IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,931

In Re: Florida Rules of
Criminal Procedure, Rule 3.851

COMMENTS AND RECOMMENDATIONS BY THE OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE

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I. INTRODUCTION

Capital litigants and jurists must "consistently require[] that capital proceedings be policed at all stages by an especially vigilant review for procedural fairness and for the accuracy of factfinding." Strickland v. Washington, 104 S. Ct. 2052, 2073 (1984) (Brennan, J., concurring in part and dissenting in part). Rule 3.850 of the Florida Rules of Criminal Procedure ostensibly provides an avenue for post-conviction factfinding in Florida courts, and this Court has policed this rule to correct departures from a procedure intended to be fair, Clark v. Florida, 491 So. 2d 545 (Fla. 1986) (right to due process in post-conviction procedures), and thereby to insist that accurate factfindings be developed upon proper evidentiary hearings. Holland v. Florida, 11 F.L.W. 94 (Fla. Feb. 6, 1987). Proposed Rule 3.851 must be analyzed in this "especially vigilant" spirit.

The administration of the death penalty in Florida is a function of all three branches of government. Historically, changes in the capital litigation process have come after careful investigation, after solicited and provided input from the bench, bar, and general public, and according to procedures that have long been recognized as critical to representative governmental functioning. For example, the legislature created the Office of Capital Collateral Representative (CCR) after study by the Florida State-Federal Judicial Council, upon the recommendation of the executive branch, and after participation in the capital post-conviction process by the bar, through the Florida Bar Special Committee on the Representation of Death-Sentenced Inmates in Collateral Proceedings. When this Court amended Rule 3.850 to include, inter alia, a two-year limitation on the commencement of collateral proceedings, it did so only after the thorough studies and reasoned recommendations of the bar. See Rule 2.130, Rules of Judicial Administration. In emergencies, this Court has acted sua sponte to create interim capital rules,

while inviting comments and suggestions and awaiting input from the bar before the rules went into effect. See, e.g., In re Emergency Amendment to Florida Rules of Criminal Procedure (Rule 3.811, Competency to Be Executed), 497 So. 2d 643 (Fla. 1986).

On February 5, 1987, this Court "on its own initiative" determined that a new rule of criminal procedure was necessary only for the policing of post-conviction proceedings brought by prisoners for whom death warrants have been signed. In re Florida Rules of Criminal Procedure, Rules 3.851, 11 F.L.W. 92 (Fla. Feb. 5, 1987). The rule was not prompted by any stated emergency, and it was not proposed pursuant to Rule 2.130, Rules of Judicial Administration. However, the Court did invite comment and suggestions regarding the rule, and has allowed those comments to be filed despite the passing of an initial March 15, 1987, deadline.

CCR is affected by proposed Rule 3.851 more than is any other entity. CCR is required by statute to represent all indigent and unrepresented death-sentenced inmates in Florida in post-conviction proceedings. See Report of the Florida Bar, Individual Rights and Responsibilities Committee, "An Analysis of Ch. 85-332, Laws of Florida: Can the Capital Collateral Representative Refuse to Represent Any Individual Who is Under Sentence of Death and Indigent," March, 1987 (App. C). The comments and suggestions which follow are necessarily colored by self-interest. It is truly CCR's purpose here to further the constitutional imperative that its clients have "meaningful access to the courts." In re Rule 3.851, supra, slip op. at 1. It is to be hoped that despite CCR's interest, the comments and suggestions made here will prove useful to the discussion and debate which properly should precede the effective date of this (or any other) capital proceeding rule.

CCR believes that the proposed rule, while an admirable effort to address an intractable problem, has significant practical and constitutional shortcomings. As will be more fully

explained below, (a) the Rule does provide the courts with more time to react under warrant, but does nothing to promote access to those courts by death-sentenced inmates, due to underfunding and understaffing problems at CCR, a documented shortcoming that is beyond this Court's control, (b) the rule invites executive derogation of the two-year rule for filing, contained in Rule 3.850, Fla. R. Crim. P., in violation of due process, and (c) the rule violates the constitutional imperative of separation of powers, by allowing the executive branch to decide arbitrarily which judicial rules will control capital litigation. CCR suggests that the Rule not be effective until referred to and addressed by the bar, and until proper funding is provided CCR by the legislature. Finally, CCR respectfully suggests, for reasons that will be explained, that a rule of criminal procedure be established which requires that a stay of execution be entered whenever a judge ruling on a Rule 3.850 motion determines that an evidentiary hearing is required, or determines that the resolution of the issues raised concerns matters of law about which reasonable jurists could differ.

