rules of Criminal Procedure:

1. This Court is caught on the horns of a dilemna regarding the provision of a more reasonable time for the Court to consider post-conviction and collateral relief claims for those individuals against whom the Governor of the State of Florida has signed a death warrant.

2. The need for a fair and orderly procedure is mutually shared with the Court by individuals under sentence of death, defense attorneys, the Attorney General's Office, and the people of the State of Florida.

3. The root of the problem stems from the fact that two different branches of government share simultaneous control of the timing mechanism which sets in motion the cogs in the procedural machinery necessary for the execution of a death sentence. It is the Governor who determines when a judicially imposed death sentence may be carried out. However, our great democratic system relies upon the judiciary to provide collateral review as a checks and balances system. Neither the judiciary, defense attorneys, or the Attorney General's Office is privy to the procedures by which the Governor decides when and against whom to sign a death warrant.

4. Timing of the responsibilities of the judiciary and defense attorneys alike are driven by the Governor's announcement as to whom he has signed a death warrant and at what stage in the collateral process that person is at.

5. Since this Court has no jurisdiction to instruct the Governor regarding his procedure for selecting and signing

death warrants, this Court seeks, through proposed Rule 3.851, to induce the Governor into a practice of signing death warrants for a week certain at least 60 days in the future. The inducement is the creation of a procedural bar which shortens the time for filing collateral claims by persons under active death warrants.

6. Proposed Rule 3.851 has serious deficiencies as drafted and, in any event, should not become effective until further comments have been received and oral argument held. The initiative taken by the Court is laudable, however, the substance of proposed Rule 3.851 will not solve the problem.

7. The FLORIDA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION opposes any limitation on collateral attack. Nonetheless, this Court has already recently limited, by Rule 3.850, Florida Rules of Criminal Procedure, the time within which post-conviction proceedings can be filed. That Rule requires all convicted individuals to file collateral actions within two years of when the conviction becomes final. The time restrictions of Rule 3.850 are sufficient to prevent any dilatorious behavior on the part of defense counsel.

8. The judiciary, however, is without authority to require that a death warrant will not be signed before the two year provision of Rule 3.850 expires. A fair and orderly process for collateral review is often disrupted because the Governor routinely signs warrants for the death of an individual prior to the expiration of the two years allowed by Rule 3.850 for filing collateral actions.[1/]

9. Since Rule 3.850 creates a finite two year period within which persons under sentence of death can assert collateral claims, defense attorneys are generally requested to represent first those persons approaching the end of that two year period.

10. When the Governor signs a warrant for the death of a person whose conviction has been final for less than two years, that individual may not even have an attorney.

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1 See Exhibit "A" attached hereto which summarizes procedures for signing death warrants.

11. This Court must keep in mind that Florida still relies heavily on private attorneys to represent many collateral claims for indigents sentenced to death, even though the 1985 Legislature established the Office of the Collateral Capital Representative.[2/]

12. The statutory scheme envisions that a public defender or a private attorney acting as a special assistant public defender will represent an indigent death-sentenced person through the direct appeal process. Section 27.51, Fla. Stat., requires that when the direct appeal process terminates, the public defender must pack the files and send them to the Office of the Capital Collateral Representative. That is the first opportunity for the investigation and preparation of collateral proceedings.

13. The files then are shipped to a volunteer private criminal defense attorney if there is a conflict situation or a private lawyer volunteers to help.

14. The private lawyer reads the record for the first time, interviews the client for the first time and hires whatever investigators, psychologists or other experts are needed to determine which, if any, issues are meritorious for collateral review.

15. Often the Governor will sign a death warrant immediately after the direct appeal process, including clemency, has concluded and before a private attorney has been found to represent the particular individual.

16. If a warrant is signed before a private attorney is located to represent the person under warrant or before the matter has been fully examined by a volunteer lawyer, the defense process is short-circuited and pleadings hastily prepared focussing on requests for stay and appeals of orders denying stay.

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2 Obviously, the Office of the Capital Collateral Representative has its own unique problems based upon funding and case load. Those will surely be addressed by others. The FLORIDA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION will limit its initial comments to the experience of private criminal defense attorneys.

