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IN THE SUPREME COURT OF FLORIDA

MICHAEL ANTHONY MORSE,

Petitioner,

vs. **CASE NO: 93,705**

STATE OF FLORIDA,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

On Discretionary Review of the Certified Decision of
the District Court of Appeal, Second District
Case Number 93,705

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CERTIFICATE OF TYPE STYLE AND SIZE

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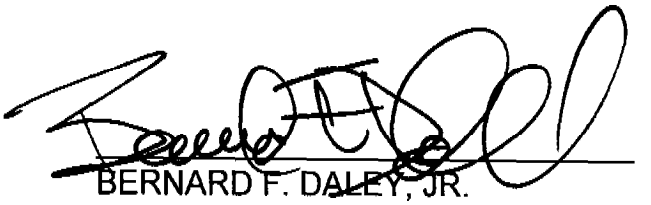

BERNARD F. DALEY, JR.

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PRELIMINARY STATEMENT

In this brief, the Petitioner, Michael Anthony Morse, will be referred to by name or as the Petitioner. The Respondent, the State of Florida, will be referred to as the State or as the Respondent.

Any citations to the record on appeal will be made by the letter "R," followed by the appropriate page number. Citations to the pleadings and orders challenged herein, will be made as they are styled.

STATEMENT OF THE CASE AND FACTS

By means of a two (2) count information, Petitioner was charged in the Thirteenth Judicial Circuit Court, in and for Hillsborough County, with committing armed robbery[1] and carjacking with a firearm.[2] Based on his indigency, the trial court appointed a special Public Defender, Peter Hobson, of Tampa, Florida, to represent Petitioner.

On October 31, 1994, Defendant and his counsel were before the court, the Honorable Susan Sexton, Circuit Judge, for a scheduled status hearing. After announcing that he was prepared for trial, Petitioner's counsel sought a brief moment to discuss the case with Assistant State Attorney, Julia Chase, and the trial court passed the case.

Upon the case being recalled, Petitioner's counsel advised the Court that a plea was to be entered in the case. The court placed Petitioner under oath, and after a summary inquiry as to the voluntariness of his guilty plea, the court accepted same. Based on the terms underlying the plea, the trial court imposed a sentence of 106.75 months in incarceration on each count, to run concurrently, with credit on each sentence for five (5) days of time served.

Subsequent to the trial court's imposition of sentence, Petitioner's mother, Karen Martaniuk, contacted petitioner's trial counsel, and requested that he appeal the trial court's entry of judgment and imposition of sentence. Attorney Hobson indicated to Martiniuk that he would not file an appeal, based upon his stated belief that "it would do no good."

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[1] *See* §787.01(1)(a)(2), *Florida Statutes.*

[2] *See* § 812.133(2)(a), *Florida Statutes.*

Sometime between October 31st and November 4, 1994, Petitioner contacted Peter Hobson, and inquired as to whether Hobson was going to file the appeal. Hobson advised Petitioner that he was not going to file an appeal, because of his opinion that if Petitioner were to get back into court, he would get more time.

Petitioner filed a motion to correct sentence sometime in 1995. The Court subsequently denied same, finding that the sentence imposed was legal. Petitioner has not previously sought collateral review of the trial court's judgment and sentence, in either this Court or any other.

On March 26, 1998, Petitioner filed a Petition for Writ of Habeas Corpus in the Second District Court of Appeal. Therein, Petitioner alleged that he was denied effective assistance of counsel, in violation of his rights under the Florida and federal Constitutions, based on the failure of his trial attorney to perfect a direct, plenary appeal to the appellate court from an underlying criminal judgment and sentence. Based on those allegations, Petitioner sought to invoke the appellate court's extraordinary writ jurisdiction for the purpose of affording him an appellate opportunity.

Pursuant to Fla. R. App. Pro. 9.030 (a)(2)(A)(vi) (1998), Petitioner seeks review by this Honorable Court of the order of July 21, 1998 denying Petitioner's Petition for Writ of Habeas Corpus entered by the Second District Court of Appeal. Therein, the court relied on its opinion in *Zduniak v. State*, 620 So.2d 1083 (Fla. 2nd DCA 1993) which requires that a petitioner to briefly outline what issues he intends to raise on appeal if the belated appeal is granted.

Upon entrance of the aforementioned order, Petitioner filed a Notice to Invoke Discretionary Jurisdiction in the Second District Court of Appeal based on the alleged

conflict between *Zduniak* and *Trowell v. State*, 706 So.2d 332 (Fla. 1st DCA 1998). In *Trowell*, the First District Court of Appeal held that a petitioner who has made a prima facie showing of his case is not required to outline the issues he will raise on appeal. *See Id.*, at 337.