II. COMMENTS ON PROPOSED RULE 3.851

On February 5, 1987, this Court proposed Rule 3.851, in an opinion which stated in relevant part:

> Florida Rule of Criminal Procedure 3.851 is created to read as follows:
>
> Rule 3.851 Collateral Relief After a Death Warrant is Signed.
>
> (a) When a death warrant is signed for a prisoner and the warrant sets the execution for at least sixty days from the date of signing, all motions and petitions for any type of post-conviction or collateral relief shall be filed within thirty days of the date of signing. Expiration of the thirty-day period procedurally bars any later petition unless it is alleged (1) that the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period, or (2) the fundamental constitutional right asserted

> was established after the thirty-day period expired and has been held to apply retroactively. The court with which any such motion or petition is filed shall consider and rule on it forthwith.
>
> (b) The time for filing motions for rehearing from orders entered upon motions and petitions filed pursuant to paragraph (a) shall be two days and the court shall rule promptly on any motion for rehearing. The time for filing a notice of appeal from orders entered upon any motions or petitions filed pursuant to paragraph (a) shall be three days.

In re Rule 3.851, supra, slip op. at p. 2. CCR offers the following comments regarding the practical and legal efficacy of the proposed Rule.

A. CCR'S CLIENTS WILL NOT RECEIVE MEANINGFUL ACCESS TO THE COURTS UNDER ANY RULE, INCLUDING PROPOSED RULE 3.851, UNLESS AND UNTIL CCR IS PROPERLY FUNDED AS SUGGESTED BY THE AMERICAN BAR ASSOCIATION, AND AS ENDORSED BY THE FLORIDA BAR BOARD OF GOVERNORS.

As this Court recognized, the executive has as of late adopted "the practice of signing death warrants to be effective for a week certain approximately 30 days after the signing. . . ." Id., p. 1. The Court also correctly noted that "in numerous instances, petitions and motions for post-conviction relief have been and are being filed scant days, and even hours, before scheduled executions." Id. The proposed rule perpetuates the "30 day to filing" rule, but purports to relieve the courts of the burden of ruling on the claims under pressure--the courts, but not the inmates, receive more time. Unless the executive develops some predictable method of signing death warrants, and until CCR is properly funded, CCR cannot meet the 30 day rule and ensure meaningful access to the courts. Consequently, Rule 3.851 should not become effective.

1. CCR Must Receive a Budget of Three Million Dollars and Be Provided a Staff of 31 Attorneys To Have Even Theoretically a Chance of Operating Effectively.

On March 20, 1987, the Board of Governors of the Florida Bar approved and unanimously agreed to recommend that the legislature adopt the findings and recommendations contained in "A

Caseload/Workload Formula For Florida's Office of the Capital Collateral Representative," a report sponsored by the ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program (hereinafter "ABA Report") (App. A). The ABA Report concluded that for CCR to operate effectively for the next year, it was necessary that it be funded at $2,991,407, with a staff of 31 attorneys. The ABA Report was the result of an independent survey, which was purposed to determine the amount of time and energy which must go into "typical" post-conviction death penalty litigation, including a comparison between those cases that are and are not "under warrant". The results of the study reveal that Rule 3.851 is impractical.

The study first evaluated the factors which make capital post-conviction litigation so singularly complex and, second, documented the number of hours of attorney and support staff, and money, necessary to pursue post-conviction litigation in Florida. The documentation was obtained from volunteer attorney responses across the country, from public defender programs that handle capital post-conviction cases, and from CCR estimates of time spent in post-conviction proceedings. The study reveals that CCR cannot effectively represent its clients and meet the thirty-day rule.

a. Death is Different

There is no area of the law more complicated than capital post-conviction litigation. Both the substantive and the procedural law are arcane and change regularly. As one volunteer attorney put it, when asked by the ABA,

> I have been involved, both as plaintiff's counsel and defense counsel in major, protracted litigation of several different types. . . . No case I have ever handled compares in complexity with my Florida death penalty case. The death penalty jurisprudence is unintelligible; it is inconsistent and, at times, irrational. In addition, it is evolving. . . In short, there is nothing more difficult, more time-consuming, more expensive, and more emotionally exhausting than handling a death penalty case after conviction.

ABA Report (App. A, p. 12). The problem is not just the law -- moving people and paper is a complex undertaking. Another volunteer explained:

> Before I took this case in Florida I had no idea whatsoever regarding the impossible logistics involved. The trial court was located in Southern Florida, witnesses were spread throughout the state, the defendant was housed in the state institution in Starke, and the Florida Supreme Court in Tallahassee. Virtually 1/4 to 1/2 of all the time devoted to this case was involved in travel to meet my legal obligations. As a civil lawyer I have never seen such a logistical nightmare, in the midst of the most difficult and time consuming case that I have handled in over 20 years of practice. It amazes me that CCR can overcome these logistics in so many cases.