17. This predicament is frustrating and unsatisfactory to the professional integrity of both defense attorneys and the courts. And, of course, the life of an individual hangs in the balance, while lawyers and judges attempt to provide a proceeding which approximates fairness.

18. Proposed Rule 3.851 attempts to carve out a specific period to provide reasonable time for the trial courts to review and consider the collateral pleadings and requires immediate filing of an appeal therefrom. However, since the proposed Rule does not require evidentiary hearings to be completed within thirty days, it is unlikely that this Court will gain any additional time.

19. Further, the proposed Rule fails to address the larger problem created when the Governor signs a death warant prior to he expiration of the two year provision of Rule 3.850. The proposed Rule will not alleviate the last minute rush of newly appointed attorneys to initiate collateral proceedings on the thirtieth day allowed by proposed Rule 3.851.

20. Proposed Rule 3.851 does not solve the problem, and will create new problems. It is already exceedingly difficult to find qualified attorneys to volunteer to represent those individuals who cannot be represented by the Capital Collateral Representative due to conflict or other problems. The time restrictions of proposed Rule 3.851 would increase that difficulty and hinder the ability to provide effective legal representation. The proposed Rule shortens the time for filing a motion for rehearing from ten days to two days and shortens the time for filing an appeal from 30 days to three days.

21. The problem lies not with Rule 3.850, but rather with the number of capital cases, the number of death warrants signed and, most importantly, the historical practice of the Governor of signing death warrants against individuals whose convictions have not been final for two years. Unless this latter problem is addressed, the quality of the judicial process in collateral proceedings will not improve.

22. In addition, proposed Rule 3.851 flagrantly violates fundamental principles of due process and equal protection. Proposed Rule 3.851 shortens the time for filing collateral claims for certain individuals to 30 days from the two years provided by Rule 3.850.

23. The effect of proposed Rule 3.851, in many situations, is to create a procedural bar to filing collateral relief claims to thirty days after the conviction becomes final or sooner, depending on when the Governor signs the death warrant. This severe limitation of rights would only apply to persons who have been sentenced to die. A person sentenced to serve a term of years in prison is still entitled under Rule 3.850 to file collateral relief claims within two years of when the conviction becomes final.

24. Proposed Rule 3.851 further creates a distinction between those persons under sentence of death and those who have warrants signed scheduling their executions for 60 days thereafter. The distinction between this latter group is secretly and arbitrarily made by the Governor of the state.

25. This Court created a right to petition within two years of the finality of conviction by Rule 3.850. Proposed Rule 3.851 would allow an action by the Governor to trigger the shrinkage of that right for those persons under active death warrant. "[T]he government violates the essence of due process when it creates a right to petiton and then makes the exercise of that right utterly impossible." Haitian Refugee Center v. Smith, 676 F.2d 1023 (5th Cir. 1982; See also, Bundy v. State, 490 So. 2d 1257, 1258 (Fla. 1986) (Barkett, J., concurring); C.f., State v. Ziegler, 494 So. 2d 957, 959-960 (Fla. 1986) (Barkett, J., dissenting).

26. The Fourteenth Amendment requires due process of law for the deprival of "life" just as for the deprival of "liberty", and proposed Rule 3.851 creates a difference in the quality of the due process based upon the difference in the sanction. Proposed Rule 3.851 turns due process principles upside down.

27. The Fourteenth Amendment will not tolerate a greater restriction of procedural rights in capital cases on the ground that the State is imminently prepared to carry out the deprival of life. "The Constitution makes no distinction between capital and noncapital cases," reasoned Justice Clark in his concurring opinion in Gideon v. Wainwright, 372 U.S. 335, 349, 83 S.Ct. 792, 799, 9 L.Ed.2d 799 (1963).

