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IN THE SUPREME COURT OF FLORIDA

ALBERT ROGERS
Appellant,

Case No.: SC00-258

v.

STATE OF FLORIDA,
Respondent.

_____ /

**PETITIONER'S REPLY TO
RESPONDENT'S BRIEF ON THE MERITS**

On Review from the District Court of
Appeal, Second District
State of Florida

Rhoton & Hayman, P.A.

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THE PETITIONER SHOULD NOT BE DENIED HIS
RIGHT TO FILE AN APPEAL FROM THE DENIAL OF
HIS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850
MOTION FOR POST CONVICTION RELIEF WHERE
HE REQUESTED THAT HIS ATTORNEY PURSUE SUCH
AN APPEAL AND, THROUGH NO FAULT OF THE
PETITIONER, COUNSEL MISINFORMED THE
PETITIONER AS TO THE NECESSITY FOR AN APPEAL
OF THE DENIAL OF THE 3.850; SUCH A RESULT
IS ESPECIALLY MANDATED WHEN POST CONVICTION
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CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel for Albert Rogers, Petitioner stated herein, hereby certifies that the instant brief has been prepared with 14 point Times New Roman type, a font that is spaced proportionately.

PRELIMINARY STATEMENT

In this Reply Brief Mr. Rogers will be relying on the Statement of Case and Facts as presented in his Initial Brief on the Merits. Mr. Rogers will also be relying on the exhibits included in the Appendix to his Initial Brief on the Merits. Each exhibit will be cited as "Ex." followed by the corresponding exhibit letter [i.e. (Ex. A)].

STATEMENT OF THE CASE AND FACTS

In this brief Mr. Rogers will rely on the Statement of Case and Statement of Facts as presented in the his Initial Brief on the Merits. Additionally, Mr. Rogers reiterates the following facts which were presented in his Initial Brief on the Merits:

Mr. Rogers did allege in his Petition for Writ of Habeas Corpus for Belated Appeal that he timely requested that his attorney appeal the summary denial of his 3.850 Motion. (Ex. A, p.3). Furthermore, it is apparent, and conceded by the Respondent, that counsel's response regarding Mr. Rogers' potential appeal, was written to Mr. Rogers by his counsel only after the thirty day period of limitation for filing a notice of appeal had lapsed.

SUMMARY OF THE ARGUMENT

Directly relevant to the instant case is this Court's ruling, in Steele v. Kehoe, 724 So.2d 1192 (Fla. 1999). In Steele this Court held that the more flexible standards of due process announced in the Fifth Amendment of the United States Constitution dictate that a post conviction movant should be allowed to file a belated 3.850 where retained counsel agreed to file a 3.850 Motion for Post Conviction Relief but failed to timely do so. The more flexible standard of due process should also be applied to allow a belated appeal where a post conviction movant asks retained counsel to file an appeal of the denial of a 3.850 motion and counsel misadvises the postconviction movant as to the availability or advisability of such an appeal. The above conclusion is even more clear when counsel's advice regarding an appeal has been given outside of the thirty day period of limitations for filing such an appeal.

ARGUMENT

ISSUE: THE PETITIONER SHOULD NOT BE DENIED HIS RIGHT TO FILE AN APPEAL FROM THE DENIAL OF HIS FLORIDA RULE OF CRIMINAL PROCEDURE 3.850 MOTION FOR POST CONVICTION RELIEF WHERE HE REQUESTED THAT HIS ATTORNEY PURSUE SUCH AN APPEAL AND, THROUGH NO FAULT OF THE PETITIONER, COUNSEL MISINFORMED THE PETITIONER AS TO THE NECESSITY FOR AN APPEAL OF THE DENIAL OF THE 3.850; SUCH A RESULT IS ESPECIALLY MANDATED WHEN POST CONVICTION COUNSEL'S ADVICE REGARDING THE FILING OF SUCH AN APPEAL IS GIVEN ONLY AFTER THE TIME FOR FILING SUCH AN APPEAL HAS LAPSED.

