IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

CASE NO. 75,563

v.

DISTRICT COURT OF APPEAL
OF FLORIDA, FIRST DISTRICT,

Respondent.

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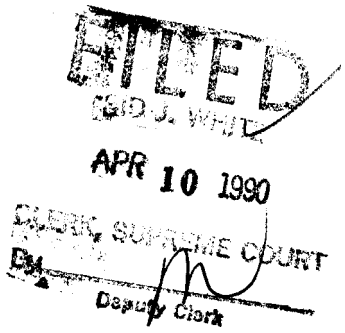


RESPONSE TO PETITION FOR WRIT OF PROHIBITION

Comes now the respondent, District Court of Appeal, First District, pursuant to the show cause order of this court dated March 26, 1990, and responds to the petition for writ of prohibition filed by the State of Florida, which argues that the district court is acting in excess of its jurisdiction.

STATEMENT OF THE CASE AND FACTS

Because the statement of the case and facts contained in the petition is incomplete, respondent submits the following statement for the court's review. All rcfcrences to petitioner's appendix shall be noted as PA. All references to respondent's appendix shall be noted as KA.

William Navarre filed a petition for writ of habeas corpus in the First District Court of Appeal seeking belated appeal (DCA Case No. 89-3262). Navarre alleged that within 30 days of his conviction and sentence he had requested that his attorney file a notice of appeal, but the attorney failed to do so (PA-A1). Respondent directed the State of Florida to file a response to the petition for writ of habeas corpus. Rather than filing a substantive response, the state argued that petitioner had sought the wrong remedy and that he should file a motion for post conviction relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure (PA-A4). The response was treated as a motion to dismiss and was denied by opinion. See, Navarre v. State, 15 F.L.W. D374 (Fla. 1st DCA Feb. 8, 1990). The state was ordered to respond to the substantive allegations contained in the petition for writ of habeas corpus. The state did not request that the question presented be certified, nor did the state seek review of Navarre in the Supreme Court of Florida. Notwithstanding respondent's opinion in Navarre, in its response state continued to argue that the petitioner's only remedy was pursuant to Rule 3.850 (PA-A8). Respondent determined that evidentiary findings were required and jurisdiction was relinquished to the trial court for 60 days to conduct a hearing on the question of Navarre's right to belated appeal (RA-1).

In Williams v. State (DCA Case No. 90-46), counsel for petitioner filed a petition for writ of habeas corpus to secure belated appeal. Counsel alleged in his motion that he had

represented Williams in the trial court and that Williams had timely directed counsel to file a notice of appeal from the judgment and sentence (PA-Bl). Counsel prepared a notice of appeal and accompanying documents, but neglected to file them due to other pressing matters. Counsel stated that his performance constituted per se ineffective assistance of counsel for failure to file a timely notice of appeal upon request. State v. Meyer, 430 So.2d 440 (Fla. 1983). Counsel requested that the petition for writ of habeas corpus be granted and Williams be allowed belated appeal (PA-Bl). A show cause order issued (PA-B3) and the state responded, continuing to argue that petitioner's only remedy was by motion pursuant to Rule 3.850 (PA-B4). The state did not respond to the substantive allegations in the petition. Respondent granted the writ of habeas corpus on February 9, 1990, by unpublished order with a citation to Navarre (PA-B6).

In Graham v. Dugger (DCA Case No. 90-282), petitioner sought a writ of habeas corpus to seek belated appeal. Jn his sworn petition, Graham stated that he had directed his appointed counsel to seek a timely appeal, but no notice of appeal was ever filed (PA-Cl). *In* response to an order to show cause (PA-C6), the state again argued that petitioner had sought the wrong remedy and should seek relief in the trial court pursuant to Rule 3.850 (PA-C7). The state did not attempt to rebut the sworn statement of petitioner, nor did the state respond to the substantive allegations in the petition. The petition *for* writ of habeas corpus was granted on March 8, 1990, by unpublished order (RA-2).

