ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ALBERT ROGERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC00-258

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL
IN AND FOR THE SECOND DISTRICT

ANSWER BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT REGARDING TYPE

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STATEMENT OF THE CASE AND FACTS

The procedural history set forth in statement of the case and facts of the Initial Brief on the Merits is substantially accurate, with the following additions and corrections.

In his habeas corpus petition, Rogers claimed that he timely made a request for an appeal but was mislead "as to the right to appeal due to Mr. Louderback [collateral counsel] representation that the order should not be appealed, and that he did not think the ruling was proper.[1] (Pet. Exh. A, pgs. 2-3) According to Roger's petition, counsel stated that upon further financial arrangements through Roger's family, the order would be challenged through a petition in this Court. (Pet. Exh. A, pgs. 2-3)

In addition, Roger's petition asserted he wanted an appeal but was not properly advised of the procedure through counsel as to the manner in which to obtain an appeal. According to Rogers, had counsel properly informed him of the applicable procedure, he would have proceeded pro se in a postconviction appeal. (Pet. Exh. A, p. 3) Rogers asserted that he timely notified his counsel that he wanted an appeal of the order. He claimed that counsel informed him the matter should be waived and he should proceed to this Court after paying for the service. (Pet. Exh. A, p. 3)

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[1]Counsel's January 18, 1999, letter to Rogers was outside the time for appeal of the December 9, 1998 order. (Pet. Exh. B) However, Rogers did not allege in his habeas corpus petition that he was unaware of the rule 3.850 order within the time for taking an appeal. Nor did he allege that his retained counsel had agreed to perfect a collateral appeal on his behalf. (Pet. Exh. A)

On January 18, 1999, collateral counsel wrote to Rogers, informing him that the court had denied the postconviction motion on the basis that issues raised in the motion had been or should have been raised in the direct appeal of Roger's conviction. Counsel stated that while he did not agree with the court's ruling, he did not feel an appeal would be useful. Further, counsel's letter advised that the only further avenue he could suggest would be a second motion alleging ineffective assistance of counsel and possibly and appeal. Counsel's letter also advised that the proceeding would most properly be filed in federal district court. By copy of the letter, counsel requested Roger's family to contact him regarding the possibility of proceeding further. (Pet. Exh. B) Almost nine months later, Rogers filed his habeas corpus petition seeking a belated appeal of the summary order. (Pet. Exh. A, p. 5)

The state does not accept Rogers' factual representations regarding a allegedly timely request by Rogers for his private counsel to appeal the summary order on his postconviction motion. (Initial Brief at pgs. 1-2) The district court did not require a response to Rogers' habeas corpus petition from the state, and there has not been an evidentiary hearing ordered on the petition.

SUMMARY OF THE ARGUMENT

This Court's decision in Lambrix v. State, 698 So. 2d 247 (Fla. 1996), cert. denied, __ U.S. __, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998), forecloses Rogers' claim that misadvice of trial counsel on the decision whether to take an appeal warrants a belated appeal of an order pursuant to Fla.R.Crim.P. 3.850. Contrary to Rogers' contention there is no due process guarantee of retained counsel's effectiveness in advising a postconviction movant on the matter of taking a collateral appeal.

Here, postconviction counsel's letter reflects his advice to forego an appeal. This Court's decision in Steele v. Kehoe, 724 So. 2d 1192 (Fla. May 27, 1999), does not compel provision for a belated appeal based on attorney error on the matter of taking of a postconviction appeal. Neither the Sixth Amendment guarantee of effective assistance of counsel nor the Due Process Clause is offended by requiring a postconviction movant such as Rogers, who has not been denied an opportunity to challenge his conviction in a timely motion under rule 3.850, to bear the risk of attorney error pertaining to the taking or prosecution of a collateral appeal. Accordingly, this Court should approve the district court's decision that a belated appeal based on ineffective assistance of postconviction counsel is not appropriate.

