IN THE SUPREME COURT OF FLORIDA



CASE NO. 93,252

**LARRY WHITE,**

Petitioner,

-vs-

**HARRY K. SINGLETARY, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,**

Respondent.

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**ON PETITION FOR DISCRETIONARY REVIEW**

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# BRIEF OF PETITIONER ON THE MERITS

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## INTRODUCTION

This case is here on a petition for discretionary review from a decision of the Third District Court of Appeal, which that court certified to be in direct conflict with decisions from other District Courts of Appeal. In this brief, the symbol "R." will indicate the record on appeal and "A." will indicate the appendix to this brief.

## STATEMENT OF THE CASE AND FACTS

Larry White was sentenced in two cases on the same day, circuit court numbers 93-79 and 93-1103 (R. 2, 53-66). According to Mr. White's *pro se* petition for a belated appeal, he told his attorney shortly after sentencing that he wanted to appeal (R. 2). The attorney told him that an appeal would take about two years and that Mr. White would be contacted at the end of the appellate process (R. 2). After two years passed and he heard nothing, Mr. White began a series of inquiries into what happened to this appeal (R. 3). Once he discovered that his attorney had not taken an appeal, he filed a *pro se* petition for a belated appeal, first (erroneously) with the circuit court (R. 4, 16), and then with the Third District Court of Appeal (R. 1-6). Mr. White's petition covered both cases (R. 1-6).

The Third District Court of Appeal denied his petition for belated review in this case (93-79) and granted the petition in the other case (93-1103) (R. 92-93). The difference is that in this case he pled guilty and subsequently admitted a violation of community control (R. 2, 33-36), whereas in the other case (93-1103) he went to trial and was found guilty (R. 2). As support for its decision, the Third District Court of Appeal cited its decisions in *Roberto Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997) and *Loadholt v. State*, 683 So. 2d 596 (Fla. 3d DCA 1996) (R. 93).

The Third District Court of Appeal certified conflict with *Gunn v. State*, 612 So. 2d 643 (Fla. 4th DCA 1993), *Trowell v. State*, 706 So. 2d 332 (Fla. 1st DCA

1998) (en banc), *Thompson v. State*, 708 So. 2d 289 (Fla. 4th DCA 1998), *review pending and briefs filed sub nom. State v. Thompson*, Case No. 92,435 (Fla.), and *Stone v. State*, 688 So. 2d 1006 (Fla. 1st DCA), *review denied*, 697 So. 2d 512 (Fla. 1997) (R. 93).

The Third District Court of Appeal's policy is to review *pro se* petitions for belated appeal and to deny them without appointing counsel if the underlying conviction is from a guilty plea and the petition does not allege one of the factors in *Robinson v. State*, 373 So. 2d 898 (Fla. 1979). *See Jorge Gonzalez v. State*, 23 Fla. L. Weekly D1578 (Fla. 3d DCA July 1, 1998). The other District Courts of Appeal grant the belated appeals and entertain motions to dismiss once the record is before the court and both parties are represented by counsel. *See Harriel v. State*, 710 So. 2d 102 (Fla. 4th DCA 1998); *Trowell v. State*, 706 So. 2d at 337-38.

Mr. White did not initially bring this certified conflict to this Court's attention. The Third District Court of Appeal subsequently withdrew its mandate and republished its opinion when it appointed the public defender to represent Mr. White (A. 1). Counsel then brought this petition for discretionary review, asking this Court to resolve the conflict.

## SUMMARY OF THE ARGUMENT

If Larry White's attorney had timely filed a notice of appeal as requested, no showing on the merits would be required. Because of his attorney's ineffective assistance of counsel, however, the Third District Court of Appeal held that he now must show one of the *Robinson* grounds for appeal before the court would grant his petition for a belated appeal.

This ruling is problematic because many petitioners requesting belated appeal are indigent prisoners who are often without legal training or access to the record in their case. Because of the concern that the right to an appeal might be lost if a defendant is unable to perceive or articulate appellate issues, the United States Supreme Court has rejected attempts to burden the right to appeal by requiring a showing on the merits of the appeal.

