IN THE SUPREME COURT OF FLORIDA

JOSEPH DUANE SAUCER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC95031

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Respondent, the State of Florida will be referenced in this brief as Respondent or the State. Petitioner, Joseph Duane Saucer, will be referenced in this brief as Petitioner or by proper name.

The symbol "R" will refer to the record on appeal, and the symbol "S" will refer to the supplemental record on appeal; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE

Petitioner pled guilty to armed burglary and dealing in stolen property in January 1996 and was sentenced as an habitual offender. No appeal was taken. In November 1997, petitioner filed a motion seeking a belated appeal in the district court pursuant to Florida Rule of Appellate Procedure 9.140(j) alleging that he had timely instructed his trial counsel to file a notice of appeal and counsel had failed to do so. The Attorney General as appellate counsel for the state was ordered to show cause why the belated appeal should not be granted and, having no information on which to base a response, communicated with the trial counsel to determine if there was a factual basis for the claim that counsel had been timely instructed to file a notice of appeal and had failed to do so. It

appearing that there was no factual basis for the claim, the state requested the district court to appoint a special master to conduct an evidentiary hearing. This was done and a special master found that petitioner had not requested an appeal and that his representations that he had requested an appeal were "not accurate, as evidenced by appellant's own testimony at the instant hearing." (I.34, 37-38). The district court denied the petition for a belated appeal and the State moved for the court to recommend sanctions in the form of forfeiture of gain time pursuant to Section 944.28(2)(a), Florida Statutes (1997), because petitioner had knowingly or with reckless disregard for the truth brought false information or evidence before the court. (I.42). On rehearing, the First District Court of Appeal determined that Section 944.28(2)(a) applied to criminal proceedings, and the First District certified the following question to this Court as a question of great public importance:

> May the gain-time forfeiture provisions of Section 944.28(2)(a) apply in criminal and collateral criminal proceedings?

Saucer v. State, 24 Fla. L. Weekly D37 (Fla. 1st DCA Dec. 17, 1998),(I.41-54). While this case was pending on appeal, this Court issued Hall v. State, 25 Fla. L. Weekly S42 (Fla. January 20, 2000), which held that Section 944.28(2)(a), Fla. Stat. (1999), did not apply to criminal and collateral criminal proceedings. This Court then order supplemental briefing on whether a petition for writ of habeas corpus, as opposed to the postconviction motion at issue in Hall, was a collateral criminal proceeding.

STATEMENT OF THE FACTS

The State agrees with petitioner's statement of the facts and adopts its earlier statement in its brief of 22 February 2000.

SUMMARY OF ARGUMENT

A petition seeking a belated appeal of a criminal judgment filed pursuant to Florida Rule of Appellate Procedure 9.140(j) is a collateral criminal proceeding. Thus, it is subject to Hall v. State in which this Court erroneously interpreted section 944.28(2)(a), Florida Statutes as inapplicable to criminal proceedings. Accordingly, petitioners such as Saucer who file rule 9.l40(j) petitions in which they falsely represent facts to the judicial system are not subject to forfeiture of gain time pursuant to section 944.28(2)(a).

ARGUMENT

ISSUE

IS A PETITION FOR A BELATED APPEAL OF A CRIMINAL JUDGMENT FILED IN THE APPELLATE COURT PURSUANT TO FLORIDA RULE OF APPELLATE PROCEDURE 9.140(j) A COLLATERAL CRIMINAL PROCEEDING UNDER SECTION 944.28(2)(a) AS INTERPRETED BY HALL V. STATE, 25 FLA. WEEKLY S42 (FLA. 20 JANUARY 2000)? (Restated)

This case again unites and illustrates some of the most burdensome appellate procedures ever to afflict the judicial system. First, the filing of claims of ineffective assistance of trial counsel in an appellate court pursuant to rule 9.140(j) instead of the trial court pursuant to rule 3.850. Second, appeals from guilty pleas where no issues are preserved in the trial court and no motions to withdraw from the plea have been filed. Three, the condoning and encouragement of frivolous legal proceedings by declining to enforce statutory sanctions against such legal actions.

We start with an attempted appeal from a guilty plea where no issues have been preserved, none are cognizable on review, and no motions to withdraw the plea or to challenge the sentence have been filed. Add a petition for a belated appeal pursuant to rule 9.140(j) claiming ineffective assistance of trial counsel which is filed in the appellate court which has no information on the allegations of the petition and is not the site or court where the alleged error occurred. That court then orders the Office of the Attorney General to show cause even though that office has no information concerning the alleged error and can only seek the

appointment of a special master through the trial court. The special master then conducts a de facto rule 3.850 evidentiary hearing at which it is determined that the petition of a belated appeal is grounded on false representations of the petitioner, which the Florida Legislature has specifically addressed and provided sanctions for in section 944.28(2)(a), Florida Statutes. The district court then requests the Department of Corrections to impose sanctions but is then overruled by Hall and we end up with a three-year appellate proceeding involving the district court, the circuit court, the district court again, and the state's highest court, the Florida Supreme Court. At the end of which we have conducted an expensive and time consuming attempt to appeal a guilty plea based on a false representation of ineffective assistance of trial counsel to no effect and have also discovered that the legal system has no remedy for false swearing in a rule 9.140(j) motion or for the prosecution of wholly frivolous appeals other than some ad hoc motion to impose sanctions.

