IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULE OF APPELLATE PROCEDURE 9.141 Case No. SC08-1226

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COMMENT OF APPELLATE COURT RULES COMMITTEE

The Appellate Court Rules Committee ("ACRC") referred this Court's opinion of September 25, 2008, to its Criminal Practice Subcommittee for study. That subcommittee met on October 3, 2008. A copy of the report is attached as **Exhibit 1**. The subcommittee identified the following suggestions or areas of concern:

1. New subdivision (c)(6) appears inconsistent with the current language in Rule 9.141(c), which was originally written to provide procedures for defendants seeking a belated direct appeal from a conviction or sentence. As a result, there may be unnecessary confusion, particularly among *pro se* defendants, as to the proper application of this rule. Specific inconsistencies include the following:

a. Every time the rule states "belated appeal," it should also state "belated discretionary review." *E.g.*, subdivisions (c)(2), (c)(3)(F), (c)(4)(A). Alternatively, generic "belated review" language could be

substituted throughout the rule, with an introductory statement on the scope of the rule indicating that "review" includes both direct appeals and discretionary review proceedings.

b. The title of the rule, as well as the heading for subdivision (c), should also state "belated discretionary review."

c. Subdivision (c)(3)(C) is written as if a "lower tribunal" is different from an "appellate court." In the context of a belated appeal, this is true, but in the context of belated discretionary review, it is not.

d. Subdivision (c)(4)(A) should provide that the petition must be filed within 2 years after expiration of the time for filing a notice to invoke discretionary jurisdiction of the Florida Supreme Court. Subdivision (c)(4)(A)(i) should have similar language.

e. It is unclear whether Rule 9.141 covers ineffective assistance of counsel claims for counsel handling cases where the Supreme Court grants discretionary review. If so, subdivision (c)(4)(B) needs to be amended as it only focuses on "direct review" and the "appeal". In addition, it is not clear whether a petition filed pursuant to the ruling in *Sims v. State*, 33 Fla. L. Weekly S698 (Fla. Sept. 25, 2008), is governed by subdivision (c)(4)(A) or (c)(4)(B), as such a petition would be both "alleging ineffective assistance of

appellate counsel on direct review" and seeking "belated discretionary review."

f. For belated discretionary review petitions, it does not seem necessary to serve the petition on the state attorney as required by subdivision (c)(5)(A).

g. Subdivision (c)(5)(D) should be amended to add "order granting a petition for belated discretionary review" and "notice to invoke discretionary jurisdiction of the Florida Supreme Court."

h. The allegations to be included in the petition set forth in rule 9.141(c)(3)(F) are not appropriate for a defendant belatedly seeking to invoke discretionary review as in *Sims*. Such a defendant could not simply assert that he or she requested the appellate attorney to seek discretionary review because *Sims* does not say that an appellate attorney has a constitutional obligation to seek review when requested, but only to advise the client of the appellate opinion in a timely manner and advise the client of the client's right to file a *pro se* notice seeking discretionary review. *See Sims* at S699 (finding "[a]ppellate counsel who fails to notify an incarcerated defendant-client in a timely manner that the district court has issued a decision on direct appeal … where that defendant may wish to seek discretionary review of that decision in this Court, falls 'measurably outside

the range of professionally acceptable performance,'" because "[u]nder the rules of appellate procedure, criminal defendants possess the right to *seek*, in a pro se capacity, discretionary review from a decision rendered by a district court on direct appeal").

2. The Court should consider adopting a "Court Commentary" to the amended rule, specifically citing to the Court's opinion in *Sims* in order to illustrate the context and scope of the new (c)(6) subdivision.

3. Even if the suggestions identified above are implemented, the Criminal Practice Subcommittee determined that subdivision (c) would benefit from a more comprehensive revision. The rule needs clarification, particularly since many of these petitions are filed by *pro se* defendants. As currently revised, the rule may be confusing to such litigants, partly because it addresses very different pleadings in one rule (petitions seeking belated appeals *to be* litigated as well as petitions presenting claims that a defendant was denied the effective assistance of counsel in appeals that *were* litigated). It may be best to construct a separate rule or subdivision addressing petitions seeking belated appellate actions. However, given the time frame for comments, there was insufficient time to craft an entire new proposal as part of this comment.

Therefore, unless directed otherwise by the Court, the ACRC will consider Rule 9.141(c) in its entirety to explore potential revisions. The ACRC's Criminal

Practice Subcommittee anticipates having specific proposals ready for consideration and approval by the full ACRC no later than the June 2009 Annual Meeting of The Florida Bar. Any proposals passed by the ACRC will be proposed in an out-of-cycle report – or as a supplemental comment in this proceeding if the Court prefers.

Respectfully submitted,

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CERTIFICATIONS

CERTIFICATION OF FONT COMPLIANCE

I certify that this report was prepared in compliance with the font requirements of *Fla. R. App. P.* 9.210(a)(2).

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was furnished by United States mail to Larry M. Wynn, DC#304976, Columbia Correctional Institute, 216 W.E. Correction Way, Lake City, FL 32025, on November 24, 2008.

/s/ Krys Godwin
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