## SUGGESTION OF MOOTNESS

Respondent suggests that the petition for writ of prohibition is moot as to Williams v. State and Graham v. Dugger. In both cases, the petitions for writ of habeas corpus seeking belated appeal were granted before a show cause order issued on the petition for writ of prohibition. Prohibition as a remedy is unavailable after the action complained of has taken place. State ex rel. Dept. of Health and Rehab. Service v. Nourse, 489 So.2d 1214 (Fla. 4th DCA 1986); Bender v. First Fidelity Sav. and Loan Ass'n of Winter Park, 463 So.2d 445 (Fla. 4th DCA 1985); Schwarz v. Waddell, 422 So.2d 61 (Fla. 4th DCA 1982). Respondent suggests that Navarre v. State is the only case that remains ripe for review by this court.

## MEMORANDUM OF LAW

A.

The right of a defendant to seek belated appeal was established by the Supreme Court of Florida in Hollingshead v. Wainwrisht, 194 So.2d 577 (Fla. 1967). Hollingshead petitioned this court for a writ of habeas corpus, which was denied. The denial of the petition was reversed by the Supreme Court of the United States on the authority of Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). (See, Hollingshead v. Wainwright, 384 U.S. 31, 86 S.Ct. 1284, 16

L.Ed.2d 333 (1966)). In compliance with the decision of the United States Supreme Court and to examine the truthfulness of Hollingshead's allegations, a special commissioner was appointed by this court to take testimony upon the factual issues presented. Upon consideration of the report submitted, it was found 'that due process of law required that Hollingshead be afforded full appellate review. This court granted Hollingshead's petition for writ of habeas corpus to seek belated appeal.

The right to seek belated appeal by petition for writ of habeas corpus was confirmed in Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969). Baggett filed an original pro se petition for writ of habeas corpus in the Supreme Court of Florida. In discussing the various avenues of habeas corpus relief available, this court determined that a petition directed to the appropriate district court of appeal would provide the most effective and expedient procedural machinery to consider this type of relief. The court stated:

> Since where habeas corpus relief is sought to vindicate deprivations of the right to appeal., or necessary incidents thereof, the ultimate relief afforded is the opportunity for full appellate review by way of habeas corpus in the district court of appeal . . . of the district where petitioner was confined at the time of sentencing, the soundest and most expeditious procedure should require the application for a writ challenging such alleged deprivations to be filed in the same district court which is empowered to grant the ultimate relief. This procedure would not only operate to balance out and minimize the judicial labor in proceedings of this kind, but would also create less procedural

> difficulties. If factual determinations are deemed necessary, the appropriate district court needs merely to issue the writ returnable before a circuit judge of that district or appoint a commissioner to make the necessary factual determinations.

Id. at 244.[1]

This is the law as established by the Supreme Court of Florida in 1969 and this is the law today. Petitions for writs of habeas corpus are routinely considered and granted by the Supreme Court of Florida in death penalty cases and the District Courts of Appeal upon the authority of Hollingshead and Baggett. See, e.g., Smith v. State, 400 So.2d 956 (Fla. 1981); Dobson v. State, 542 So.2d 1047 (Fla. 3d DCA 1989); Irby v. State, 454 So.2d 757 (Fla. 1st DCA 1984); White v. State, 456 So.2d 1302 (Fla. 5th DCA 1984); Potts v. Wainwright, 413 So.2d 156 (Fla. 4th DCA 1982); Prater v. Wainwright 238 So.2d 316 (Fla. 2d DCA 1970). More importantly, however, this court has directly spoken to the theory advanced by petitioner and rejected it. In State v. Wooden, 246 So.2d 755 (Fla. 1971), the First District Court granted belated appeal to a defendant whose court-appointed counsel had refused to file a notice of appeal for reasons of professional judgment. Although relief was granted by habeas corpus because the state posed no objection, the district court's opinion included language to the effect that a motion for post-