"Time and Expense Analysis in Post-Conviction Death Penalty Cases," prepared for the Senate and House Appropriations Committees, Florida Legislature, and for the Office of the Governor, by the ABA Post-Conviction Death Penalty Representation Project, the ABA Section on Individual Rights and Responsibilities, and the ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program (App. B, p. 23).

This Court knows the complexities. A capital post-conviction litigant must be intimately familiar with capital sentencing law, and the facts in the case which may illustrate that capital sentencing was improperly conducted or resolved. Post-conviction counsel must do a complete investigation into the client's background, O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); must obtain the services of mental health and other experts, Mason v. State, 489 So. 2d 734 (Fla. 1986) (psychiatrist/psychologist); must locate and interview former attorneys in the case, R.L. Jones v. State, 478 So. 2d 346 (Fla. 1985); must review the entire record and the direct appeal process to determine whether error occurred before this Court, Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986); Wilson v. Wainwright, 493 So. 2d 1019 (Fla. 1986), and must investigate all previous convictions and the records in those cases, if the

convictions were introduced as statutory aggravation at sentencing. Mann v. State, 420 So. 2d 578 (Fla. 1983).

But sentencing is not the only issue -- post-conviction counsel must investigate guilt/innocence. Innocent people are convicted and sentenced to death "Miscarriages of Justice in Potentially Capital Cases" (to be published in Sanford L. Rev. [Summer, 1987]; tables and appendices available upon request from CCR) (App. D), and many people are convicted (whether innocent or guilty) only after improper prosecutorial conduct. Investigation into guilt/innocence procedures produces new trials being ordered by this Court. Arango v. State, 467 So. 2d 692 (Fla. 1985); Keen v. State, No. 67,384 (Fla. March 19, 1987) (direct appeal).

A complete knowledge of federal constitutional criminal procedure law and state substantive criminal law is rudimentary for post-conviction counsel. Fourth, fifth, sixth, eighth, and fourteenth amendment jurisprudence permeates capital post-conviction proceedings, and knowledge of that ever-changing law is a fundamental necessity. Equally important is federal habeas corpus procedural law, which is complicated by doctrines of law unique to those proceedings. Exhaustion of state remedies, Rose v. Lundy, 455 U.S. 509 (1982); procedural default and its exceptions, Wainwright v. Sykes, 433 U.S. 72 (1977); presumptions of correctness for state court findings, and exceptions to such a presumption, 28 U.S.C. sec. 2254(d); and abuse of the writ law, Kuhlman v. Wilson, 106 S. Ct. 2616 (1986), add significantly to the complexity of post-conviction proceedings.

As the ABA report aptly recognized:

> In summary, the post-conviction process in death penalty cases is far more time-consuming than in a non-capital case because of heightened procedural requirements, the lengthy judicial review process, and the complexity of the law. Capital post-conviction litigation requires a disproportionate amount of time from defense attorneys, prosecuting attorneys, judges, juries, and courtroom personnel. This results in the high cost of capital litigation in post-conviction proceedings.

(App. A, p. 13).

b. The ABA Report -- Survey Results

Volunteer attorneys and public defenders around the country were asked to respond to a questionnaire which asked, inter alia, how many attorney and support staff hours were expended in their representation of death-sentenced inmates in capital post-conviction proceedings. The post-conviction process was divided into "steps," and the time required for each step was requested. The six steps, virtually the same in every state, were:

(1) State Circuit Court -- motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850 must be filed in the trial court where the conviction and the death sentence were imposed.

(2) Supreme Court of Florida -- the highest state court where an appeal is taken from the state circuit court's decision regarding a 3.850 petition. Other motions alleging errors in the original direct appeal may also be filed in the Supreme Court in the first instance.

(3) United States Supreme Court -- the court where a petition may be filed requesting a review of the decision of the Florida Supreme Court regarding a state post-conviction petition.

(4) United States District Court (federal) -- the court where a federal habeas corpus petition may be filed if relief is denied on a state post-conviction petition in the Florida Supreme Court.

(5) United States Court of Appeals for the Eleventh Circuit -- the court that hears an appeal from the decision of the U.S. District Court regarding writ of habeas corpus.

(6) United States Supreme Court -- a final post-conviction petition may be filed in this court requesting a review of the decision of the U.S. Court of Appeals regarding a writ of habeas corpus.

(App. A, p. 6).