The state urges this Court to take the following procedural actions to cure the serious defects in the judicial system which this case exposes.

First, enforce the plain terms of Florida Rules of Appellate Procedure 9.140(b)(2) prohibiting appeals from guilty or nolo pleas and rule 9.140(d) prohibiting appeals of sentencing issues unless such issues have been properly preserved in the trial court by

either contemporaneous objection or by motions pursuant to Florida Rules of Criminal Procedure 3.170(l) or 3.800(b)[1].

Second, immediately rescind the portion of rule 9.140(j) concerning belated appeals and require that such claims be filed in the trial court pursuant to rule 3.850 on the basis of ineffective assistance of trial counsel. This would eliminate what may well be the most cumbersome rule of procedure ever devised to transform a simple question which can be speedily resolved by a single trial judge into a complex undertaking involving innumerable lawyers and trial and appellate judges. Here, for example, had this claim been filed as a rule 3.850 motion in the trial court where all the records and counsel reside, it could have been definitively resolved in a matter of days by an uncontrovertible **factual** finding that counsel was or was not timely asked to file a notice of appeal. See, this Court's previous examination of this issue in State v. District court of Appeal of Florida, First District, 569 So.2d 439 (Fla. 1990).

Third, revisit at the first opportunity this Court's decision in State v. Trowell, 739 So.2d 77 (Fla. 1999) where this Court held that there is a constitutional right to appeal from guilty pleas. This decision is grounded on this Court's interpretation of the United State Constitution and the case law of the United States

[1]The state notes as this is written on 11 May 2000 that this Court has today issued a series of decisions which largely decline to enforce rules 9.140(b)(2) and 9.140(d). See, Maddox v. State,et al, SC92805, SC93000, SC93207, and SC93966 (Fla. 11 May 2000).

Supreme Court which, this Court concludes, creates such right. Contrast this interpretation with the controlling interpretation of the United States Supreme Court in Smith v. Robbins, 120 S.Ct. 746 (2000) where the Court examined the same case law and held that the states are not obliged to "support a wasteful abuse of the appellate process" and "may protect [themselves] so that frivolous appeals are not subsidized and public moneys needlessly spent". The Court further stated that a state created right to appeal "does not include the right to counsel for bringing a frivolous appeal" and "an indigent defendant who has his appeal dismissed because it is frivolous has not been deprived of a 'fair opportunity' to bring his appeal" because the constitution "does not require either counsel or a full appeal once it is properly determined that an appeal is frivolous." The state suggests there cannot be a more frivolous class of appeals than those from guilty pleas where the criminal fails to reserve any issue and waives the right to move to withdraw the plea pursuant to rule 3.170(l) or to belatedly raise a sentencing claim pursuant to rule 3.800(b). The state is aware as this is written on 11 May 2000 that the Court has issued a series of decisions which essentially continue the Trowell procedure of subsidizing and encouraging wholly frivolous appeal from guilty pleas. See, State v. Jefferson, SC94630 (Fla. 11 May 2000).

This Court has asked for further briefing on whether a habeas petition seeking a belated appeal is a collateral criminal proceeding. The State cannot in good conscience, argue that a habeas petition is not collateral to the criminal proceedings.

Although case law holds that a petition for writ of habeas corpus is a civil action, it also holds that it is collateral to the criminal proceeding. Allen v. Butterworth, 25 Fla. L. Weekly S277, S280 (Fla. April 14, 2000) (stating that "[a]lthough habeas corpus petitions are technically civil actions, they are unlike other traditional civil actions" and recognizing the "quasi-criminal nature of habeas proceedings"); State ex rel. Butterworth v. Kenny, 714 So.2d 404, 409-410 (Fla. 1998)(holding that "[t]echnically, habeas corpus and other postconviction relief proceedings are classified as civil proceedings. Unlike a general civil action, however, wherein parties seek to remedy a private wrong, a habeas corpus or other postconviction relief proceeding is used to challenge the validity of a conviction and sentence....Consequently, postconviction relief proceedings, while technically classified as civil actions, are actually quasi-criminal in nature because they are heard and disposed of by courts with criminal jurisdiction."); Phillips v. State, 623 So.2d 621 (Fla. 4th DCA 1993)("In short, when the Court announces a new rule of criminal procedure in a collateral proceeding (by definition, habeas corpus), the new rule now applies by its very nature to all collateral review cases."); Rozier v. State, 603 So.2d 120 (Fla. 5th DCA 1992)(noting that "like a habeas corpus proceeding an action under rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction, notwithstanding the inclusion of rule 3.850 within the criminal rules."); State v. White, 470 So.2d 1377, 1378-

