

IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 95, 107

IN RE: AMENDMENT TO FLORIDA
RULES OF CRIMINAL PROCEDURE
AND FLORIDA RULES OF APPELLATE
PROCEDURE

COMMENTS OF THE FLORIDA BAR
CRIMINAL PROCEDURE RULES COMMITTEE

I. INTRODUCTION

The Florida Bar Criminal Procedure Rules Committee (the “committee”) has examined the proposed rules submitted in this cause. The proposed rules were referred to two subcommittees of the committee; after several meetings, the subcommittees issued written reports to the full committee. At its Emergency Meeting on October 1, 1999, the full committee met and the Honorable Chris W. Altenbernd, Chair of the Criminal Appeals Reform Act Committee, addressed the committee regarding these proposals. Full deliberation and discussion followed.

The committee’s response to the proposed rules generally was favorable.

However, the committee concludes that the text of the proposed rules raises both substantive and formal concerns.

Collectively, the proposed rules are believed to facilitate the early detection and correction of illegal and erroneous sentences. The fact that the rules provide a procedure for correcting such sentences in the early stage of the appellate process is welcomed. The areas of concern to the committee are described below. The committee's suggested remedial solutions also are addressed.

II. SUSPENSION OF THE ABILITY TO ATTACK ILLEGAL SENTENCES DURING THE PENDENCY OF THE APPELLATE PROCESS

The proposed amendment to rule 3.800(a) limits the currently existing ability to correct an illegal sentence at any time in two instances:

1. During the period of time provided for filing a motion to correct an erroneous or illegal sentence provided in proposed rule 3.800(b)(1).
This time period is the period of time for filing a notice of appeal after sentence.
2. During the pendency of a direct appeal.

Proposed rule 3.800(b)(1)–(2) provide a process for correcting an illegal or erroneous sentence during the time for filing a notice of appeal after sentence and, if a notice of appeal is filed, during the initial stage of the appellate process and before

initial briefs are filed. These proposals, taken in their entirety, would preclude the correction of an illegal sentence after the initial briefs have been filed until all direct appeals have been exhausted. This is a substantive concern to the committee.

It is true that eliminating the ability to correct an illegal sentence after initial briefs have been filed and before the direct appellate process has been concluded will prevent the problem of multiple proceedings in the same or different courts. However, the period of time involved, although usually only a few months, may, at times, be prolonged. A prisoner who is serving an uncorrected illegal sentence that goes undetected until after initial briefs have been filed and before the appeal has ended would be without remedy. The prisoner might be forced to serve all or a portion of the illegal sentence before the opportunity to correct the sentence is available or terminate his or her appeal — a deplorable dilemma. The committee believes that this circumstance is unacceptable. By a vote of 18 in favor; 4 opposed, the committee recommends the deletion in the proposed rule 3.800(a) of the words, “or during the pendency of a direct appeal,” and recommends that the rule be amended to read:

Rule 3.800. Correction, Reduction, and Modification of Sentences

(a) Correction. A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in the sentencing ~~guideline~~ score sheet, provided that a party may not file a motion to correct an illegal sentence pursuant to this subsection during the time allowed for the filing of a motion pursuant to subsection (b)(1).

The committee believes that the problem of multiple simultaneous proceedings in the same case during the pendency of the appeal after initial briefs are filed will be greatly reduced by:

1. The implementation of the remainder of proposed rule 3.800 together with the other proposed rules. This should greatly reduce tardy detection of defective sentences and the likelihood of the multiple simultaneous proceedings.
2. The implementation of the committee's proposed amendments to rules 3.670 and 3.700(b) proposed. See *In Re Amendment to Florida Rules of Criminal Procedure 3.670 and 3.700(b)*, Case No. 95,117. The proposed amendments require the trial court, at the rendition of sentence, to orally specify the amount of jail time to be credited towards the sentence (proposed rule 3.700(b)) and require that the trial court's judgment and sentence be served, within 15 days of its rendition, on the two persons who have the greatest interest in detecting and expeditiously correcting erroneous or illegal sentences — the defendant and his or her trial counsel (proposed rule 3.670).

III. THE PROPOSAL FOR THE STATE TO FILE MOTIONS TO CORRECT SENTENCING ERRORS

Unlike the current rule, proposed rule 3.800(b) specifically authorizes the state to file motions to correct sentencing errors. The Criminal Appeals Reform Act Committee may have inserted the state as an potential movant for the laudable reason to allow the state to correct erroneous or illegal sentences in a manner advantageous to the defendant. (See Reference to a Memorandum by Judge Altenbernd contained in Comments by Bennett Brummer, Public Defender Eleventh Judicial Circuit, page 3, filed in this cause.) However, the text of the rule is not so limited.

Obviously, the state is precluded from seeking to correct an erroneous sentence when its correction would constitute an enhancement of the defendant's sentence after the defendant has begun to serve that sentence. See, *e.g.*, *Hopping v. State*, 708 So2d 263 (Fla. 1998); *Troupe v. Rowe*, 283 So2d 857 (Fla. 1973). The language of the proposed rule will result in confusion and unnecessary litigation. By a vote of 19 in favor; 2 opposed, the committee concluded that this problem could be remedied by redrafting the proposed amendment. Specifying the circumstances in which the state is authorized to seek a correction of sentence is warranted. The committee is prepared to assist the Court, if it determines that

redrafting of this provision is desirable.

IV. INTERFACE OF FLORIDA RULE OF CRIMINAL PROCEDURE 3.111(e)
WITH PROPOSED AMENDMENT TO RULE 9.140(b)(5)

The proposed amendment to rule 9.140(b)(5) further impacts on trial counsel's duties and ability to withdraw after judgment and sentence. Should the Court adopt the proposed amendment to rule 9.140(b)(5), the committee unanimously believes that 3.111(e) should be amended and will submit with its Four-Year Cycle Report a proposed amendment to rule 3.111(e) to conform the language of the latter to the new rule 9.140(b)(5). The committee feels that greater compliance with the substance of proposed rule 9.140(b)(5) would result because criminal trial attorneys, especially private practitioners, are more familiar with the Florida Rules of Criminal Procedure than the Florida Rules of Appellate Procedure.

We certify that a copy of these comments has been furnished to:

Honorable Chris W. Altenbernd

Andrew Stanton, Assistant Public Defender

Paula Saunders, Assistant Public Defender

Blaise Trettis, Assistant Public Defender

by facsimile transmission and mail on this date.