(1) National survey of private attorneys

A study recently completed by the ABA Post-Conviction Death Penalty Representative Project, under the sponsorship of the Individual Rights and Responsibilities Section, provided this data, which was incorporated into the ABA Report. The data derives from representation of defendants in 23 states other than Florida, including 114 defendants and 150 private attorney responses. Many of the responding private law firms kept a contemporaneous computerized time record system for their private attorneys including the attorneys handling capital post-

conviction cases. This time sample is labelled "documented." Other respondents had less sophisticated methods for time keeping, and some respondents reconstructed time spent from memory. The results, in number of attorney hours spent per step, are:

Table 9

Comparison of Attorney Hours
Entire Sample, Florida Sample, & Documented Sample

Court Level	Entire Sample	Florida Sample	Documented Sample
State Trial Court	400	500	494
State Supreme Court	200	240	369
U.S. Supreme Court (1)	65	77	100
Federal District Court	305	388	500
Federal Circuit Court	320	318	437
U.S. Supreme Court (2)	180	160	100

(App. A, p. 45). Thus, in documented samples, 494 attorney hours were required to prepare for and conduct state trial court proceedings in capital post-conviction actions. It is documented that one attorney working eight hours per weekday would need 62 days, or twelve five-day work weeks, to prepare and present post-conviction pleadings just in the trial court.

The number of "support staff" hours was also obtained:

Table 7

Support Hours for Entire Sample

Support Responses	State Trial Court	State Supreme Court	US Supreme Court 1	Federal District Court	Federal Circuit Court	US Supreme Court 2
No. Responding	89	68	30	59	38	17
Max Hours	2,592	986	250	2,200	796	803
Min Hours	20	5	5	10	24	10
Median Hours	150	80	40	150	166	75
Average Hours	257	160	67	275	237	133

Table 8

Support Hours for Florida Cases

Support Responses	State Trial Court	State Supreme Court	US Supreme Court 1	Federal District Court	Federal Circuit Court	US Supreme Court 2
No. Responding	34	28	6	18	17	7
Max Hours	2,592	986	175	1,647	700	75
Min Hours	37	5	20	10	24	10
Median Hours	168	78	45	145	182	45
Average Hours	343	235	79	312	193	44

(App. B, pp. 17-18). Thus, one support person in Florida working eight hours per five-day work week would need 343 hours, or 44 days, or nine weeks to produce the work necessary for just the trial court in post-conviction proceedings.

(2) State appellate defender programs

Twenty-two of the 37 states with the death penalty have a state appellate defender system. Eleven of the programs were able to supply useful information as to time required to provide representation in post-conviction death penalty cases. The results, in number of attorney hours per "step," are:

Table 11

Summary of State Appellate Defenders Time

	State Trial Court	State Supreme Court	US Supreme Court 1	Federal District Court	Federal Circuit Court	US Supreme Court 2
California		464				
Florida	400	200	266	400	400	266
Indiana	[-----2250-----]					
Kentucky	[------730-----]					
Maryland	[------800-----]					
Nevada	300					
New Mexico	450					
Ohio	[------600-----]					
Oklahoma	400					
So. Carolina	400					
Wyoming	[----------2000----------]					

(App. A, p. 54).

(3) CCR estimates

CCR reported the following attorney hours, corrected by the Delphi Method of Statistical Analysis:

Court Level	Total Estimated Lawyer Time
Florida Circuit Court	500 hours
Florida Supreme Court	200 hours
U.S. Supreme Court	100 hours
Federal District Court	500 hours
Federal Circuit Court (11th)	300 hours
U.S. Supreme Court	100 hours

(App. A, p. 56).

c. Litigation "Under Warrant"

Expenses and attorney hours increase under death warrant as compared to when cases are progressing normally. Where there is no warrant, a death penalty case proceeds at a rational judicious pace, with scheduling of motions and hearings that accommodates the participants' schedules, and the calendars of the various courts. In short, normal, civil, and predictable litigation occurs.

A death warrant jolts the entire process. A litigant can proceed through the trial court, this Court, the federal district court, the federal circuit court, and the United States Supreme Court in a matter of days. Regardless of the obvious jurisprudential shortcomings of such a process, preparation for each step must be made, and the now proposed rule allows thirty days. The cost of litigation under this system goes up, as bar recruits reveal:

> The costs and attorney times vary if the case is litigated under a death warrant. Overtime costs increase, as does same-day and overnight delivery costs. Travel increases because of the numbers of courts that must be attended within a short time period. Overall efficiency is decreased under such circumstances, because of the inability to plan litigation needs. By my estimate, cost and attorney time rises overall by a factor of 1/3 if the case is litigated under a death warrant.

(App. A, p. 24).