ARGUMENT

ISSUE: DOES THE HOLDING IN LAMBRIX V. STATE, 698 So. 2d 247 (FLA. 1996), WHEN CONSIDERED IN LIGHT OF STEELE V. KEHOE, 747 SO. 2D 931 (FLA. 1999), FORECLOSE THE PROVISION OF A BELATED APPEAL FROM THE DENIAL OF A POSTCONVICTION MOTION WHEN THE NOTICE OF APPEAL WAS NOT TIMELY FILED DUE TO INEFFECTIVENESS OF COUNSEL IN THE COLLATERAL PROCEEDING?

In a habeas corpus petition, Roger sought a belated appeal based on misadvice of his postconviction counsel regarding the matter of taking an appeal of an order summarily denying his postconviction motion. Rogers did not contend that his retained counsel had agreed to file an appeal but neglected to do so in a timely manner. The thrust of Rogers' petition was that he timely informed retained counsel of his desire to appeal, he was mislead by counsel's advice not to take a collateral appeal, and as a result, he was denied a right of appeal.

At the outset, Rogers acknowledges that a criminal defendant does not have a due process right pursuant to the Sixth Amendment of the Unites States Constitution to effective assistance of counsel in a postconviction proceeding, citing Lambrix v. State, 698 So. 2d 247 (Fla. 1996), cert. denied, __ U.S. __, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998). (Initial Brief at p. 5) Notwithstanding, Rogers argues he is entitled to a belated appeal premised on alleged misadvice of postconviction counsel pursuant to the Fifth Amendment of the United States Constitution.

The state asserts that Lambrix squarely precludes a claim by

a noncapital movant such as Rogers that his retained counsel was ineffective in counseling him on the matter of taking a appeal of a postconviction order. Rogers does not have a Sixth Amendment right nor a due process right to a belated appeal based on a claim of misadvice of postconviction counsel.

In Lambrix, a prisoner under sentence of death sought postconviction relief based upon his collateral counsel's failure to appeal a particular issue. This Court held that "claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief." Id. at 248. In so holding, this Court in Lambrix set forth a marker, illuminating the line between challenges based on ineffectiveness of trial counsel and claims spawned from the collateral quest itself. As such, the Lambrix decision afforded a measure of finality to the extent of limiting collateral attacks grounded on the effectiveness of a movant's representation in a postconviction proceeding.

The demarcation recognized in Lambrix was established in the United States Supreme Court's decisions in Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(holding that the right to appointed counsel extends to the first appeal as a matter of right and no further), and Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)(applying Finley to inmates under sentence of death).

Contrary to Rogers' contention, the Lambrix holding does foreclose Roger's his claim of misadvice as to the propriety of taking

an appeal from a rule 3.850 order. Although he avoids use of ineffective assistance terminology, Rogers clearly challenges the effectiveness of advice rendered by postconviction counsel on the bypassing a collateral appeal, filing a successive 3.850 motion, and/or proceeding in a federal habeas petition.[2] Because a claim that postconviction counsel failed to raise an issue on collateral appeal is not cognizable in a postconviction proceeding, Rogers' claim of attorney error on the matter of appealing an order pursuant to rule 3.850 does not constitute a cognizable claim for relief.

Rogers asks this Court to extend Steele v. Kehoe, 724 So. 2d 1192 (Fla. 1999), to his situation. The state responds that due process considerations addressed in Steele do not extend to entitle

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[2]This is illustrated by Rogers' argument that counsel incorrectly advised him that the only further avenue available was federal habeas relief. (Initial Brief at p. 9) It appears that collateral counsel had concluded it would be useless for Rogers to ply an appeal of the summary order in his case. If, as the circuit court had concluded, Rogers was improperly plying direct appeal issues in a rule 3.850 motion, his pursuit of a collateral appeal would not avoid application of the state's procedural rules to his claims in a federal habeas proceeding. See e.g., Harmon v. Barton, 894 F.2d 1268, 1270 (11th Cir.)(where state trial court finds procedural default, state appellate court's silent affirmance is a finding of procedural default by the last state court to rule on the question), cert. denied, 498 U.S. 832, 111 S.Ct. 96, 112 L.Ed.2d 68 (1990).