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[1] At the time Baggett was decided, postconviction relief to seek collateral review was available under former Rule 1.850, Rules of Criminal Procedure. See Roy v. Wainwright, 151 So.2d 825 (Fla. 1963).

conviction relief [then codified as Rule 1.8501 was a more appropriate remedy for petitioner. This court accepted jurisdiction and expressly disapproved that holding, finding conflict with Baggett. It repeated the direction given in Baggett that where a factual conflict arises, the appellate court may appoint a commissioner to take evidence. More importantly, it recognized that a trial court lacks jurisdiction to grant this type of relief:

> But what is a trial judge to do if he discovers that a defendant's right to a direct appeal has been frustrated? Clearly, he cannot enter an order granting a delayed appeal in the appropriate District Court or the Supreme Court, because he has no power over these courts and such an order would not be binding upon them. Nor can he set the judgment and sentence aside because a finding of frustration of direct appeal does not bring into question the validity of the judgment and sentence.
>
> However, the appellate court which would have been empowered to hear the direct appeal could clearly grant a defendant a delayed appeal in appropriate circumstances through the remedy of habeas corpus.

State v. Wooden, 246 So.2d at 757.

Initially, the petitioner argues that Rule 3.850 is intended to provide a complete and efficacious postconviction remedy to correct convictions on any grounds which subject them to collateral attack. The respondent suggests that this description of the power of Rule 3.850 is overbroad. For example, the claim of ineffective assistance of appellate counsel is a collateral attack which is not cognizable pursuant to Rule 3.850, but by petition for writ of habeas corpus in the appellate

court in which the original appeal was taken. Knight v. State, 394 So.2d 997 (Fla. 1981). The petition for writ of habeas corpus seeking belated appeal is another example of a remedy beyond the power of Rule 3.850. Hollingshead, Baggett, Wooden and State v. Meyer, 430 So.2d 440 (Fla. 1983).

Petitioner argues that claims of ineffective assistance of trial counsel, with rare exceptions, are cognizable by Rule 3.850 only and may not be raised by petition for habeas corpus before an appellate court. Rule 3.850 is a remedial device to correct the errors of trial counsel. Respondent submits that for all intents and purposes, the trial of a defendant is concluded when the judgment and sentence is pronounced. Barring a motion for rehearing or other post trial relief, the only duty left for counsel to perform is to file the notice of appeal if requested to do so. It can be argued for purposes of this analysis that at the very moment a defendant advises his attorney he wishes to appeal, the status of that attorney changes from trial counsel to appellate counsel. Accordingly, if appellate counsel fails to perform that duty, the defendant may seek a writ of habeas corpus alleging ineffective assistance of appellate counsel. Knight. While the process of referring fact disputes to a circuit judge sitting as a commissioner can be cumbersome, it leaves the ultimate power to determine appellate jurisdiction in the appellate court, where it belongs. State v. Wooden, 246 So.2d 755, 757 (Fla. 1971); Lovett v. City of Jacksonville Beach, 187 So.2d 96, 99 (Fla. 1st DCA 1966), appeal dismissed, 200 So.2d 179 (Fla. 1967).

The cases petitioner cites in support of its argument do not hold that Rule 3.850 has supplanted habeas corpus as the remedy to seek belated appeal. In White v. Dugger, 511 So.2d 554 (Fla. 1987), White sought relief which was time barred by Rule 3.850. White's convictions for first-degree murder and his death sentences had previously been affirmed by this court. Two requests for postconviction relief had also been denied. White then filed a petition for writ of habeas corpus and a motion for stay of execution. This court denied all relief, finding that the issues raised were of the type which would properly be raised under Rule 3.850. By its terms, Rule 3.850 procedurally bars motions for relief where the judgment and sentence have been final for more than two years, or were final prior to January 1, 1985. Moreover, the primary issue White raised was previously raised in a postconviction proceeding and disposed of, therefore it was also procedurally barred by Rule 3.850. This court pointed out that habeas corpus was not a vehicle for obtaining additional appeals of issues which were raised, or should have been raised on direct appeal or which were waived at trial or which could have, should have, or have been raised in Rule 3.850 proceedings. White stands for the proposition that habeas corpus is not a vehicle for obtaining a second determination of matters previously decided on appeal. White does not hold that Rule 3.850 has replaced habeas corpus as the proper remedy to seek belated appeal.