> While our firm did not take primary responsibility for this case while it was under a death warrant, we were sufficiently involved to recognize the insanity, unfairness and enormous waste of lawyer time associated with the 28 day warrant period. Unless the state Circuit Court Judge is prepared to issue an immediate stay, the attorneys are faced with the nearly impossible task of beginning to prepare the case at five additional appellate levels. In this case, as I recall, the Florida Supreme Court issued a stay during the last week of the warrant. By that time, hundreds of hours had been spent preparing the federal habeas corpus papers. All of this latter work proved to be wasted since a stay was granted in the Florida Supreme Court. I can only describe this nightmare as bizarre--that lawyers spend hundreds of hours of valuable but wasted pro bono time on an appellate matter that never reaches the level for which the work is being prepared.

Id., p. 25.

2. Proposed Rule 3.851 Perpetuates The Denial of Meaningful Access To The Courts for Death Warrant Cases.

The average documented number of attorney hours required to handle state post-conviction capital litigation, just in the trial court, is 494. "The median figure of 400 hours for the state trial court would represent about 25% of a lawyer's time for a full year [typical private attorney spends 1600 hours per year in private practice] just for providing representation in one post-conviction death penalty case litigated only at that one level." (App. B, p. 11). This Court's proposed rule requires all state court pleadings to be filed within thirty days if the Governor allows 60 days before execution. Under warrant, the necessary number of attorney hours goes up. There is not enough time in the entire Rule 3.851 60-day period to file and proceed on state-court papers (actual time required is 62 days of attorney work, section A, 1, b, (1), supra).

The ABA Report reveals that CCR, during the first year of operation, represented 88 death-sentenced inmates through 164 steps in post-conviction, with gross underfunding. For 1987, there are 31 active cases for which CCR has sole responsibility.

These case are progressing at a normal, nonwarrant pace. CCR has 65 other active cases for which the agency has a substantial responsibility. Under the two-year limitations period of Rule 3.850, there are 26 additional cases to be filed by CCR in 1987. There are two unknowns: the number of volunteers who will withdraw from their cases, and the number of death warrants the Governor will sign. Using a standard public defender "attorney unit" formula for funding, the ABA Report determined that CCR would need three times its current attorney staff and, 3-4 times the current appropriations, in order to operate in 1987.

Rule 3.851 simply exasperates the problem. It must be remembered that CCR does not "catch-up." Cases remain active for long periods of time, through numerous hearings, depositions, investigations, briefs, and oral argument. A case is no longer active only when an execution occurs. The number of cases and "steps" for which CCR is responsible constantly increases. It is within this framework that Rule 3.851 must be considered.

The "thirty days until filing" rule in existence when warrants are for 60 days is impossible, and gets even more impossible as caseload goes up and effective funding goes down, as it did in this year's budget. Rule 3.851 does not change that problem; rather, it codifies a requirement that litigants complete all work and filings in state court within 30 days of a warrant signing, or lose substantial rights. Requiring 30 day filing ensures poor preparation and presentation, and limits rather than enlarges access to the courts. Quite simply put, the rule and its invited procedure violate due process.

Death-sentenced inmates are entitled to file a post-conviction motion in Florida state court. Rule 3.850, Florida Rules of Criminal Procedure. That rule provides, in pertinent part, that:

> A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that the judgment was entered or that the sentence was imposed in violation of the

> Constitution of Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to enter such judgment or to impose such sentence or that the sentence was in excess of the maximum authorized by law, or that his plea was given involuntarily, or the judgment or sentence is otherwise subject to collateral attack, may move the court which entered the judgment or imposed the sentence to vacate, set aside or correct the judgment or sentence.

The State of Florida chose to provide counsel to indigent death-sentenced inmates when it created CCR:

> The capital collateral representative shall represent, without additional compensation, any person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to his indigency or determined by a state court of competent jurisdiction to be indigent for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court.

Sec. 27.702, Fla. Stat. (1985). Consequently, an inmate may file a post-conviction relief petition, and he or she must be assisted by counsel in that proceeding, in both state and federal courts. This Court recognizes that fourteenth amendment due process considerations control the operation of post-conviction proceedings under Rule 3.850. See Holland v. State, 11 F.L.W. 94 (Fla. Feb. 6, 1987) ("When a determination has been made that a defendant is entitled to such an evidentiary hearing [as in this case], denial of that right would constitute denial of all due process. . . ." Slip op., p. 5); Clark v. State, 491 So. 2d 545 (Fla. 1986) ("[D]iscretion must be exercised with regard to the petitioner's right to due process."). Inmates have a state constitutional right to seek habeas corpus relief. Art. 1, sec. 13, Fla. Const. Rule 3.850 provides the mechanism. They likewise have a federal constitutional right to seek federal habeas corpus relief. Art. 1, sec. 9, U.S. Const. 28 U.S.C. sec. 2254 provides the mechanism. Sec. 27.702, Florida Statutes (1985), provides counsel.

