

IN THE SUPREME COURT OF FLORIDA

**IN RE: AMENDMENTS TO THE FLORIDA
RULES OF CRIMINAL PROCEDURE
(THREE YEAR CYCLE)**

Case No. SC06-169

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**COMMENTS OF DAVID A. DEMERS
CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT
ON PROPOSED AMENDMENTS TO
RULE OF CRIMINAL PROCEDURE 3.850**

Pursuant to the Florida Supreme Court's invitation for comments on the proposed amendments to Rule of Criminal Procedure 3.850 Motion to Vacate, Set Aside, or Correct Sentence, The Honorable David A. Demers, Chief Judge of the Sixth Judicial Circuit, files this memorandum. This comment is offered in opposition to the proposed amendment to Rule of Criminal Procedure 3.850(d) requiring a thirty day cure period for procedural defects and to the proposed amendment to Rule of Criminal Procedure 3.850(e) requiring court files be delivered to the judge along with the motion. This comment is offered in support of the proposed amendment to Rule of Criminal Procedure 3.850(g) requiring a movant to file a motion to amend while an original motion is pending, rather than file a successive motion.

I. Factual Background

Rule of Criminal Procedure 3.850 was enacted in 1971 and has been amended several times. The purpose of Rule of Criminal Procedure 3.850 is to allow an offender to move to vacate, set aside, or correct a sentence within the two year period after his or her judgment and sentence become final. The Supreme Court Criminal Steering Committee and the Florida Bar's Criminal Procedure Rules Committee have requested that the Florida Supreme Court adopt the proposed amendments to Rule of Criminal Procedure 3.850.

II. Objections to Proposed Amendments to Rule of Criminal Procedure 3.850

A. The 30 day cure period creates an additional burden on the court and may prolong the process.

The proposed amendment to Rule of Criminal Procedure 3.850(d) would permit the movant to amend a motion to cure a procedural defect. It would require the court to issue an order generally describing the deficiency, granting the movant at least 30 days in which to file the amended motion, and informing the movant that failure to amend will result in the dismissal of the motion on the merits. This procedure is arduous and will prolong the process.

Currently, if a movant files a procedurally defective Rule 3.850 motion, the Sixth Judicial Circuit **dismisses** the motion without prejudice. In addition, the order specifically advises the movant why his or her motion has been dismissed. For example, when a movant fails to include an oath on a Rule 3.850 motion, the

movant is advised of the deficiency. This practice alerts the movant to the defect and allows him or her to file a corrected motion. Case law supports the practice of dismissing motions with procedural defects. See Murray v. State, 917 So.2d 989 (Fla. 3d DCA 2005); Morais v. State, 640 So.2d 1227 (Fla. 2d DCA 1994) Anderson v. State, 627 So.2d 1170 (Fla. 1993). The Morais court specifically encourages the practice of dismissing a procedurally defective motion without prejudice so that a defendant may refile without prejudice. Morais at 1228. The current procedure quickly addresses the procedural defects and places the burden on the movant to refile the motion in a timely manner. Many defective motions are correctly refiled.

This proposed change to Rule 3.850 seems to be in response to Nelson v. State, 875 So.2d 579 (Fla. 2004). The Nelson case deals with properly presenting a claim alleging ineffective assistance of counsel based on failure to call a witness. In the Nelson case, when the defendant failed to allege that a witness would have been available, the court found that he should have been granted leave to amend the motion within a specified time period. While the Nelson case may have motivated this proposed amendment, the case does not require the suggested approach and there are problems with the proposal.

1. The amendment to Rule 3.850(d) requiring the court to issue an order allowing the movant 30 days to correct his or her procedurally defective

motion requires the court to enter an additional order if the movant's defect is not cured.

As stated above, the judges in the Sixth Judicial Circuit correctly dismiss defective motions without prejudice and generally inform the movant of the procedural defect. Even if the movant is granted 30 days to correct a procedurally defective motion, the movant may fail to file an amended motion. In that case, the court will have to enter an additional order dismissing the motion. Therefore, in many instances, the court will be forced to enter two orders (an Order Granting Leave to Amend and an Order Dismissing the Motion) as opposed to one order that accomplishes the same purpose.

2. The amendment to Rule 3.850(d) requiring the court to issue an order allowing the movant 30 days to correct his or her procedurally deficient motion creates an unnecessary 30 day bottleneck.

