IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO THE FLORIDA RULES
OF CRIMINAL PROCEDURE (THREE YEAR CYCLE)
CASE NO.: SC06-169: RULE 3.850
FLA. R. CRIM. P.
COMMENTS BY JAMES T. MILLER,
JACKSONVILLE, FLORIDA
_____/

I. INTRODUCTION - STATEMENT OF INTEREST

The undersigned counsel, James T. Miller, offers the following comments to the proposed amendments to Rule 3.850 Fla. R. Crim. P. The undersigned has practiced criminal law for 26 years and for the last twelve (12) years had handled appeals and post-conviction cases. During that time, counsel has handled several hundred 3.850 motions. This experience has given counsel a perspective that he hopes will corroborate his comments and suggestions to the proposed amendments to rule 3.850. The undersigned counsel, as a Board member with the Florida Association of Criminal Defense Lawyers (FACDL), has discussed these comments with the co-chair of the Amicus Committee of FACDL, Michael Ufferman. Mr. Ufferman advised the undersigned that he concurs with these comments. The undersigned will address the proposed amendment section by

section to avoid confusion and duplication.

As a general matter, counsel understands and appreciates the desire to clarify and streamline, if possible, the procedures under Rule 3.850. However, most 3.850 motions are filed by pro-se

Defendants. The undersigned counsel has often represented pro-se Defendants who previously filed a pro-se 3.850 motion. In most every one of those cases, counsel filed amendments to the motion - in many of those instances, counsel was able to eliminate meritless allegations or combine or streamline other issues. As counsel will delineate below, some of the proposed amendments may not streamline the 3.850 motion procedures and may actually prevent counsel from amending a pending motion.

II. SPECIFIC COMMENTS - SECTION BY SECTION

A. Rule 3.850(c) contents of motion:

(1) a description of the judgment or sentence under attack...

The additions of the phrase **description** could be misleading. Counsel assumes that the intent of this addition is to describe the actual judgment (nature of the offense) and the actual sentence. Counsel understands that a specific case number may involve separate judgments and sentences. If the

intent of the addition is to name the specific offense and sentence under attack, then the amendment should so state. The addition also appears to include a **description** of the court which rendered the judgment and sentence. Counsel is unsure of what the intent is for this amendment as to a description of the Court. The appropriate case number and the specific offense and sentence should be sufficient to describe the judgment and sentence. To avoid future questions of litigation over this issue, counsel suggests that the phrase "description" be further defined.

B. Rule 3.850(c)(6) amendment as to an allegation of failure to call witnesses.

The undersigned counsel supports this amendment. Case law already requires the allegations now included in the proposed amendment.

C. Rule 3.850(d) amendments.

The undersigned counsel respectfully suggest that this proposed section will cause many problems and it may violate due process principles. The undersigned counsel supports the requirement that the Court **shall** allow a Defendant to cure a procedural defect. Counsel also supports the general proposition that the Court **shall** allow an amendment for the

omission of a material allegation. The problem with the proposed amendment is that a material allegation may include a **substantive** allegation, not a procedural defect.

Many pro se Defendants may not understand or appreciate the often subtle difference between substantive and procedural allegations. In the context of the proposed amendment, the phrase, material allegation is vague and overly broad. The lack of a specific definition would not be fatal except that the proposed rule allows a dismissal of the motion on the **merits**, after the Court grants the movant at least thirty (30) days to correct the motion. The proposed amendment only requires a **general** description of the motion's deficiency. If pro se Defendants do not understand the "general description of deficiency", then the Court could later dismiss the motion on the merits due to a technical pleading deficiency. If a Court is going to dismiss a petition for a pleading deficiency then the Court should **specifically** (not generally) identify the pleading deficiency so the party may correct it.