Moreover, the *Anders* procedure provides the twin protections of review by both counsel and the court before determining if an appeal is frivolous. The Third District Court of Appeal vitiates this protection when it determines whether there are any grounds for appeal based solely on a *pro se* petition. In effect, the Third District Court of Appeal requires a showing of some additional harm from the failure to file the notice of appeal beyond the fact that the failure to appeal leaves a defendant without appellate counsel. The protection of counsel is just as necessary for the

appeal as for the trial and the lack of counsel is itself sufficient harm.

The approach of the other District Courts of Appeal solves these constitutional problems. The other courts treat all petitions for belated appeal the same, whether the convictions resulted from a guilty plea or a trial. Once the defendant has counsel and the record is before the court, the court will then entertain motions to dismiss if the appeal is frivolous. Alternatively, defense counsel could file an *Anders* brief if the appeal is frivolous. In either event, the court makes its decision at a stage when both the court and the parties can examine the complete record and the defendant has counsel.

This Court should resolve the conflict by disapproving the procedure followed by the Third District Court of Appeal.

## ARGUMENT

### THE THIRD DISTRICT COURT OF APPEAL'S PROCEDURE IMPERMISSIBLY DEPRIVES A DEFENDANT OF THE RIGHT TO THE ASSISTANCE OF COUNSEL IN THE APPELLATE PROCESS MERELY BECAUSE TRIAL COUNSEL FAILED TO FILE A NOTICE OF APPEAL.

Larry White did not have an opportunity to appeal his conviction because his lawyer did not file a notice of appeal. If his lawyer had filed that notice, Mr. White would not have to meet any threshold test on the merits of his appeal, even from a guilty plea. He would have a right to have counsel review the record and advocate on his behalf if there are any meritorious arguments.

Because his lawyer failed to file the notice of appeal, the Third District Court of Appeal held that he must now meet a threshold test on the merits of his appeal before it would grant the belated appeal and appoint an attorney to review the record. The Third District Court of Appeal essentially requires indigent petitioners to be able to represent themselves on the merits before the court will appoint a lawyer to do so. Such a requirement impinges on the constitutional rights to appeal and to effective assistance of counsel.

The Florida Constitution grants a right to appeal final judgments. *See* Art. V, §4(b), Fla. Const.; *Amendments to the Florida Rules of Appellate Procedure*, 685

So. 2d 773 (Fla. 1996). The United States Constitution requires the assistance of counsel in this appeal. *See Douglas v. California*, 372 U.S. 353 (1963). Of course, a wide margin exists between the right to appeal and the right to appellate relief. The right to appeal does not guarantee that an appellate court will not subsequently dismiss the appeal if it is frivolous. *See Harriel v. State*, 710 So. 2d 102, 104-06 (Fla. 4th DCA 1998) (en banc); *Trowell v. State*, 706 So. 2d 332, 337 (Fla. 1st DCA 1998) (en banc).

The right to appeal merely guarantees that an attorney will carefully scrutinize the record and raise any arguable points. "The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal." *McCoy v. Court of Appeals*, 486 U.S. 429, 438 (1988). If an attorney discovers that an appeal is frivolous, the attorney will direct the appellate court to places in the record that might arguably provide grounds for reversal and the appellate court will then scrutinize the record for itself. *See Anders v. California*, 386 U.S. 738 (1967); *see also Penson v. Ohio*, 488 U.S. 75, 80-84 (1988); *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991); *State v. Causey*, 503 So. 2d 321 (Fla. 1987). If an appeal is frivolous, the opposing party has the option of moving to dismiss the appeal. *See Harriel*, 710 So. 2d at 104-06.

Defendants who plead guilty still have the right to appeal. The guilty plea

merely limits the issues that defendants can litigate on appeal. "Once a defendant enters a plea of guilty, the only points available for an appeal concern actions which took place contemporaneously with the plea." *Robinson v. State*, 373 So. 2d 898 (Fla. 1979). *Robinson* listed four such issues: "(1) the subject matter jurisdiction, (2) the illegality of the sentence, (3) the failure of the government to abide by the plea agreement, and (4) the voluntary and intelligent character of the plea." *Id.* at 902.