The proposed amendment places the burden on the **court** to hold the movant's motion for an additional 30 days. Therefore, many cases that would be resolved at the outset will be placed in a holding pattern and then ultimately be dismissed for failure to file a sufficient motion or cure the procedural defect.

3. The amendment to Rule 3.850(d) requiring the court to issue an order allowing the movant 30 days to correct his or her procedural defect unnecessarily creates additional responsibility for the court and court staff who must keep track of a high number of pending cases for the additional 30 days.

Currently, the Sixth Judicial Circuit receives a high number of procedurally defective Rule 3.850 motions. Procedurally defective motions are dismissed

without prejudice in a prompt fashion. This practice allows the movant adequate time to refile his or her motion and gives the court the ability to quickly resolve the motion, while at the same time properly informing the movant of the procedural defect.

If the court is required to issue a formal order allowing 30 days for the movant to correct his or her defective motion, the court will have to monitor a high number of “pending” procedurally defective motions. This task will entail checking the docket on a regular basis, pulling files, and keeping copies of motions on hand in court offices. This may require additional staff and resources. As stated previously, many movants do not refile corrected motions. Therefore, the 30 day monitoring will be pointless in a number of cases.

4. The amendment to Rule 3.850(d) does not clearly define “procedural defect.”

The proposed amendment characterizes a procedural defect as “failing to have the motion verified or omitting a material allegation.” It is unclear what a procedural defect is in contrast to a facially insufficient claim. Rule 3.850(c) clearly defines the necessary content of a sufficient Rule 3.850 motion (i.e. oath, judgment and sentence under attack, etc.).

Nelson v. State, 875 So.2d 579, 584 (Fla. 2004) specifically sets forth the necessary pleading requirements for an ineffective assistance of counsel claim for failure to call a witness at trial. The Nelson court characterizes failure to comply

with these requirements in a Rule 3.850 motion as a “pleading defect.” Nelson at 584. Further, Nelson states that if the Defendant does not cure his or her pleading defect within the time allowed by the court, the court should **deny** the motion with prejudice. Id. Arguably, the Nelson court may have intended to merge procedurally defective motions and facially insufficient motions. But other authority suggests that the better position is that the Nelson court did not intend this merger.

Judges of the Sixth Judicial Circuit currently dismiss procedurally defective motions without prejudice and case law supports this practice. *See* Murray v. State, 917 So.2d 989 (Fla. 3d DCA 2005); Morais v. State, 640 So.2d 1227 (Fla. 2d DCA 1994) Anderson v. State, 627 So.2d 1170 (Fla. 1993). The Anderson court confirms the practice of dismissal of a motion without prejudice when a motion is procedurally defective (i.e. an unverified motion should be dismissed). Further, case law supports the summary denial of facially insufficient motions. *See* Griffin v. State, 866 So.2d 1 (Fla. 2003); State v. Pelham, 737 So.2d 572 (Fla. 1st DCA 1999); Ragsdale v. State, 720 So.2d 203 (Fla. 1998). The defendant bears the burden of establishing a prima facie case based upon a legally valid claim. Griffin at 9. Mere conclusory allegations are not sufficient to meet this burden and should be summarily denied. Id.

Specifically, case law supports **denial** of a facially insufficient claim and **dismissal** of a procedurally defective motion. Cabrera v. State, 721 So.2d 1190 (Fla. 2d DCA 1998). The Cabrera court found that the trial court should have denied a Rule 3.850 motion as facially insufficient rather than dismiss it on procedural grounds. *Id.* at 1191.

In light of current case law, the Sixth Judicial Circuit believes that there is still a difference between a procedurally defective motion and facially insufficient claim. If “procedural defect” is not clearly defined, the courts may be unable to determine if they should summarily deny a claim or grant a movant additional time to correct a procedural defect. Most likely courts will be forced to grant movants 30 days to correct procedural defects **and** facial insufficiencies, thereby greatly increasing the number of motions that will be held an additional 30 days before final disposition.

5. If a movant does not cure the procedural defect, it is unclear whether the amendment to Rule 3.850(d) requires that the dismissal be with or without prejudice.

The amendment simply states that if a movant does not correct a procedural defect after the 30 day period, the motion will be dismissed on the merits. The amendment is unclear whether the motion should be dismissed with or without prejudice. If the motion is dismissed without prejudice, the movant will have

another opportunity to refile his or her motion, thereby defeating the purpose of granting the 30 days in which to amend the original motion.