Under any notion of fairness and due process, the trial court **must** specifically identify the deficiency because the proposed amendment states that the order will be a non-final, nonappealable order. The language in this section is unclear

but the context of the phrases seem to indicate that the order of dismissal is a non-final, nonappealable order. Does this mean that if a Defendant fails to amend the motion sufficiently to correct the order that the Circuit Court may dismiss the case on the merits and that the order is a nonappealable order? If this is the intent of the proposed amendment, then the proposed amendment would violate due process.

If a Defendant does not correct the deficiency to the satisfaction of the trial court, then apparently the Court could dismiss the order without recourse. Rule 3.850 is a descendant of Rule 1 of the Rules of Criminal Procedure and these rules are descendants of the common law writ of habeas corpus. If counsel is correct in this possible interpretation of the proposed amendments, a Defendant may not be able to have his case heard on the merits because of a judgment by a trial court that there is a deficiency that the Defendant did not correct. If the trial court is wrong in its judgment of what is, for example, a material allegation, then the proposed amendment appears to foreclose an appeal of that decision. If the intent is to require the correction of a technical pleading requirement (like the failure to sign the motion under oath), then the proposed amendment may make sense. However, an application of the

proposed amendments to defects in material allegations (which include substantive allegations of pleading as to prejudice) could result in grave injuries to pro se Defendants without the right to appeal.

The undersigned counsel respectfully suggests that the **30** day rule for amendments is grossly unfair and unrealistic for pro se Defendants. Given the vagaries of prison mail and library systems, 30 days may not be enough time for a pro se prisoner to get the order and comply with it within 30 days. The time period should be at least 60 days. 30 days may be appropriate for counsel but it is unfair as to pro se Defendants.

D. Rule 3.850(3) - a motion filed under this rule shall be immediately delivered to the assigned Judge along with the court file.

The undersigned counsel endorses this amendment. This provision is a significant improvement over the current system where often long periods of time pass before the trial court gets the motion and its attendant court file. This provision will most likely help reduce the length of time it takes to adjudicate a Rule 3.850 motion.

E. Rule 3.850(g) successive motions.

The undersigned counsel respectfully submits that the proposed amendments in subsection (g) are the most troublesome of the proposed amendments. The undersigned counsel will specifically address the individual sections of subsection (g) that require discussion or explanation. The proposed amendment provides that if a movant wishes to alleged new or different grounds while the original motion is pending, the movant shall file a motion to amend, attaching the proposed amendment, and alleging good cause why the new ground was not included within the motion.

The undersigned counsel does not understand the need to ask for permission to amend the motion **prior** to any ruling by the Court. If the trial court has not yet ruled upon the sufficiency of the motion or requested a response from the State, there is simply no prejudice to the State nor delay to a disposition of the motion, if the Defendant offers an amendment to the motion. The undersigned counsel has represented many clients who have filed a 3.850 motion. At the time the Defendant hires the undersigned counsel, the trial court may not have yet ruled upon the motion. Counsel then often files an amended motion which most often results in the reduction of the issues. Counsel many times deletes invalid grounds. Counsel

has never had the trial court decline to prevent counsel to file the amended motion.

Once a Defendant files a motion that invokes the subject matter jurisdiction of the trial court, a trial court has the inherent power to control amendments to the motion. Florida courts have previously held that courts should freely/liberally grant leave to amend. Again, if the Defendant files its amendment before a ruling by the Court or a response by the State, then there is simply no prejudice to any party.

Even if the good cause requirement is necessary, the proposed rules do not define that term. Given the practical realities that exist for pro se Defendants, the proposed rules should define good cause or include a comment that Courts should liberally define good cause.