1379 (Fla. 1985)("Appellee misunderstands the nature of collateral post-conviction remedies such as those provided by rule 3.850 and writs of error coram nobis and habeas corpus.... These post-conviction collateral remedies are not steps in a criminal prosecution but are in the nature of independent collateral civil actions governed by the practice of appeals in civil actions from which either the government or the defendant (petitioner) may appeal.").

The State, in good conscience, can argue that Hall v. State, was wrongly decided. Section 944.28(2)(a), provides that:

> **All or any part of the gain-time earned by a prisoner according to the provisions of law is subject to forfeiture if such prisoner** unsuccessfully attempts to escape; assaults another person; threatens or knowingly endangers the life or person of another person; refuses by action or word to carry out any instruction duly given to him or her; neglects to perform in a faithful, diligent, industrious, orderly, and peaceful manner the work, duties, and tasks assigned to him or her; **is found by a court to have brought a frivolous suit, action, claim, proceeding, or appeal in any court; is found by a court to have knowingly or with reckless disregard for the truth brought false information or evidence before the court;** or violates any law of the state or any rule or regulation of the department or institution.

(Emphasis added). Section 944.279, Florida Statutes (1997), is similar in that it provides for disciplinary actions against prisoners who file frivolous or false pleading. However, Section 944.279, specifically provides that "[t]his section does not apply to a criminal proceeding or a collateral criminal proceeding." Despite the general principle of statutory construction that the mention of one thing implies the exclusion of another; expressio

unius est exclusio alterius[2], this Court concluded that because sections 944.279 and 944.28 were passed as part of the same act in an effort to deter frivolous civil actions and because it would have been redundant to repeat the language in restricting application in criminal proceedings, section 944.28 did not apply to criminal or collateral criminal proceedings. Hall v. State, 25 Fla. L. Weekly S42 (Fla. January 20, 2000).

This Court further stated that "a postconviction motion, such as 3.850 motion, should be considered a collateral criminal proceeding for purposes of considering sanctions under the frivolous filing statute as well. Similarly, if a prisoner appeals the denial of his or her postconviction motion, that appellate proceeding would retain the collateral criminal nature of the original motion, and thus, the appeal should also be considered a collateral criminal proceeding." Hall at S42. This Court stated:

> [W]e find that the plain meaning of the phrase "collateral criminal proceeding" used in section 944.279 refers to a type of criminal proceeding that is "collateral to" or somewhat separated from the "main" criminal proceeding. That is, for the very limited purposes of interpreting the statutes created or amended by chapter 96-106, a prisoner's felony conviction would be the result of the main criminal proceeding, while the prisoner's motion to correct his or her sentence (or any postconviction motions such a 3.800 or a 3.850 motion) would be "collateral" to his or her "main" criminal conviction, so such a proceeding would be a "collateral criminal proceeding."

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[2] See Thayer v. State, 335 So.2d 815, 817 (Fla.1976). Brown v. State, 672 So.2d 861, 863 (Fla. 3d DCA 1996)

Id. at S44 fn5. A petition for writ of habeas corpus, like a motion for postconviction relief is collateral to the main criminal proceeding.

Nevertheless, this Court should find that Section 944.28 applies to collateral criminal proceeding in which prisoners file frivolous and false pleadings. Even in Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103 (Fla. 1996), where this Court held that a defendant had a right to an appeal, this Court held that the "legislature may implement this constitutional right and place reasonable conditions upon it so long as they do not thwart the litigants' legitimate appellate rights." Amendments. at 1104. The imposition of sanctions upon the filing of a frivolous or false pleading or appeal, was a reasonable restriction on a prisoner's appellate rights. Moreover, even if Section 944.28 is read in conjunction with Section 944.279, because Section 944.28 does not have the limiting language of Section 944.279, Section 944.28 should apply to criminal and collateral criminal proceedings. Accordingly, this Court should reverse its earlier decision in Hall and hold that Section 944.28 applies the criminal and collateral criminal proceedings.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to R. Mitchell Prugh, Esq., Middleton & Prugh, P.A., 303 State Road 26, Melrose, Florida 32666, this ____ day of May, 2000.

_____
Trisha E. Meggs
Attorney for the State of Florida

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