Further, Nelson v. State, 875 So.2d 579 (Fla. 2004) only adds to the confusion on the issue. The Nelson court instructs courts to **deny** (not dismiss) with prejudice motions that are not corrected after the court grants leave to correct a procedural defect. Nelson at 584. That seems inconsistent with the amendment.

6. The current procedure in the Sixth Judicial Circuit of dismissing without prejudice for procedural defects in 3.850 motions, accomplishes what the proposed amendment sets out to do without any of the disadvantages.

The procedure in the Sixth Judicial Circuit accomplishes what the proposed amendment sets out to do without any of the disadvantages. The current practice informs the movant of the procedural defect and gives the movant an opportunity to amend because the dismissal is without prejudice. If the movant fails to amend, no further order is required. The 30 day cure period significantly extends the 3.850 procedure and places additional responsibilities on the courts.

B. Requiring the Clerk of the Court to provide the file unnecessarily imposes a burden on the Clerk and the Court.

The proposed amendment to Rule of Criminal Procedure 3.850(e) would require that every motion filed under Rule 3.850 be immediately delivered to the assigned judge along with the court file. This would apparently include procedurally defective and facially insufficient motions, which exacerbates the problems of file maintenance discussed above. Mandatory delivery of the court

file unreasonably creates additional expenditures of resources in file management, file transportation, and file storage. In many instances, the court does not need the court file in order to resolve the motion. The shipment of the file with the motion to the judge creates unnecessary confusion within the judge's and judge's staff's office. There is no need to transport the court file in many cases.

III. Support of proposed amendments to Rule of Criminal Procedure 3.850

A. The specific requirements for alleging new or different grounds while a Rule 3.850 motion is pending should be set forth in the rule.

The proposed amendment to Rule of Criminal Procedure 3.850(g) would require a movant who wishes to allege new or different grounds while an original Rule of Criminal Procedure 3.850 motion is pending to file a motion to amend, rather than a second or successive motion. Rule 3.850 is not clear regarding allegations of new or different grounds while an original Rule 3.850 motion is pending in the court. The proposed amendment to Rule 3.850(g) clearly sets forth when and why a movant may allege a new or different ground.

These guidelines may be set forth in case law, but it is unreasonable to expect movants to be familiar with all Florida case law regarding raising additional grounds while a Rule 3.850 motion is pending. Pro se movants should have the requirements of a Rule 3.850 pleading set forth as clearly as possible in the new rule. This encourages the movant to initially file a facially sufficient amendment to his or her motion. Clearly setting forth the procedures for filing new or

additional grounds only streamlines the Rule 3.850 process for movants and courts alike.

CONCLUSION

For the reasons stated above, the Sixth Judicial Circuit respectfully requests that the Court deny the petition of the Supreme Court Criminal Steering Committee and the Florida Bar's Criminal Procedure Rules Committee to adopt the proposed amendments to Rule of Criminal Procedure 3.850(d) requiring a thirty day cure period for procedural defects and to the proposed amendment to Rule of Criminal Procedure 3.850(e) requiring that court files be delivered to the judge along with the motion. Further, the Sixth Judicial Circuit respectfully requests that the Court grant the petition of the Supreme Court Criminal Steering Committee and the Florida Bar's Criminal Procedure Rules Committee to adopt the proposed amendment to Rule of Criminal Procedure 3.850(g) requiring movants to file motions to amend while an original motion is pending rather than a successive motion.

Respectfully submitted this _____ day of August, 2006.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **COMMENTS OF DAVID A. DEMERS, CHIEF JUDGE OF THE SIXTH JUDICIAL CIRCUIT ON PROPOSED AMENDMENTS TO RULE OF CRIMINAL PROCEDURE 3.850** has been furnished to George Euripedes Tragos, Chair, Florida Bar’s Criminal Court Rules Committee, 600 Cleveland Street, Suite 700, Clearwater, Florida 33755-4158, and to The Honorable O.H. Eaton Jr., Chair, Supreme Court Criminal Court Steering Committee, 101 Bush Boulevard, Sanford, Florida 32773 by U.S. Mail, postage prepaid, this _____ day of August, 2006.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this memorandum was prepared using Times New Roman 14-point font in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

B. Elaine New