An order entered on August 31, 1998 by the Second District Court of Appeal granted the Petitioner's motion to certify conflict between *Trowell* and *Zduniak*.[3]

[3] It should be noted parenthetically that the First District Court of Appeals certified to the Supreme Court of Florida that *Trowell* and *Zduniak* are in express conflict with one another. *See Trowell v. State*, 706 So.2d 332, 338 (Fla. 1st DCA 1998). That case is currently pending before the Court in case number 92-393.

SUMMARY OF THE ARGUMENT

Petitioner alleges that his state and federal constitutional right to a direct, plenary appeal from the sentence imposed under a plea bargain is being contravened by the Second District Court of Appeal requirement the he state meritorious grounds he would raise if his belated appeal is granted.

A substantial body of case law exists at both the state and federal level which establishes the right of criminal defendant to a direct appeal. Currently, the only relevant inquiry is whether the defendant was informed of his right to appeal and thereafter made at timely request to appeal to his attorney or other appropriate person.

In addition to violated a criminal defendant's constitutional rights, the Second District Court of Appeal requirement violates the ethical considerations promulgated by the Florida Bar Association and the American Bar Association to criminal defense attorneys. Therein, both associations explicitly state that an attorney is required to file a notice of appeal if requested to do so by a client. Any determination of the merits of the appeal is immaterial to the attorney; only the reviewing court should make such a determination.

As such, the Second District Court of Appeals requirement of stating meritorious issues to be granted a belated appeal must be overturned.

ARGUMENT

ISSUE ONE

THE DISTRICT COURT ERRED IN DENYING HABEAS RELIEF AND BELATED APPEAL TO A CRIMINAL DEFENDANT BY REQUIRING, AS A CONDITION PRECEDENT, A STATEMENT OF MERITORIOUS ISSUES TO BE RAISED IF A BELATED APPEAL WERE GRANTED?

In its Order of April 13th, the lower court directed Petitioner to "briefly outline" those issues he intended to raise in the event he were granted a belated appeal from the trial court's order. In its Order, this Court cited to *Zduniak v. State*, 620 So.2d 1083 (Fla. 2d DCA 1993).

Petitioner believes that the lower court may have misapprehended the relevant decisional law and the rationale underlying those decisions, in now requiring a habeas petitioner to set forth a prima facie showing of meritable issues which will be brought in the event he is afforded a belated direct appeal. In support of this assertion, Petitioner relies primarily upon the recent *en banc* decision of the Florida First District Court of Appeal in *Trowell v. State*, 706 So.2d 332 (Fla. 1st DCA 1998), *cert. pending*, *State v. Trowell*, (Florida Supreme Court case number 92,393).

In *Trowell*, the First District, sitting *en banc*, reversed a trial court order which had summarily denied the defendant's Rule 3.850 claim that he had been deprived of the effective assistance of trial counsel due to counsel's failure to file a notice of appeal. *See Id.*, at 333. In denying the defendant collateral relief on this ground, the trial court concluded that the defendant was not entitled to an appeal, "because he had entered into a negotiated plea ... [and thus] waived his right to appeal matters relating to the judgment." *See Id.* In denying relief, the trial court cited to the First District's decision in *Thomas v,*

State, 626 So.2d 1093 (Fla. 1st DCA 1993)

In reversing the trial court's order as to that issue, the *en banc* First District found that its "decision in *Thomas* is inconsistent with a substantial body of case law from this court and other district courts of appeal." *See Id.* (citations omitted) Accordingly, the District Court receded from the panel decision in *Thomas*, to the extent that it had required "a defendant to state in a rule 3.850 motion for belated appeal what issues he or she would have raised on appeal." *See Id.*

In reaching this result, the *Trowell* Court relied upon the Supreme Court of Florida's decision in *Baggett v. Wainwright*, 229 So.2d 239 (Fla. 1969), which the First District characterized as having "addressed the reason why a defendant need not state meritorious issues in a 3.850 motion as a precondition to his or her right to a belated appeal from a criminal conviction."[4]

In *Baggett*, the Florida Supreme Court specifically rejected the state's contention that the defendant must make a preliminary showing of arguable points on the merits in order to be entitled to an appeal. *See e.g., Trowell*, 706 So.2d at 334. Further, the Court found that its result was buttressed by the fact that the Florida Supreme Court had recently addressed the procedure for obtaining a belated appeal in *Amendments to the Florida Rules of Appellate Procedure*, 685 So.2d 773 (Fla. 1996)[5] and moreover, that the

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[4] As the First District noted, at the time of *Baggett*, the procedure to obtain a belated appeal is by means of petition for writ of habeas corpus in the appropriate appellate court.