In State v. Bolvea, 520 So.2d 562 (Fla. 1988) the issue was whether a claim by a probationer of ineffective assistance of trial counsel was cognizable under Rule 3.850. This court found that court-ordered probation constituted "custody under sentence" for purposes of Rule 3.850. This court stated that Rule 3.850 was a procedural vehicle for the collateral remedy otherwise available by writ of habeas corpus. Therefore, ineffective assistance of trial counsel could not be raised by a petition for writ of habeas corpus, but must be raised by a motion for postconviction relief pursuant to Rule 3.850. Respondent submits that Bolyea reaffirmed the use of Rule 3.850 to challenge ineffective assistance of trial counsel, but did not eliminate habeas corpus as a remedy to seek belated appeal.

In Richardson v. State, 546 So.2d 1037 (Fla. 1989), petitioner sought leave to apply to the circuit court for a writ of error coram nobis. This court held that the writ of error coram nobis had been supplanted by Rule 3.850. This pronouncement did not extend to the writ of habeas corpus to seek belated appeal.

B.

Next, petitioner argues that the remedial procedures of Hollingshead and Baggett were grounded on the proposition that the **failure** of a trial judge to appoint **appellate** counsel constituted state action which violated due process. This theory of state action was later extended to include the failure of

court appointed counsel to timely file a notice of appeal. Costello v. State, 246 So.2d 752 (Fla. 1971). The supreme court receded from this view in State v. Mever, 430 So.2d 440 (Fla. 1983), finding that the failure to file a notice of appeal by any counsel, whether appointed or privately retained, did not constitute state action. Petitioner argues that the holdings of White, Bolvea, and Richardson are a "command that all claims of ineffective assistance of trial counsel be submitted under rule 3.850."

Respondent submits that there remain viable theories for granting belated appeal that have nothing to do with the issue of ineffective assistance of counsel. A petitioner's right to seek belated appeal may be the result of other state action. In Robinson v. Wainwright, 245 So.2d 867 (Fla. 19711, petitioner alleged, and a review of the trial transcript confirmed, that the trial court failed to advise him of his right to appeal a judgment and sentence as required by the Florida Rules of Criminal Procedure. In Hoggart v. Wainwright, 490 So.2d 129 (Fla. 1st DCA 19861, petitioner had sought relief pursuant to Rule 3.850, Florida Rules of Appellate Procedure. The trial court denied the motion for postconviction relief, but the order of denial failed to inform petitioner of his right to appeal within 30 days as required by Rule 3.850. Both Robinson and **Hoggart** were **granted relief.** If petitioner's view of the review process were accepted, there would possibly be two different avenues to seek belated appeal: one in the trial court pursuant

to Rule 3.850 when a claim of "ineffective assistance of trial counsel" is made, and another still remaining in the appellate court when other state action is alleged.

There are other problems inherent in petitioner's proposed process for review. Rule 3.850 provides that except for a motion to vacate a sentence, no other motion shall be filed **or** considered pursuant to the rule if filed more than two years after the judgment and sentence become final. This time bar may be constitutionally acceptable to limit a collateral attack, but if a defendant is uninformed of his right to take a direct appeal from his criminal conviction and he fails to discover this right within two years, would he be time barred to file a motion for postconviction relief alleging ineffective assistance of trial counsel for failure to inform him of his right to direct appeal of his criminal conviction and sentence?

C.