The holding of this Court in Steele V Kehoe, 724 So.2d 1192 (Fla. 1999), specifically acknowledges that a criminal defendant does not have a due process right, **pursuant to the Sixth Amendment of the United States Constitution**, to effective assistance of post conviction counsel. However, as was specifically addressed in Steele, “[postconviction] remedies are subject to the more flexible standards of due process announced in the Fifth Amendment, Constitution of the United States.” Steele citing State v. Weeks, 166 So.2d 892, 896 (Fla. 1964). And pursuant to said “more flexible” standard of due process, a post conviction movant will not be denied his right to file a 3.850 motion because his or her attorney agreed to but failed to file such a motion. Steele v. Kehoe, 724 So.2d 1192 (Fla. 1999).

The Respondent, in its Answer Brief makes much to-do about the fact that a post conviction movant is not constitutionally entitled to effective assistance of post conviction counsel. As such, the Respondent appears to be arguing that Mr. Rogers should not be granted a belated appeal of the denial of his post conviction motion based on the ineffectiveness of his counsel in failing to timely file his appeal. Mr. Rogers concedes such a fact, as did this Court in Steele. Mr. Rogers does not, for one moment argue that his counsel was ineffective and as a result, a belated appeal should be granted. Instead Mr. Rogers' position is that he should be granted a belated appeal pursuant to the more flexible standards of due process due to a movant in a post conviction case pursuant to the Fifth Amendment of the United States Constitution. Mr. Rogers wished to appeal the circuit court's summary denial of his 3.850 Motion for Post Conviction Relief and so informed his attorney in a timely manner. Mr. Rogers was then misinformed by his attorney, outside of the period of limitations for filing a notice of appeal, as to the availability and viability of such an appeal. Had Mr. Rogers been properly informed by his attorney as to the necessity of an appeal of the denial of his 3.850 Mr. Rogers would have pursued such an appeal pro se. Through no fault of his own, and due entirely to his attorney's dilatory procedural misadvice, Mr. Rogers has now been denied the right to appeal the denial of his 3.850. Such a denial is

fundamentally unfair and the more flexible standards of due process, as enunciated in Steele, dictate that Mr. Rogers should be granted a belated appeal.

Thus, it appears that the Respondent's position in the present case is completely misplaced. The Respondent, in its Answer Brief on the Merits does not in any manner meaningfully address the crux of the holding of Steele. A litany of cases is cited by the Respondent which stand for the proposition that a post conviction movant is not constitutionally entitled to effective assistance of post conviction counsel. Mr. Rogers has already conceded this point. There is no reason for him to attack the cases presented by the Respondent; They are good law. However, barely even acknowledged in the Respondent's Answer Brief is the significant holding that post conviction movants are entitled to the more flexible standard of due process as provided in the Fifth Amendment of the United States Constitution. Additionally untouched by the Respondent is the holding that said "more flexible standard" of due process would entitle a post conviction movant to file a belated post conviction motion where the movant has retained counsel to pursue such a motion and counsel, through no fault of the movant, fails to timely file such a motion. In Mr. Rogers' case he informed his attorney that he wished to appeal the summary denial of his 3.850 and counsel did not even reply to Mr. Rogers about such an appeal until January 18, 1999, after the thirty day

period of limitations for filing an appeal had expired. (Ex. B). By the Respondent's own admission, **Mr. Rogers' attorney did not even address the issue of an appeal of the 3.850 until after the time for such an appeal had lapsed.**

The Respondent attempts to argue that just because Steele grants a 3.850 movant the right to file a belated 3.850 (based upon counsel's failure to timely file such a motion) such a right should not be granted to a movant appealing the denial fo a 3.850. Once again the Respondent appears to misunderstand the import of Steele, stating "[t]hat Florida provides a further vehicle for collateral review does not automatically mean that the right to effective assistance of counsel engages in the continuing quest for collateral relief on appeal." (Answer Brief on the Merits at 15). Once again the Respondent confuses the Sixth Amendment right to effective assistance of counsel with the more flexible standard of due process announced in the Fifth Amendment of the United States Constitution. **The issue simply is not, as the Petitioner seems to argue, whether Mr. Rogers was due effective assistance of counsel on the appeal of his 3.850.** The issue is whether the more flexible standards of due process, as enunciated in Steele, apply to an attorney's failure, contrary to his client's instructions, to timely file a notice of appeal of the denial of a post conviction motion.