Even after the Criminal Appeal Reform Act, a defendant who pleads guilty still has this right to appeal. "Insofar as [the Criminal Appeal Reform Act] says that a defendant who pleads nolo contendere or guilty without expressly reserving the right to appeal a legally dispositive issue cannot appeal the judgment, we believe that the principle of *Robinson* controls. A defendant must have the right to appeal that limited class of issued described in *Robinson*." *See Amendments to the Florida Rules of Appellate Procedure*, 685 So. 2d at 775.

Therefore, Mr. White has the right to appeal his conviction and, on his request, his attorney should have filed a notice of appeal. The remedy for his counsel's failure to do so is a petition for a belated appeal to the appellate court. *See* Fla. R. App. P. 9.140(j)(1). This Court's appellate rules set forth the factors that defendants must state in such a petition:

> (A) the date and nature of the lower tribunal's order sought to be reviewed;
>
> (B) the name of the lower tribunal rendering the order;
>
> (C) the nature, disposition, and dates of all previous proceedings in the lower tribunal and, if any, in appellate courts;
>
> (D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;
>
> (E) the nature of the relief sought; and
>
> (F) the specific facts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel or basis for entitlement to belated appeal, including in the case of a petition for belated appeal whether the petitioner requested counsel to proceed with the appeal.

Fla. R. App. P. 9.140(j)(2).

The Third District Court of Appeal added to the list of factors in rule 9.140(j)(2) by requiring that the petitioner allege one or more of the *Robinson* issues as a viable ground for appeal. "[T]he defendant's motion [for a belated appeal] failed to allege with specificity any of the limited exceptions, dictated by *Robinson v. State*, 373 So. 2d 898 (Fla. 1979), necessary for an appeal from a guilty plea." *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997). Only this Court has authority to adopt rules of procedure, which District Courts of Appeal must follow. *See TGI Fridays,*

*Inc. v. Dvorak*, 663 So. 2d 606, 611 (Fla. 1995); *State v. Lott*, 286 So. 2d 565, 566 (Fla.1973).

The Third District Court of Appeal's procedure makes the preliminary question of the right to appeal turn on the subsequent question of whether the appellate attorney could make a non-frivolous argument on appeal. Such an additional requirement is deeply troubling given that most petitions for belated appeal are filed *pro se* by prisoners with no legal training and no access to the court file. The *Robinson* factors are not self-evident. For example, one of the *Robinson* factors–illegality of the sentence–has been the subject of much confusion and litigation. *See State v. Mancino*, 23 Fla. L. Weekly S301, S303 (Fla. June 11, 1998); *Davis v. State*, 661 So. 2d 1193 (Fla. 1995).

Exactly because of the concern about unrepresented defendants who might be ignorant of the law, the United States Supreme Court has rejected any requirement that a defendant make any showing on the merits of the appeal:

> At this stage in the proceedings only the bare record speaks for the indigent, and unless the printed pages show that an injustice has been committed, he is forced to go without a champion on appeal. Any real chance he may have of showing that his appeal has hidden merit is deprived him when the court decides on an ex parte examination of the record that the assistance of counsel is not required.
>
> . . . .
>
> When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair

procedure.

*Douglas v. California*, 372 U.S. at 356-57.

For the same reasons, the Court has rejected any different standard for belated appeals, saying:

> Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a summary statement of points to be raised on appeal. . . . They would thus be deprived of their only chance to take an appeal even though they have never had the assistance of counsel in preparing one . . . . Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings.

*Rodriquez v. United States*, 395 U.S. 327, 330 (1969); *see also Baggett v. Wainwright*, 229 So. 2d 239, 243 (Fla. 1969). The Third District Court of Appeal violated this principle when it made the right to appeal turn on a *pro se* litigant's ability to perceive and articulate appellate issues. Just as a showing on the merits is not required to secure either a timely appeal or a belated appeal, "[s]imilarly, there should be no difference between a defendant's right to a belated appeal from a conviction following trial or after a plea, because, in either instance, if the appeal had been timely filed, an initial statement of arguable points would be irrelevant to the right to appeal." *Trowell v. State*, 706 So. 2d 332 (Fla. 1st DCA 1998) (en banc).