The undersigned counsel certainly understands the need to avoid piece-meal litigation. However, the undersigned counsel often amends a pro se motion. Is an amendment offered by counsel good cause? What does constitute good cause? In counsel's experience, both pro se and motions filed by counsel may not be ruled upon for a year or two after the filing of the motion. The undersigned counsel has personally had many cases that are pending for **years**. Sometimes, based upon further

investigation or new developments in the law, these motions are amended several times. Counsel sees no need for a good cause requirement before any ruling. Counsel agrees that after an initial ruling or a response by the State, then the Defendant must show cause for an amendment. To the undersigned counsel, the good cause requirement appears to be an unintended trap for pro se Defendants. If the good cause requirement remains in the proposed amendments, then good cause should be defined to include the appearance of counsel, a new development in the law or the discovery of new grounds (legal or factual) not previously known. Otherwise, this section will act as a draconian measure that may very well result in meritorious claims not being considered by trial courts.

The undersigned counsel is very much aware of how pro se 3.850 motions can add to congestion in court dockets. The proposed subsection about amendments will not solve this problem. Prior to the proposed amendment, Rule 3.850 motions prohibited successive motions not successive grounds. By definition, a motion or ground cannot be successive until a ruling by the Court. Florida courts and the rule itself suggests that except where otherwise provided, the Rules of Civil Procedure will govern 3.850 proceedings. See Saucer v.

State, 779 So.2d 261 (Fla. 2001); State v. White, 470 So.2d 1377 (Fla. 1985) (3.850 procedures governed by rules in civil actions). The Rules of Civil Procedure provide for liberal granting of motions to amend initial pleadings. See Palm v. Taylor, 929 So.2d 566 (Fla. 2d DCA 2006); Rule 1.190(b) Fla. R. Civ. P. The same rules should apply to 3.850 motions. Liberal construction of the rules should apply even more to 3.850 motions, given the fact that most such motions are filed pro se.

The undersigned counsel also questions the proposed amendment which requires leave to add a ground after the two year period. If a Defendant timely files the motion, then the Defendant has involved the subject matter jurisdiction of the Court. There is no compelling reason to deny an amendment after the two year if the Court has not yet ruled upon the motion. Under this proposed amendment, counsel would not be able to amend (add a new or different ground) to the motion if the two year period has passed. This requirement is fundamentally unfair. Counsel believes that a **laches** provision would be more appropriate than a blanket rule that requires proof of an exception to the two year period under subsection (b) of Rule 3.850.

The undersigned counsel understands the possible need to

control the number of motions/amendments to a motion. Counsel also understands that some pro se Defendants do abuse the process by the filing of multiple and successive motions. However, the proposed amendments do not strike a proper balance between the need to have an orderly administration of justice and the rights of Defendant to challenge their convictions. The undersigned counsel respectfully suggests that the following procedures would better eliminate any problems in the disposition of 3.850 motions:

Trial courts must rule upon 3.850 motions as soon as practically possible. Counsel understands the inherent problem with having a court, who has to handle new pending criminal cases, handle cases previously disposed of by trial or plea. However, a quick review of the motion and initial disposition would eliminate some of the time problems discussed above by counsel. In counsel's experience, trial courts often do **not** require a response by the state even though the rule requires such a response. Trial courts could also eliminate some of the problems discussed above, if the Court would appoint counsel in cases that have complex multiple issues. Courts have appointed the undersigned counsel in such cases and counsel has most often amended the 3.850 motions. Such amendments most always results

in the reduction of the number of issues in the motion.

III. Conclusion.

The Supreme Court should **not** adopt the amendments objected to by the undersigned counsel as outlined above. The undersigned counsel resolutely believes that the proposed amendments will **not** improve efficiency or fairness in 3.850 proceedings. Counsel also resolutely believes that the proposed amendments will result in a great deal of litigation over the undefined or ambiguous terms in the proposed amendments. The proposed amendments will **not** have their intended effect - the proposed amendments will only add to the delay and confusion which is already sometimes inherent in 3.850 proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail on this 10th day of August, 2006 to: George E. Tragos, 600 Cleveland Street, #700, Clearwater, Florida 33755-4158; and Honorable O.H. Eaton, Jr., 101 Bush Boulevard, Sanford, Florida 32773.

James T. Miller