Moreover, contrary to Rogers' criticism, it would be entirely prudent, given the one-year limitations period of 28 U.S.C. §2244(d), to advise Rogers to proceed to press any federal question he had properly exhausted through his direct appeal in a federal habeas petition under 28 U.S.C. §2254. Notwithstanding, it is apparent that Rogers, in actuality, seeks a belated appeal based on ineffective assistance of counsel for rendering purported misadvice of the taking of a postconviction appeal.

an unsuccessful postconviction movant to an evidentiary hearing to assess counsel's performance regarding the taking of a collateral appeal.

Steele involved a civil malpractice action in which a prisoner serving life in prison alleged that his privately retained appellate attorney negligently failed to file a timely motion for postconviction relief under rule 3.850 on his behalf, despite an oral agreement. Determining that appellate or postconviction relief is a prerequisite to maintaining a legal malpractice action, the Court in Steele went on to address the matter of a right to belatedly file a 3.850 motion. This Court concluded that when a prisoner alleges his attorney agreed to file a rule 3.850 motion but failed to do so in a timely manner, due process entitles the prisoner to a hearing to determine whether a belated postconviction motion should be permitted. Id.

Previous to the Steele decision, the Second District in Diaz v. State, 724 So. 2d 595, 596 (Fla. 2d DCA 1998), had held that Lambrix mandated a criminal defendant be afforded no relief in the form of a belated appeal based on counsel's failure to file a notice of appeal from the denial of a postconviction motion, upon timely request by a defendant. In denying Rogers' habeas corpus petition, the district court sub judice relied upon Diaz but certified as a question of great public importance whether Lambrix, when considered in light of Steele forecloses provision for a belated appeal when the notice of appeal was not timely filed due to inef-

fectiveness of counsel in the collateral proceeding. Rogers v. State, 752 So. 2d 657 (Fla. 2d DCA 2000).

This Court's decision in Steele does not compel provision for a belated postconviction appeal where collateral counsel is charged with, or even concedes, that a timely postconviction appeal was requested and not instituted. More particularly, the Steele holding does not extend to the situation where a criminal defendant charges his counsel with misleading advice in the taking of a postconviction appeal. The differences in both the belated collateral remedy sought and the complaints by Steele and Rogers compel a different result in this case.

Rogers stands in a different posture than a defendant such as Steele. Rogers does not allege that he was denied access to a rule 3.850 motion due to attorney error. As noted, this Court in Steele amended rule 3.850 to expressly make retained counsel's failure to timely file a postconviction motion an exception to the two-year time limitation. Unlike Steele's situation, Roger's retained counsel filed a timely rule 3.850 motion.

Moreover, Rogers, unlike Steele, charges his counsel with misadvice. The summary ruling in Rogers' case rests upon this state's procedural rules precluding collateral litigation of issues which were or should have been raised, if at all, on appeal. Due process concerns do not extend to review of the propriety of counsel's advice to forego an appeal of the summary order on Rogers' postconviction claims. The Due Process Clause of the United States

Constitution does not guarantee that a collateral movant such as Rogers have effective assistance of counsel to appeal a state postconviction ruling.

The Fourteenth Amendment guarantees a criminal defendant the right to counsel on first appeal as of right. See Douglas v. California, 372 U.S. 353, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963). This guarantee has been interpreted to require that counsel pursuing a first appeal render effective assistance in Evitts v. Lucey, 469 U.S. 387, 391-392, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985).[3]

In contrast, the United States Supreme Court has held that the Fourteenth Amendment does not require appointed counsel to indigent defendants seeking discretionary, second-tier, appellate review. Wainwright v. Torna, 455 U.S. 586, 71 L. Ed. 2d 475, 102 S. Ct.

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[3]The United States Supreme Court has consistently pointed out that there is no federal constitutional right of criminal defendants to a direct appeal. See Evitts v. Lucey, 469 U.S. at 393, 105 S.Ct. at 834 ("Almost a century ago the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors."). Accord Abney v. United States, 431 U.S. 651, 656, 97 S.Ct. 2034, 2038-39, 52 L.Ed.2d 651 (1977); Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974).