The Third District Court of Appeal's procedure vitiates the protections

imposed by *Anders v. California*, 386 U.S. 738 (1967). *Anders* provides the twin protections of review by both counsel and the court before any determination that an appeal is frivolous. *See, e.g., McCoy v. Court of Appeals*, 486 U.S. at 437-39; *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991); *In re Order of the First District Court of Appeal*, 556 So. 2d 1114, 1116 (Fla. 1990). The Third District Court of Appeal, however, erroneously determines that an appeal would be frivolous from a *pro se* petition without providing counsel. "The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not foregone and that substantial legal and factual arguments are not inadvertently passed over." *Penson v. Ohio*, 488 U.S. 75, 85 (1988).

In effect, the Third District Court of Appeal impermissibly requires a showing of some additional harm other than the deprivation of appellate counsel that automatically occurs when trial counsel fails to file a notice of appeal. Lack of counsel is itself prejudice. When the ineffective assistance of counsel "left petitioner completely without representation during the appellate court's actual decisional process," "'[a]ctual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.'" *Penson v. Ohio*, 488 U.S. at 88 (*quoting*

*Strickland v. Washington*, 466 U.S. 668, 692 (1984)). Thus, a colorable claim for a belated appeal requires only a claim that a defendant timely asked for an appeal and that defense counsel did not file a notice of appeal. *See, e.g., State v. Meyer*, 430 So. 2d 440 (Fla. 1983); *Courson v. State*, 652 So. 2d 512 (Fla. 5th DCA 1995); *Short v. State*, 596 So. 2d 502 (Fla. 1st DCA 1992).

The approach taken by the other District Courts of Appeal avoids these constitutional problems and is a much better approach to deciding these cases. Under that procedure, the courts treat all petitions for belated appeal the same, whether the conviction was the result of a trial or a guilty plea. *See Faircloth v. State*, 661 So. 2d 1292, 1293 (Fla. 4th DCA 1995); *Owens v. State*, 643 So. 2d 105, 106 (Fla. 1st DCA 1994); *Gunn v. State*, 612 So. 2d 643, 644-45 (Fla. 4th DCA 1993). Once the court has the record before it and the defendant has counsel, if there are no *Robinson* issues the court will proceed under *Anders* or will entertain motions to dismiss the appeal. *See Harriel v. State*, 710 So. 2d 102, 106 (Fla. 4th DCA 1998) (en banc); *Stone v. State*, 688 So. 2d 1006 (1st DCA 1997), *rev. denied* 697 So. 2d 512 (Fla. 1997); *Ford v. State*, 575 So. 2d 1335 (Fla. 1st DCA 1991).

> [T]he only relevant inquiry, once a request for a belated appeal is made, is whether the defendant was informed of his or her right to an appeal and thereafter timely made a request for an appeal to his or her attorney or other appropriate person. If the appeal proceeds form the entry of an unconditional guilty plea, it may, due to appellant's

> failure to submit any issue cognizable under *Robinson*, eventually result in dismissal by an appellate court, but issues of merit are not required as a precondition to the appeal.

*Trowell v. State*, 706 So. 2d at 337 (emphasis omitted).

Under this procedure, the appellate court will not dismiss any potentially meritorious appeal because of misconceptions about the state of the record or lack of issue-perception by a *pro se* litigant. This Court should explicitly adopt this procedure and require that the record be present and the defendant be represented by counsel before the appellate court determines if an appeal is frivolous.

## CONCLUSION

The procedure adopted by the Third District Court of Appeal impermissibly burdens the right to appeal by requiring a showing on the merits of the appeal. That court's approach vitiates the protections of the *Anders* procedures and incorrectly assumes that a defendant must show some harm other than being denied counsel before the appellate court. Lack of appellate counsel is itself sufficient harm. This Court should resolve the conflict by disapproving of the Third District Court of Appeal's decision in this case and in *Gonzalez v. State*, 685 So. 2d 975 (Fla. 3d DCA 1997).

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was delivered by mail to Douglas J. Glaid, Assistant Attorney General, Office of the Attorney General, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, Florida 33301, this 20th day of August 1998.

## CERTIFICATE OF TYPE SIZE

I hereby certify that this brief is printed in 14 point Times New Roman.

JOHN E. MORRISON
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