Petitioner argues that "the sheer inefficiency of the Hollingshead, Baggett and Costello procedures [are a] needless waste of judicial and state resources." Respondent submits that not all petitions for writs of habeas corpus seeking belated appeal involve issues of disputed fact. Petitioner has brought the case of Williams v. State to the attention of this court (PA-B1). In Williams, the assistant public defender who represented Williams at trial filed a petition seeking belated appeal showing that counsel was instructed to file a notice of appeal and failed

to do so. The state's response did not contest that factual allegation, but merely argued a legal position which had previously been rejected by this court in Navarre. Williams v. State did not require this court to refer the case to a commissioner for factual findings as there was no dispute about the facts. This court has reviewed countless petitions which are accompanied by sworn statements of counsel which admit that counsel was instructed to but failed to file a notice of appeal. The process as it stands may not be perfect, but petitioner's suggested alternative could be worse if not fully thought through. For example, if petitioner's alternative were adopted and a movant is denied relief pursuant to Rule 3.850, the movant will most likely appeal the order denying his 3.850 motion. This would result in "an appeal within an appeal." This alternative may create more, not less, work for the appellate and trial courts involved.

D.

Respondent believes that the above arguments demonstrate that the petitioner's contentions regarding the proper method for establishing entitlement to a belated appeal have been refuted. However, assuming solely for the sake of argument that this court may find some merit in petitioner's arguments, it is obvious that the writ of prohibition is not the proper vehicle for obtaining relief.

The extraordinary writ of prohibition is utilized to prevent an inferior court from attempting to act in excess of its jurisdiction. English v. McCrary, 348 So.2d 293, 296 (Fla. 1977). Specifically, prohibition is not utilized to correct alleged errors which may be cured by appeal. Id. at 297; State ex rel. Dunscombe v. Smith, 56 So.2d 536 (Fla. 1952). As previously noted, prohibition is a preventive remedy and not corrective. It may be used only to forestall an improper action that is about to occur. Sparkman v. McClure, 498 So.2d 892 (Fla. 1986).

The respondent is bound by the decisions of the Supreme Court of Florida. Hoffman v. Jones, 280 So.2d 431, 440 (Fla. 1973). Thus, even had it agreed with petitioner that the motion for postconviction relief was a "better" remedy than habeas corpus for resolving issues of entitlement to belated appeal, it had no authority to implement the change proposed by the state. This court squarely spoke to this issue in Baggett and Wooden and the jurisdictional precedent announced there has been followed by its decisions and the decisions of the district courts of appeal on countless occasions. See, Saunders v. Wainwright, 254 So.2d 197 (Fla. 1971); Chaudoin v. State, 383 So.2d 645 (Fla. 5th DCA 1980); Showers v. State 359 So.2d 928 (Fla. 2d DCA 1978). The state's argument, when distilled to its essence, is that it would prefer another way of doing things, and is hardly **grounds** for respondent to veer from well-established precedent nor for the state's highest court to issue the extraordinary writ of

prohibition when it does not. The petitioner's continued reliance on its theory in belated appeal cases pending in respondent's court, even after the theory was expressly rejected in Navarre, is evidence of its persistent adherence to its theory on this question. The state has neither sought rehearing en banc in the district court nor requested that the question be certified as one of great public importance, remedies which are certainly far more appropriate than a petition for writ of prohibition.

## CONCLUSION

Based on the foregoing, respondent respectfully requests that the petition for writ of prohibition be denied.

Respectfully submitted,

DISTRICT COURT OF APPEAL, FIRST DISTRTCT

BY:

Douglass B. Shivers
Chief Judge

First District Court of Appeal
300 Martin Luther King Jr. Boulevard
Tallahassee, Florida 32399

## CERTIFICATE OF SERVICE

I HEREBY certify that a true and correct copy of the foregoing has been furnished by U.S. Mail to James W. Rogers,

Office of the Attorney General, the Capitol, Tallahassee, Florida, 32399-1050, this 10th day of April, 1990.

Douglass B. Shivers
Chief Judge