In State v. Creighton, 469 So. 2d 735 (Fla. 1985), this Court stated that there was no right to appeal set forth in our state's constitution. In Amendments to the Florida Rules of Appellate Procedure, 696 So.2d 1103, 1104 (Fla. 1996), this Court receded from Creighton to the extent that the Court construed the language of article V, section 4(b) as a constitutional protection of the right to appeal. Stating 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, the Court concluded that legislature could reasonably condition the right to appeal upon the preservation of a prejudicial error or the assertion of a fundamental error. Id. at 1104.

1300 (1982)(holding that since, under Ross v. Moffitt, 417 U.S. 600, 41 L. Ed. 2d 341, 94 S. Ct. 2437 (1974), the appellant had no constitutional right to counsel on a discretionary appeal, he was not deprived of effective assistance of counsel by his retained counsel's failure to timely file an application for certiorari in the Supreme Court of Florida).

In 1974, this Court held that an attorney's failure to seek a writ of certiorari or alternatively to notify his client of his right to apply for it does not constitute a violation of the client's right to appeal. In so holding, this Court specifically held that certiorari is limited to specific situations and is discretionary with the Court. See Rhome v. State, 293 So. 2d 761 (Fla. 1974). Thus, a criminal defendant in Florida has neither a state-based nor a federal constitutional right to claim a violation of his appellate rights when his attorney has failed to preserve his opportunity to seek discretionary review in this Court.

The United States Supreme Court has not interpreted the Due Process Clause to guarantee effectiveness of counsel on postconviction appeal. In Coleman v. Thompson, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), the United States Supreme Court rejected a federal habeas petitioner's contention that collateral counsel's late filing of a notice of appeal of the denial of his state habeas application was the result of attorney error of sufficient magnitude to excuse the default. The Court reasoned as follows:

> There is no constitutional right to an attorney in state post-conviction proceedings. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989) (applying the rule to capital cases). Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings. *See* Wainwright v. Torna, 455 U.S. 586, 102 S.Ct. 1300, 71 L.Ed.2d 475 (1982) (where there is no constitutional right to counsel there can be no deprivation of effective assistance). Coleman contends that it was his attorney's error that led to the late filing of his state habeas appeal. This error cannot be constitutionally ineffective; therefore Coleman must "bear [501 U.S. 753] the risk of attorney error that results in a procedural default."

Coleman, 111 S.Ct. at 2566.

In deciding that Coleman did not have a constitutional right to counsel on appeal of a state collateral determination, the Court in Coleman necessarily rejected the notion that due process principles require counsel in the taking of a collateral appeal thus:

> Coleman has had his "one and only appeal," if that is what a state collateral proceeding may be considered; the Buchanan County Circuit Court, after a 2-day evidentiary hearing, addressed Coleman's claims of trial error, including his ineffective assistance of counsel claims. **What Coleman requires here is a right to counsel on appeal from that determination. Our case law will not support it.**
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> In Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), and Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987), we declined to extend the right to counsel beyond the first appeal of a criminal conviction. **We held in Ross that neither the fundamental fairness required by the Due Process Clause nor the Fourteenth Amendment's equal protection guarantee necessitated that States provide counsel in state discretionary appeals where defendants already had one appeal as of right.** "The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to

> assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." 417 U.S., at 616, 94 S.Ct., at 2447. **Similarly, in Finley we held that there is no right to counsel in state collateral proceedings after exhaustion of direct appellate review.** 481 U.S., at 556, 107 S.Ct., at 1993-1994 (citing Ross, *supra*).
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> **These cases dictate the answer here. Given that a criminal defendant has no right to counsel beyond his first appeal in pursuing state discretionary or collateral review, it would defy logic for us to hold that Coleman had a right to counsel [501 U.S. 757] to appeal a state collateral determination of his claims of trial error.**

Coleman, 111 S.Ct. at 2568 (emphasis supplied).

In essence, Rogers asks this Court to hold that he has a guarantee of effective assistance of his retained counsel as a matter of due process to appeal a postconviction ruling. Because the Due Process Clause does not guarantee the right of counsel to take such appeal, however, due process does not guarantee the effectiveness of counsel, engaged or appointed, in taking, perfecting, or prosecuting a postconviction appeal. It would be illogical to hold that due process requires effective assistance of collateral counsel when due process does not guarantee counsel for the taking of a postconviction appeal in the first instance.