"[W]hen a state opts to act in a field when its action has significant discretionary elements, it must nonetheless act in accordance with the dictates of the Constitution -- and, particularly, in accordance with the Due Process Clause." Evitts v. Lucey, 469 U.S. 381, 103 S. Ct. 830, 833 (1985). Thus, in Evitts v. Lucey, due process guaranteed effective assistance of counsel in the defendant's state-created first appeal as of right. Implications in post-conviction are obvious.

The United States Supreme Court is presently considering Pennsylvania v. Finley, 107 S. Ct. 61 (1986). In that case, the Pennsylvania Supreme Court held that court-appointed counsel who seeks to withdraw from further representation of an indigent prisoner in a case brought under the Pennsylvania collateral review statute must follow the dictates of Anders v. California, 386 U.S. 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967). See Brief of Respondent, p. 1. The Court granted Pennsylvania's petition for writ of certiorari, which presented, inter alia, the following question: "Does indigent defendant's Sixth Amendment right to meaningful first appeal pursuant to Anders v. California, 386 U.S. at 738, extend to state court collateral review proceedings." Finley presents an ineffective assistance of post-conviction counsel issue which falls within the type of ineffective assistance claim controlled by Strickland v. Washington, 104 S. Ct. 2052 (1984): whether an attorney committed unreasonable acts or omissions which prejudiced the defendant.

The circumstances in post-conviction in Florida capital cases present a second type of post-conviction counsel ineffectiveness: Whether "the surrounding circumstances make it so unlikely that any lawyer could provide effective assistance that ineffectiveness [is] properly presumed without inquiry into actual performance. . . ." United States v. Cronic, 104 S. Ct. 2039, 2048 (1984). CCR is drastically underfunded and understaffed. The procedure through which CCR must operate, as

proposed in Rule 3.851, prohibits post-conviction counsel from being effective, and thereby violates due process.

B. PROPOSED RULE 3.851 VIOLATES DUE PROCESS OF LAW.

Proposed Rule 3.851 invites the Governor to violate due process. See Evitts v. Lucey, 105 S. Ct. at 830; Goldberg v. Kelly, 397 U.S. 254, 262, 90 S. Ct. 1011, 1017 (1970); Bundy v. State, 490 So. 2d 1257 (1986) (Barkett, J., concurring). When Rule 3.850 was promulgated, it gave all prisoners -- including death-sentenced individuals -- the right to collateral review of their convictions and sentences. Importantly, the rule (as amended) specifically gives inmates two years from their conviction and sentence becoming final within which to file petitions for post-conviction relief.

Provision of the 3.850 procedure is intended to ensure that no constitutional violation has occurred. Thus in both capital and non-capital cases, this Court has stressed the importance of the right to present arguments under the procedure and the right to have them heard by the Florida courts. See Clark v. State, 491 So. 2d 545 (Fla. 1986); Holland v. State, No. 68,320 (February 5, 1987); Lemon v. State, 498 So. 2d 923 (Fla. 1986); Munsen v. State, 489 So. 2d 734 (Fla. 1986). These rights are not merely hortatory, but are firmly grounded in important due process considerations. Id. For death-sentenced individuals, effective access to the 3.850 procedure becomes of paramount importance.

Specifically, the two years granted by the rule provide a death-sentenced individual the time necessary to investigate the facts and circumstances of the criminal incident, to examine court records, to explore family background and relationships, to determine and evaluate mental health issues, and finally, to present the results of this exhaustive research to the courts. Since the vast majority of the over 270 people on death row in this state are indigent, the beleaguered Capital Collateral

Representative, alone, is charged with ensuring that they receive representation in critical post-conviction proceedings. Sec. 27.702, Fla. Stat. (1985).

Proposed Rule 3.851 will inevitably deny a death-sentenced individual effective access to the 3.850 procedure. At any time after a death sentence has been affirmed on direct appeal and without any prior notice, the Governor may, at his discretion, sign a death warrant. Rule 3.851 would operate to turn the right provided by Rule 3.850 to petition the court within two years into a right to do so in only thirty days.

Under these circumstances, the petitioner would indeed only "have nominal representation[,] .... [b]ut nominal representation .... does not suffice to render the proceedings constitutionally adequate." Evitts v. Lucey, 103 S. Ct. at 836. This result is impermissible because it constitutes a violation of due process:

> When a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the due process clause.