28. Indeed, if any distinction can be made between capital and noncapital cases, the Court historically has leaned towards greater protections in the awesome face of the only irrevocable sanction. Proffitt v. Wainwright, 685 F.2d 1227, 1253 (1982) (and cases cited therein), cert. denied, 464 U.S. 1002 (1983); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

29. Proposed Rule 3.851 will not resolve the Court's dilemna regarding an orderly procedure for the review of collateral relief claims. The proposed Rule misses its mark by predicating the procedural bar on the Governor's signing death warrants for at least 60 days in the future. That alone will only create further problems because of the flagrant violation of due process and equal protection. The proposed Rule omits the most essential component necessary for a smoothly flowing capital review process, that is, a procedure whereby no death warrant will be signed against a person prior to the expiration of the two year time-limitation provided by Rule 3.850.

30. In light of the complexity of the dilemna, this Court by its sua sponte announcement of proposed Rule 3.851, Florida Rules of Criminal Procedure, has sounded the trumpet. The solution can only come after careful study, consideration, discussion and response by all of the affected persons and entities.

31. The usual procedure before the adoption of such a rule is to refer the matter to the Florida Bar for recommendation.[3] It is respectfully suggested, however, that due to the weight of the matter and complexity of the problem, a special commission appointed by the Chief Justice of the Florida Supreme Court may be the best vehicle to resolve the problem. Members of this commission should be selected from the Governor's Office, Attorney General's Office, State Prosecutors' Offices as well as criminal defense attorneys, Florida Bar members, the Office of the Capital Collateral Representative and the Public Defenders Association.

32. We have reviewed the Comments and Recommendations submitted on or about March 12, 1987 by the State of Florida. The state suggests that this court dispense with any semblence of due process by eliminating any right to rehearing and by reducing the already proposed minimal three-day jurisdictional period for filing notices of appeal. The state further recommends that a more restrictive standard be set for the exception to the thirty-day procedural bar.

33. The State's irresponsible recommendations that the Court abolish any notion of due process, lends weight to the above suggestion that the Chief Justice appoint a commission to study the whole process of capital collateral review. "The

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3 The Florida Bar has consistently been involved with the problems involving representation of persons under the sentence of death. In 1984 the Florida Bar established a Special Committee on Representation of Death-Sentenced Inmates in Collateral Proceedings. James C. Rinaman, Jr., former President of the Florida Bar, chaired the Special Committee. Former Florida Bar President William Henry appointed 15 distinguished Florida lawyers to be members of that committee. The purpose of the Special Committee was the recruitment of major civil Florida law firms and other Florida lawyers to represent death-sentenced inmates in post-conviction proceedings. The Florida Bar sought and obtained funding from the Florida Bar Foundation to create a center to support this activity. The Volunteer Lawyers Resource Center, Inc. was established to provide guidance and assistance to volunteer civil lawyers and other volunteer lawyers recruited by the Special Committee. Notwithstanding the 1985 legislative establishment of the Office of the Capital Collateral Representative, many volunteer lawyers continue to represent indigent death-sentenced inmates.

minimum assurance that the life and death guess will be a truly informed guess requires respect for the basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected." Ford v. Wainwright, __US__,106 SCt 2595,2604,__ L.Ed2d__ (1986), citing, Solesbee v. Balkom, 339 US, at 23, 70 SCt, at 464 (Frankfurter, J., dissenting).

WHEREFORE, and by reason of the foregoing, the FLORIDA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION respectfully requests this Court to postpone the effective date of proposed Rule 3.851 of the Florida Rules of Criminal Procedure until such time as a special commission appointed by the Chief Justice and/or The Florida Bar has had an opportunity to review the underlying problem and recommend a more appropriate rule.[4]/ Oral argument should be scheduled prior to any Rule becoming effective.

Respectfully submitted,

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ON BEHALF OF THE FLORIDA CRIMINAL DEFENSE ATTORNEYS ASSOCIATION

I HEREBY CERTIFY that these Comments and Recommendations on proposed Rule 3.851, Fla.R.Crim.P., were delivered via Federal Express to the Supreme Court of Florida on March 27, 1987.

Sharon B. Jacobs
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4 The Court should consider that while there may be a crisis, there are not sufficient grounds to depart from the normal procedure by adopting proposed Rule 3.851 as an emergency measure. Adequate time should be allowed for the input of all interested parties, for example, the Appellate Rules Committee of the Florida Bar will not meet until June 12, 1987, which will be its first opportunity for discussion of this proposed rule.