Although the decision in State ex rel. Butterworth v. Kenny, 714 So. 2d 404 (Fla. 1998), involved representation of a capital defendant in the civil context, this Court's reasoning offers support for the state's assertion that due process guarantees do not require extension of the right to effective representation in the taking of a postconviction appeal. Therein, the Court rejected the

contention that barring the Office of the Capital Collateral Regional Counsel (CCRC) from representing prisoners under sentence of death in civil litigation would run afoul of due process and equal protection as such would prevent it from filing and litigating petitions for writs of habeas corpus. This Court reasoned:

> As CCRC recognized at oral argument, both the United States Supreme Court and this Court have held that defendants have no constitutional right to representation in postconviction relief proceedings. Under the Sixth and Fourteenth Amendments to the United States Constitution, an indigent defendant is entitled to counsel at the state's expense at the trial stage of a criminal proceeding, Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and for the initial appeal from a judgment and sentence of the trial court, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). **That right, however, does not extend to postconviction relief proceedings. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987)(constitution does not require states to provide counsel in postconviction proceedings). As noted by the United States Supreme Court in Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974), there is a distinction between the need for counsel in preconviction proceedings and the need for counsel in postconviction proceedings. That distinction is based on the fact that during the initial proceedings, the State is presenting witnesses and arguing to a jury in an attempt to strip from the defendant the presumption of innocence; whereas, once the conviction and sentence become final, the presumption of innocence is no longer present and the defendant, in seeking postconviction relief, acts to "upset the prior determination of guilt."** 417 U.S. at 611, 94 S.Ct. at 2444.
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> This distinction holds true even where the defendant has been sentenced to death. Although the United States Supreme Court has stated that death is different and although no person has been executed in this state in recent years who has not had counsel at the time of execution, that Court has determined that **there is no right to counsel for postconviction relief proceedings even where a defendant has been sentenced to death.** *See* Murray v. Giarratano, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1

(1989) (holding that Finley applies to inmates under sentence of death as well as to other inmates). *See also* Jones v. Crosby, 137 F.3d 1279 (11th Cir. 1998). As the Supreme Court stated in Murray, "[t]he additional safeguards imposed by the Eighth Amendment at the trial stage of a capital case ... are sufficient to assure the reliability of the process by which the death penalty is imposed."

492 U.S. at 10, 109 S.Ct. at 2770. *See also* Hill v. Jones, 81 F.3d 1015, 1025 (11th Cir. 1996)(no constitutional right to postconviction relief counsel in this circuit; ineffective assistance of postconviction relief counsel not cognizable claim); Lambrix v. State, 698 So.2d 247, 248 (Fla. 1996)(based on Murray, claims of ineffective assistance of postconviction counsel do not present a valid basis for relief), cert. denied, --- U.S. ----, 118 S.Ct. 1064, 140 L.Ed.2d 125 (1998). **All that is required in postconviction relief proceedings, whether capital or non-capital, is that the defendant have meaningful access to the judicial process.** Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) (furnishing access to adequate law libraries or adequate assistance from persons trained in the law may fulfill a State's obligation to provide prisoners' right of access to courts), disapproved in part by Lewis v. Casey, 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (Bounds disapproved to extent it can be read to require state to enable prisoner to discover grievances and litigate effectively once in court; state need only provide inmates with tools needed to attack sentences directly or collaterally).

Id., 714 So. 2d at 408.[4] (emphasis added)

If then, due process is satisfied by providing meaningful access to the courts in the postconviction setting, it can be logically concluded such concern is fully satisfied in furnishing a

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[4]This Court then pointed out that like most other states, Florida, to ensure the credibility and constitutionality of its death penalty process, has provided postconviction representation only in cases where the defendant has been sentenced to death. "This statutory right to representation acts to ensure meaningful access to the courts in a complex area of the law and to ensure that our death penalty process is constitutional." Id., 714 So. 2d at 408.

noncapital defendant the opportunity to raise his claims for relief in a rule 3.850 motion, the state's collateral remedy for assaulting a state conviction. The Steele decision affords defendants just such access where an attorney has neglected to file a timely 3.850 motion despite his agreement to do so. It does not offend due process to draw the line at that point. "Meaningful access" does not require that a noncapital postconviction movant, who is not guaranteed appointed counsel by our state or federal constitution, statutes, or rules at the appellate stage of the postconviction process, have a guarantee of effective assistance of counsel in taking or advocating a claim for relief in a collateral appeal.