The untimely filing by an attorney of both a 3.850 and the notice of appeal of the denial of a 3.850 are extremely similar. In both situations the State has seen fit to provide the filing of such a vehicle as a matter of right. The appeal of the denial of a 3.850 motion for post conviction relief is not a discretionary appeal. Such an appeal is specifically provided for in Florida Rule of Criminal Procedure 3.850(g). As such, the State's attempt to distinguish between the importance of a 3.850 and the appeal thereof is unconvincing. If due process rights attach and provide that a post conviction movant should be allowed to file a belated 3.850 when retained counsel fails to timely file such a motion, said rights should be just as applicable to post conviction counsel failing to timely file a notice of appeal from the denial of a 3.850. It is all a part of the post conviction process and the due process rights delineated in Steele should apply.

Mr. Rogers timely requested that his attorney file a notice of appeal of the summary denial of Mr. Rogers' 3.850 Motion. After the time for such an appeal had lapsed, counsel responded to Mr. Rogers and informed him that an appeal was not advisable. Had Mr. Rogers been correctly advised by counsel, in a timely manner, as to the necessity of an appeal of the denial of his 3.850, Mr. Rogers would have proceeded with such an appeal pro se. As a result of post conviction counsel's tardy and inaccurate advice, Mr. Rogers' was denied his right to appeal

the denial of his 3.850. Mr. Rogers does not claim that he had a Sixth Amendment right to effective assistance of counsel regarding an appeal of the denial of his 3.850; Instead, he only proposes that had his counsel done one of the following two things, Mr. Rogers would have been able to pursue an appeal as he wished: either (1) file a notice of appeal in a timely manner (as was requested by Mr. Rogers); or, (2) respond to Mr. Rogers' request in a timely manner with proper advice as to the advisability and viability of an appeal of the denial of his 3.850. Had counsel done either of the above, Mr. Rogers would have pursued an appeal of the summary denial of his 3.850 Motion. However, as a result of counsel's untimely and inaccurate advice, no notice of appeal was ever filed on Mr. Rogers' behalf.

In its Answer Brief on the Merits the Respondent states: "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 place." (Respondent's Answer Brief at 12). Such a statement clearly demonstrates the Respondent's misunderstanding of the import of Steele. Pursuant to the Respondent's position, the rationale of Steele itself is "illogical." The requirements of due process under the Fifth Amendment, as addressed in Steele may be more flexible than the Respondent wishes, however, they have been

clearly enunciated by this Court. In a situation such as the instant case, Mr. Rogers' Due Process rights under the Fifth Amendment would clearly be violated if he were not at least allowed a belated appeal of the summary denial of his 3.850. Although Mr. Rogers did not have the right to effective assistance of counsel in his post conviction matters, Steele clearly dictates that Mr. Rogers should have at least been able to rely on counsel, pursuant to Mr. Rogers' request, to file a notice of appeal of the denial of Mr. Rogers' 3.850. Consequently, Mr. Rogers should be granted a belated appeal of the denial of his 3.850 motion.


CONCLUSION

Based upon the foregoing arguments and citations of authority, Mr. Rogers respectfully requests that this Honorable Court

1. Enter an Order granting Mr. Rogers a belated appeal of the denial of his Florida Rule of Criminal Procedure 3.850 Motion for Post Conviction Relief; and,
2. Grant any other relief as this Honorable Court deems just and proper.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing initial brief has been delivered by regular U.S. Mail this 6th day of June, 2000, to the Office of the Attorney General, 2002 North Lois Avenue, Tampa, Florida 33607-2367.


Loren D. Rhoton