[5] As the *Trowell* Court correctly noted, in enacting Rule 9.140(j), i.e., the procedure to be followed by defendants seeking belated appeal, the Supreme Court of Florida did not distinguish between those cases arising from a plea from those after trial. *See Trowell*, 706 So.2d at 336-7. Importantly, had the Supreme Court desired to

Committee Notes to Rule 9.140(j) which were enacted at that time specifically indicated that "the revision was intended to reinstate the procedure set forth in *Baggett*." *See Trowell*, 706 So.2d at 336.

In *Baggett*, 229 So.2d at 239 (Fla. 1969), the Supreme Court of Florida devised a procedure for determining eligibility of belated appeals. The two step process requires, first, that the defendant "timely express the desire to appeal to the court, defense attorney or other appropriate person," and second, that "the facts show a deprivation, through state action," of the right to appeal guaranteed to the defendant. *See Id.*

While the first prong of the *Baggett* procedure remains relatively unchanged, the second prong has been eliminated. *See*, *State v. District Ct. of App.; State v. Meyer*, 430 So.2d 440 (Fla. 1983). The Supreme Court of Florida denied the state's claim that the defendant must make a preliminary showing of meritorious argument to be granted an appeal. *See Id.* To support this position, the Court relied on an opinion from the United States Supreme Court which had rejected a similar argument. *See*, *Rodriquez v. United States*, 395 U.S. 327, 89 S.Ct. 1715 (1969).

In *Rodriquez*, a prisoner sought post-conviction relief under 28 U.S.C. § 2255 seeking a belated appeal because he alleged that his counsel had deprived him of his right to appeal. Both the trial court and the Ninth Circuit Court of Appeals denied the § 2255 claim because the petitioner failed to disclose the grounds he would have raised on appeal. *See Id.* The Court noted that "an appeal from a criminal judgment of conviction is a matter of right." *See Id.* As such, the Supreme Court held that the courts below erred

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require a merit showing, such could have easily been included in the procedure now set forth in Rule 9.140(j).

in requiring petitioner to make a preliminary showing of merit. *See Id.* Additionally, the Court noted that this type of rule would require a circuit court to screen out cases where a petitioner did not have proper grounds for appeal which violates *Coppedge v. United States*, 369 U.S. 438, 82 S.Ct. 917 (1962).

Similarly, the *Trowell* court recognized that requiring a merit showing prior to authorizing a belated appeal ultimately deprives a defendant of due process. As best put by Judge Ervin:

> [T]he only difference between the practice the United States Supreme Court rejected in *Anders* [*v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)] and that which the court below appears to sanction is that the trial attorney may trump the *Anders* procedure by declaring his client's appeal to be of no merit because it followed an unconditional guilty plea. Consequently, the defendant, thereafter unassisted by counsel, must first file sufficiently stated errors before his appeal may proceed; a procedure which would be entirely irrelevant to his appellate rights if his lawyer had simply honored his client's request and filed the notice.

See Trowell, 706 So.2d at 338. In reversing the trial court's order, the First District held that the only relevant inquiry in such cases "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." *See Id.*, at 337.

In contrast to *Trowell*, which protects the constitutional rights of criminal defendants to appeal their sentence, *Zduniak* explicitly finds that criminal defendants have no right to appeal from a plea where no issues were reserved for review. *See Zduniak*, 620 So.2d at 1083. In that opinion, the Second District Court of Appeal relied upon a 1987 case to hold that "[c]ounsel's failure to file a notice, even if Zduniak requested he do so, is immaterial." *See Id., citing Bridges v. Dugger*, 518 So.2d 298 (Fla. 2d DCA 1987).

A substantial body of federal and state case law contradicts that holding. In *Amendments,* 685 So.2d at 773 (Fla. 1996), the Supreme Court of Florida found a state constitutional right to appeal for criminal defendants in *State v. Creighton*, 469 So.2d 735 (Fla. 1985). Additionally, in *Stone v. State*, 688 So.2d 1006 (Fla. 1st DCA 1997), *rev. denied* 697 So.2d 512 (Fla. 1997), the First District Court of Appeal held that it had jurisdiction to consider an indigent criminal appeal under *Anders*, *supra*, notwithstanding the Reform Act [§ 924.051(4), Fla. Stat. (1997)] and amendments to the rules of appellate and criminal procedure.

Additionally, a criminal defendant possesses a federal constitutional right to a direct criminal appeal. *See Anders, supra; Rodriquez, supra; Douglas v. California*, 372 U.S. 353 (1963); and *Penson v. Ohio*, 488 U.S. 75 (1988). As the United States Supreme Court has found a federal constitutional right to a direct appeal for a criminal defendant, no decision of a Florida court can eliminate this right.