Evitts v. Lucey, id. at 839; see also Lane v. Brown, 372 U.S. 477, 83 S. Ct. 768, 773 (1963) (Due process protections attach to state collateral proceedings); Haitian Refugee Center v. Smith, 676 F. 2d 1023, 1039 (11th Cir. 1982) (The government "violates the fundamental fairness which is the essence of due process when it creates a right to petition and then makes the exercise of that right utterly impossible.)

A death-sentenced person has a fundamental interest (his or her life) in the procedure accorded by Rule 3.850. The Governor, otherwise, has no interest in forcing that person to relinquish the right to correct an invalid sentence and/or conviction. See Goldberg v. Kelly, 90 S. Ct. at 1017-18. Despite the more important interest of a death-sentenced individual, under its current formulation Rule 3.851 would operate so as to nullify the rights provided by Rule 3.850 and thereby to compel a due process violation.

C. PROPOSED RULE 3.851 VIOLATES SEPARATION OF POWERS DOCTRINE.

The proposed rule unlawfully delegates to the Governor the power to determine rules of court. The 30-day limitation period (to be followed by the courts) becomes effective at the sole discretion of the Governor. If executive arbitrariness is absent, a litigant has two years. There is no restriction on the Governor's power to determine, on an ad hoc basis, which cases he will decide the courts must consider within the 30-60 day time confines of Proposed Rule 3.851. The rule permits the executive to impose upon the courts an unalterable and strict time period on cases he alone decides should be so treated. The separation of powers doctrine imbedded in the Florida Constitution does not permit such a blanket delegation to the executive of the authority to control judicial processes.

Article 2, section 3 of the Florida Constitution provides:

> The power of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the branches unless expressly provided herein.

Procedural rules concerning the judicial branch are within the exclusive province of this Court. Benyard v. Wainwright, 322 So. 2d 473 (Fla. 1975). Assuming Rule 3.851 is procedural, its terms amount to an unprecedented and unconstitutional delegation to the executive to set rules governing time periods for handling specific cases by the Courts of the State.

Should the Court view the limitation period under Rule 3.851 as substantive law, as it has similar limitations in the past, Rubin v. State, 350 So. 2d 322 (Fla. 1980) (..."in criminal prosecutions, statutes of limitation are considered to vest a substantive right rather than a procedural right"), the rule's terms violate art. 2, sec. 3 as well, because the rule has not been enacted by the legislature, the sole repository of power to enact substantive law in this state.

III. CCR'S SUGGESTIONS REGARDING PROPOSED RULE 3.851

A. THIS COURT SHOULD SUSPEND OPERATION OF THE RULE UNTIL THE FLORIDA BAR STUDIES IT AND OFFERS PROPOSALS, AS IN OTHER RULES OF CRIMINAL PROCEDURE.

The death penalty debate is fully integrated into government in Florida. A move by any branch in that government sends ripples throughout the entire system. Historically, before a move is made the proper and settled institutional approach to change has been followed. The bar, the executive, the legislative, and the judiciary all studied the crisis in death penalty litigation and made proposals before CCR came into existence. The two-year limitations period on Rule 3.850 was instituted only after thorough study (and, interestingly, a negative recommendation on it) by the Florida Bar. A permanent "competency to be executed" rule has now made its way through proper bar committees, and has been unanimously approved by the Board of Governors. The Florida Bar Individual Rights and Responsibilities Committee recently completed a study and submitted the results to the legislature regarding the fact that CCR is responsible for all indigent capital inmates (App. C). The legislature, through proper committees, is now entertaining and examining a "continuing warrants" procedure. All of this, and much other activity and study, has been ongoing as representatives from all branches of government and from the bar have sought rational and reasonable solutions to the problems of administering state sanctioned executions.

The new proposed rule should be no exception. It presents no emergency, yet purports to and in fact does address a major intra-governmental problem in capital post-conviction litigation. There is every reason to follow the Rules of Judicial Administration, and the Clerk of the Supreme Court should refer the proposed rule to the appropriate committee of the Florida Bar. Rule 2.130(b)(2), Rules of Judicial Administration.

B. THIS COURT SHOULD SUSPEND OPERATION OF THE RULE UNTIL CCR IS PROPERLY FUNDED.

The ABA Report recommends that CCR be funded at 2.9 million dollars, with 31 attorneys. The Florida Bar Board of Governors unanimously agreed to recommend the results of that report to the Florida Legislature. The Florida Bar Individual Rights and Responsibilities Committee plans to "contact the ABA Section on Individual Rights and Responsibilities and jointly monitor whether" CCR is adequately and effectively funded. (App. C, p. 10). Until adequate funding occurs, due process is violated. Rule 3.851 should await an agency that has a chance of complying with the Rule.