Rogers argues that he should be entitled under due process considerations enunciated in Steele to have his petition for a belated appeal granted. "The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages.'" Ross v. Moffitt, 94 S.Ct. at 2444. That Florida provides a further vehicle for collateral review does not automatically mean that the right to effective counsel engages in the continuing quest for collateral relief on appeal. It suffices that Florida treats indigent movants and those with retained counsel alike in gaining access by affording equal access to a collateral appeal. See Ross v. Moffitt, 94 S.Ct. at 2444 ("Unfairness results only if indigents are singled out by the State and denied meaningful access to the appellate system because of their poverty.").

Although Rogers likens his case to situations where the defendant was not apprised of the order or the right to appeal, Rogers does not complain that he was not informed of his right to appeal. Cf. Darden v. State, 588 So. 2d 275 (Fla. 2d DCA 1991)(belated appeal was granted where the order denying postconviction relief failed to inform the petitioner of the right to appeal within 30 days). Nor does Rogers allege in his petition that he was not aware of the order within the time for appeal. Cf. Hildebrand v. Singletary, 666 So. 2d 274 (Fla. 4th DCA 1996)(petitioner did not, through no fault of his own, file a timely appeal because he did not receive a copy of the order denying his postconviction motion in a timely manner.)

While a defendant who is not informed of an order or the right to appeal cannot be said to have meaningful access to the appellate court if he is unaware of such access or of the order within the time for appeal, a defendant who is aware of the right of appeal and the order within the time for appeal, has been furnished meaningful access to appellate review. Rogers claims he has been denied an appeal by faulting counsel's advice not to appeal and failing to apprise him of the procedures for undertaking an appeal as a pro se prisoner. Such allegations, however, do not implicate the same due process concerns as presented by a defendant who is not informed of an adverse order or of the right to appeal. Since there is no right to counsel on postconviction appeal or to take such appeal in the first instance, due process standards do not

guarantee an unsuccessful rule 3.850 movant have effective representation on whether to appeal or how to pursue the appeal as pro se litigant.

Moreover, the fact that a movant has retained counsel in a rule 3.850 proceeding does not elevate the subsequent taking of a collateral appeal to due process dimensions. A movant who had been afforded the opportunity to attack his conviction or sentence in a postconviction motion, either pro se or through counsel, has not been denied access to the state's collateral remedy of rule 3.850. Requiring an unsuccessful movant to bear the risk of any attorney error in progressing through the appellate stage of collateral process does not offend due process. This is especially true, where, as here, the defendant does not allege and show that his postconviction claims were so complex as to require the assistance of counsel.

Placing the risk of attorney omission upon a collateral movant's shoulders after a 3.8850 motion has been birthed does not run afoul of this Court's decisions holding that appointment of counsel may be required by due process considerations for an evidentiary hearing if the issues are complex and require substantial legal research. See Graham v. State, 372 So. 2d 1363 (Fla. 1979); State v. Weeks, 166 So. 2d 892 (Fla. 1964). See also, Russo v. Akers, 724 So. 2d 1151, 1153 (Fla. 1998)(construing §924.066(3), Fla.

Stat. (Supp. 1996),[5] to mean that there is no statutory right to counsel but does not preclude the appointment of counsel when constitutionally mandated under Weeks and Graham). The due process considerations regarding the conducting of a complex evidentiary hearing in the circuit court do not apply to the decision whether to undertake a collateral appeal, and to the perfecting of such. More particularly, it cannot be said that appealing a summary 3.850 order is so complex as to require appointment of counsel in order for due process to be satisfied. Then, no attendant effective assistance guarantees flow in taking of a collateral appeal.