The holding in *Zduniak* not only contradicts several decisions of state and federal courts, but it also contravenes the ethical considerations of attorneys promulgated by the Florida and American Bar Associations. In Opinion 81-9, Professional Ethics of the Florida Bar, the Florida Bar concluded:

> A court appointed attorney who, at the insistence of his client and in accordance with approved procedure, commences an appeal he believes to be frivolous may not thereafter be said to have acted unethically in commencing the appeal. The ultimate decision regarding whether the indigent defendant's appeal is frivolous appears to be reserved to the reviewing court, to the exclusion of personal determination by court appointed counsel.

See also, ABA Standard for Criminal Justice, Standard 4-8.2(a) (the decision to appeal

must be the defendant's own choice); and Standard 4-8.3(a) (counsel should not seek to withdraw solely on the basis of his or her opinion that the appeal lacks merit).

Several decisions also exist that hold that failure to file a timely notice of appeal upon request of the client constitutes ineffective assistance of counsel. *See State v. Meyer*, 430 So.2d 440 (Fla. 1983); *see also*, *The Florida Bar v. Dingle*, 220 So.2d 9 (Fla. 1969); and *Thames v. State*, 549 So.2d 1198 (Fla. 1st DCA 1989).

The only conclusion that can be drawn from these ethical considerations is that counsel is required to file a notice of appeal upon request of his client. As such, the reasoning and holding in *Zduniak* are flawed.

Instantly, Petitioner has set forth sworn allegations in his petition to the effect that he requested that his trial attorney take an appeal, and that his counsel failed to so do. The practical effect of counsel's action is to trump the requirement of *Anders*, *supra*, simply by allowing trial counsel to determine that the appeal would "do no good." Indeed, such a procedure allows an attorney to make a determination of the merits of an appeal which directly contradicts the precedent that only a reviewing court can make such a determination.

While undersigned counsel is cognizant of the need to conserve scarce judicial resources, that concern cannot overcome Petitioner's right to seek appellate review. In the event that Petitioner is afforded a belated appeal from his guilty plea, this Court will still possess jurisdiction to dismiss that appeal in accordance with the procedure set forth in *Anders*, in the event that Petitioner's counsel (and the Court itself) are unable to identify a meritorious basis for such a proceeding. *See e.g., Miller v. State,* 697 So.2d 586 (Fla.

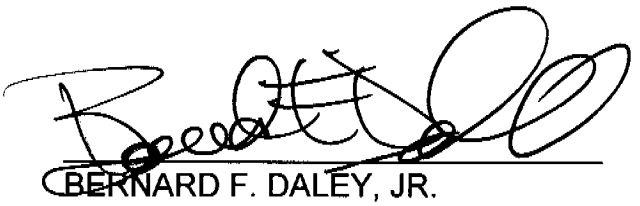
1st DCA 1997)(describing procedure to be followed when appeal is devoid of merit); *Stone v. State*, 688 So.2d 1006, 1008 (Fla. 1st DCA 1997).

Based on these facts and authorities, Petitioner submits that he has demonstrated his entitlement to further habeas proceedings, and that he be allowed such without being required to make a showing of the merits of those issues to be raised in a belated appellate proceeding. For these reasons, Petitioner respectfully requests that this Honorable Court remand this case to the Second District Court of Appeal with specific instructions to consider the petition without a requirement to state meritorious issues to be raised per the reasoning of *Trowell*.

CONCLUSION

Based upon the foregoing fact and authority, Petitioner, Michael Anthony Morse, respectfully requests that this Court approve the *en banc* decision in *Trowell*, and overrule the requirement of *Zduniak* that a criminal defendant state meritorious issues to be raised if a belated appeal is granted. Additionally, Petitioner requests that this Court remand this case to the Second District Court of Appeal to be considered in accordance with this Court's opinion.

Respectfully Submitted,



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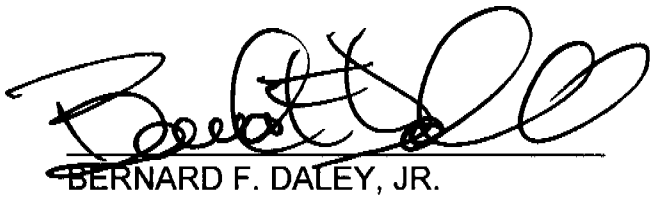
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by First Class U.S. Mail to Mr. Robert Krauss, Assistant Attorney General, Florida Department of Legal Affairs, 2002 North Lois Avenue, 7th Floor, Tampa, FL 33607 and Mr. Lou Vargas, General Counsel, Florida Department of Corrections, 2601 Blair Stone Rd., Tallahassee, FL 32399-2500, this 4th day of November, 1998.



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