C. STAYS SHOULD BE AUTOMATIC IN CASES IN WHICH EXECUTION DATES ARE SET BEFORE THE TWO-YEAR LIMITATIONS PERIOD OF RULE 3.850 HAS PASSED.

A shoplifter has two years from denial of a petition for writ of certiorari within which to challenge his or her conviction and sentence. That is this Court's rule, and the executive branch can, constitutionally, do nothing to abrogate that two-year right. There is no reason for capital cases to be treated with less procedural protection. Thus, when the execution branch arbitrarily chooses to shorten the time within which a capitally sentenced inmate may file for post-conviction relief, this Court should require that the execution be stayed, so that the reasoned decision to allow two years is not frustrated. The state should have no right to alter court rules, and in fact has no constitutional power to do so. Stays in this situation would enforce separation of powers, and would protect the litigants' due process rights.

C. IT SHOULD BE REQUIRED THAT A STAY OF EXECUTION ENTER WHERE THE RULE 3.850 MOTION PRESENTS ISSUES WHICH REQUIRE AN EVIDENTIARY HEARING, AND WHEN IT PRESENTS LEGAL ISSUES ABOUT WHICH REASONABLE JURISTS MAY DIFFER.

It is virtually impossible, and manifestly unnecessary, to require that evidentiary hearings be conducted "under warrant".

Witnesses must be subpoenaed from long distances upon very short notice, CCR must virtually move many of its personnel to the circuit court site, the vagaries of ground transportation interfere, the trial court must be open virtually around the clock, tempers flare and patience withers, and the pressure-filled resolution of facts produces faulty, incomplete, and unreliable results. No other area of the law would tolerate the conditions imposed upon these litigants, who have a right to post-conviction litigation, but have very little remedy when the entire case must be investigated and litigated under a timetable chosen by the opposition. The scenario is quite bizarre, and the result is usually foreshadowed by the restraints imposed. There is no reason to rush to an evidentiary hearing, if the pleadings demonstrate that one should be afforded.

Of particular concern is the situation when CCR prepares (necessarily) under warrant as best as possible to present an evidentiary hearing, produces the witnesses necessary for the hearing, gets the necessary office personnel transported to the hearing (i.e., taking everyone from Tallahassee to Miami), and spends large amounts of appropriated funds in order to be prepared to put on evidence, but upon arrival, the circuit court judge rules that no evidentiary hearing is necessary, and summarily denies the motion. This is a colossal waste of money, time and energy, and is easily avoidable.

Rule 3.850 requires evidentiary hearings whenever the files and records in the case do not conclusively demonstrate that the petitioner is entitled to no relief. This Court frequently issues stays and orders evidentiary hearings, when hearings have been denied by the trial court. Lemon v. State, 498 So. 2d 923 (Fla. 1986); Groover v. State, 489 So. 2d 15 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Jones v. State, 478 So. 2d 346 (Fla. 1985). A system which requires CCR to spend thousands of appropriated dollars just to get witnesses and personnel before a judge who denies an evidentiary hearing is

illogical, out-of-control, and counterproductive, if "access to the courts" is the predicate for the system. The suggestion that a stay issue whenever an evidentiary hearing is necessary makes perfect legal and practical sense.

CCR attorneys (without witnesses, but with verified allegations) can appear before the trial court and present arguments regarding why an evidentiary hearing is required. If the court determines that an evidentiary hearing is necessary, the hearing can be scheduled in a normal, orderly, and judicious way, so as to allow full and complete determination of the facts. As it is, those cases which are litigated "out-of-warrant" have proper and plenty of opportunity to present the case in what has always been recognized as a logical way -- hearings are scheduled, people act normally, eight-hour workdays ensue, and clear findings are made, unfettered by a rush to judgment. Those against whom a death warrant "strikes like lightning" have done nothing to deserve it, but suddenly receive a truncated process and helter-skelter fact determinations. A stay provision is proper.

The additional suggested reason for staying an execution -- that the motion presents legal issues about which reasonable jurists may differ -- has its genesis in federal law. Whenever a federal habeas corpus petition has presented claims that "are debatable among jurists of reasons," Barefoot v. Estelle, 103 S. Ct. 3383, 3394 n.4 (1983), a circuit court "should grant a stay of execution pending disposition of an appeal. . . ." Id. The same test should apply in Florida courts.

IV. CONCLUSION

Rule 3.851 is a good faith attempt to improve access to the courts for death-sentenced inmates who are scheduled for execution. CCR appreciates the opportunity to provide input before the rule comes into effect. There are serious practical and legal problems with the rule, and many ways to improve it --

i.e., addition of a provision for stays of execution. CCR requests that the rule not become effective April 1, 1987, but instead that the rule be referred to the proper committee of the bar.

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Respectfully submitted,

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