Furthermore, at the appellate stage of the postconviction process, there are no longer the same concerns as with the direct review of a conviction which, when final, strips the defendant of the presumption of innocence. By the time of entry of a postconviction order, the movant has been afforded an opportunity to have a jury trial, to direct review of his conviction, and to institute a rule 3.850 proceeding. In the case where a motion is summarily denied, as here, a movant is not required to file a brief on appeal. See Fla.R.App.P. 9.140(i). And, in the case where an evidentiary hearing has been afforded, the due process concerns regarding presentation of witnesses and evidence in a complex hearing do not apply once the hearing is concluded and the case is ripe

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[5]§924.066(3), Fla. Stat. (Supp. 1996), provides that "[a] person in a noncapital case who is seeking collateral review under this chapter has no right to a court-appointed lawyer."

for appeal.[6]

Contrary to Rogers' argument, the district court in Diaz v. State, 724 So. 2d 595 (Fla. 2d DCA 1998), properly relied on Lambrix to hold that relief by way of belated appeal based on ineffectiveness of counsel was not appropriate in the postconviction setting. With regard to the taking of a collateral appeal, there are compelling policy considerations in favor of adhering to Lambrix's holding that claims of ineffective assistance of postconviction counsel do not provide a basis for relief. The credibility of the criminal justice system depends upon both fairness and finality. See Johnson v. State, 536 So. 2d 1009, 1011 (Fla. 1988). Given no boundary on expansion of a "due process right to collateral counsel" doctrine to a "due process right to effective collateral counsel," there can be little doubt movants will soon be making a myriad of claims of ineffective assistance of postconviction counsel in connection with undertaking a collateral appeal and the prosecution thereof, adding a new tier of relief.[7]

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[6]By this, the state does not suggest in any way that advocacy at the collateral appellate stage is necessarily simple or straightforward. That, the state contends, is not the lens through which the court should view due process to be afforded in the collateral quest to upset a final conviction. Rather, the question is whether the defendant is deprived of meaningful access to the court unless he is given the right of counsel. If the assistance of counsel is not guaranteed to take a collateral appeal and there is no need to present witnesses or evidence at the appellate stage of the collateral process, then due process considerations do not compel an extension of the right to effectiveness of counsel to the taking and perfecting of a collateral appeal.

[7]

For instance, one can, with modest foresight, envision the burden upon our district courts with such claims as the adequacy of collateral counsel's compliance with Anders requirements. Cf. Grubbs v. Singletary, 892 F.Supp. 1484 (M.D. Fla. 1995) (counsel on direct appeal deficient in failing to comply with Anders requirements), reversed, 120 F.3d 1174 (11th Cir. 1997), cert denied, 118 S. Ct. 1388, 140 L. Ed. 2d 647 (1998). The fundamental fairness concerns in Steele do not dictate that such burden be assumed when there is no constitutional guarantee of effective assistance of counsel for an unsuccessful movant seeking to upset a final conviction at the appellate stage of the postconviction proceedings.

It is thus both reasonable and prudent to conclude that due process guarantees are not violated by requiring a postconviction movant to bear the risk of attorney error in connection with taking, perfecting, and prosecution of an appeal of a postconviction order. This is particularly true in the case of a movant, such as Rogers, who has been afforded both direct review and an opportunity to challenge his conviction in a timely rule 3.850 motion. Under such circumstances, due process guarantees of the state and federal constitutions are fully satisfied by the state's furnishment of the remedy of rule 3.850. That attorney error hinders a postconviction movant's further pursuit of relief from his conviction or sentence in the state appellate process does not mean that there was insufficient meaningful access accorded to satisfy due process guarantees. In Rogers' case, his complaint regarding the propriety of

private counsel's advice on the matter of an appeal of the postconviction order does not implicate due process concerns and is foreclosed by Lambrix.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Respondent respectfully requests that this Honorable Court decline jurisdiction, or alternatively, approve the district court decision and answer the certified question in the affirmative.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Loren D. Rhoton, Rhoton & Hayman, P.A., 412 Madison Street, Suite 1111, Tampa, Florida 33602 this 31ST day of May, 2000.

COUNSEL FOR RESPONDENT