IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.850 AND 3.851 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.141 AND 9.142
_____/

SC09-1733

COMMENTS OF FLORIDA PUBLIC DEFENDER ASSOCIATION

The Florida Public Defender Association, Inc. ("FPDA") respectfully offers the following comments on the proposed amendments to Florida Rule of Criminal Procedure 3.850 and Florida Rule of Appellate Procedure 9.141. The FPDA consists of the twenty elected public defenders, hundreds of assistant public defenders, and support staff. As appointed counsel for thousands of indigent criminal defendants annually, FPDA members have tremendous practical experience with the rules of procedure and are deeply interested that the rules promote fairness, integrity, and accuracy in the criminal justice system.

The FPDA agrees with the vast majority of the proposed amendments and thanks the members of the Belated Criminal Appeals Joint Committee ("Joint Committee"), and the three committees it represents, for all of their efforts in bringing these proposals before this Court. The FPDA has concerns with four aspects of the proposed rules, however. First the proposed rules create absolute

time limits on the exceptions designed to protect against manifest injustice. Second, the proposed rules require petitioners to swear to exact dates, often many months or years later. Third, the proposed rules contain formatting requirements that prize form over substance. And finally, the proposed rules expand the standard for the imposition of sanctions from frivolous or malicious pleadings to those that may be found to be merely successive or non-meritorious.

I.
THIS COURT SHOULD NOT ADOPT TIME LIMITS ON THE EXCEPTIONS TO THE TIME LIMITS IN RULE 9.141.

Florida Rule of Appellate Procedure 9.141(c)(4) requires that petitions for belated appeal in ineffective assistance of appellate counsel be made within two years of the date the notice of appeal should have been filed or the judgment and sentence became final. This Court expanded this rule to apply to petitions for belated discretionary review. *Sims v. State*, 998 So. 2d 494, 503 (Fla. 2008). The exception in the current rule requires an allegation of a "specific factual basis" that the petitioner did not have the requisite information to know to file the petition within the two years and could not have ascertained the information "by exercise of reasonable diligence."

The Joint Committee's proposal separates and reorganizes the rule. The Joint Committee's proposed rule for belated appeals, Rule 9.141(c)(5)(A), would read:

> (A) A petition for belated appeal shall not be filed more than 2 years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner was unaware a notice of appeal or a notice to invoke discretionary jurisdiction had not been timely filed or was not advised of the right to an appeal, and could not have ascertained such facts by the exercise of reasonable diligence. In no case shall a petition for belated appeal be filed more than 4 years after the expiration of time for filing the notice of appeal.

(Petition at 12).

The Joint Committee's proposed rule for belated discretionary review, Rule 9.141(c)(5)(B), would read:

> (B) A petition for belated discretionary review shall not be filed more than 2 years after the expiration of time for filing the notice to invoke discretionary review from a final order, unless it alleges under oath with a specific factual basis that the petitioner was unaware such notice had not been timely filed or was not advised of the results of the appeal, and that the petitioner could not have ascertained such facts by the exercise of reasonable diligence. In no case shall a petition for belated discretionary review be filed more than 4 years after the expiration of time for filing the notice to invoke discretionary review from a final order.

(Petition at 13).

The Joint Committee's proposed rule for ineffective assistance of appellate counsel claims, Rule 9.141(d)(5), is similar.

> **(5) Time Limits.** A petition alleging ineffective assistance of appellate counsel on direct review shall not be filed more than 2 years after the judgment and sentence becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel. In no case shall a petition alleging ineffective assistance of appellate counsel on direct review be filed more than 4 years after the judgment and sentence becomes final on direct review.

(Petition at 14-15).

Most of this language is existent in present rules. The Joint Committee, however, added the final sentence to all three of these provisions that "in no case" shall any of these pleadings "be filed more than 4 years after" the triggering event. The FPDA urges this Court to not adopt the final sentences from each of these three sections of the proposed rule.

Imposing an absolute four-year deadline with no exceptions will affect only those cases where an appellate court would otherwise grant the belated review because of extraordinary circumstances or to avoid an injustice. Generally, the two-year deadline applies. To be able to file after that deadline under the current Rule, the petitioner must show that s/he did not have the requisite information in a timely manner, and could not have obtained it by reasonable measures. *See* Fla. R. App. P. 9.141(c)(4)(A). This is a heavy burden, and few petitioners are able to meet it. Petitioners have to show some extraordinary circumstance, such as mental incompetence for the entire period, a detention by another state, the federal government, or another country and that did not allow adequate communications,

or extreme neglect or misrepresentations by counsel. Petitioners have to be able to prove their factual allegations in evidentiary hearings. *See Stanley v. State*, 12 So. 3d 778, (Fla. 1st DCA 2009) (describing procedure for relinquishing jurisdiction and appointment of a special master to resolve factual disputes relating to petitions for belated appeal).[1] Alternatively, petitioners have to show some manifest injustice, such as co-defendants receiving relief based on issues that their appellate counsel did not raise. *See McKay v. State*, 988 So. 2d 51 (Fla. 3d DCA 2008).

Most petitioners are unable to meet this strict test, and therefore for them the proposed absolute four-year deadline is irrelevant—their claims would fall under the present Rule. Appellate courts have no problem denying review under the present Rule when there has been no showing of extraordinary circumstances. *See Wilson v. State*, 845 So. 2d 236, 237 (Fla. 2d DCA 2003) (dismissing belated petition raising ineffective assistance of appellate counsel when petitioner had no explanation for ten-year delay).

Thus, the proposed four-year absolute deadline will affect only these rare cases where the petitioner can make the requisite showing and "exceptional circumstances have rendered the ordinary appellate process unavailable." *Rumph v. State*, 746 So. 2d 1249, 1250 (Fla. 1st DCA 1999); *see also Sims v. State*, 998 So. 2d at 511 (Cantero, J., dissenting) ("[I]n the

[1] Fraudulent claims are punishable by the Department of Corrections. *See Rivera v. State*, 943 So. 2d 973 (Fla. 5th DCA 2006).

criminal context, jurisdictional deadlines must sometimes give way to the defendant's constitutional rights. When defense counsel fails to file a timely notice of appeal, for example, constitutional rights may be implicated.). Because the current Rule's requirements already foreclose relief in most cases where the petitioner has not filed within the requisite two-years, the proposed four-year deadline acts to cut off review only in those cases where justice or the constitutional right to appeal would require an appellate court to hear the belated petition.

Of course, as time goes on, making this showing will become increasingly difficult. At five years, a presumption of laches attaches, but even then it is a rebuttable presumption. *McCray v. State*, 699 So. 2d 1366, 1368 (Fla. 1997). The proposed four-year deadline, however, is irrebuttable, without exceptions, and therefore absolute.

To allow for extraordinary cases and avoid manifest injustice, the present Rule contains an exception to the usual two-year deadline. The question for this Court is whether that exception should itself expire in an additional two years. The FPDA respectfully submits that this Court should not promulgate rules creating an absolute deadline beyond which appellate courts cannot remedy manifest injustice.

II.
THE PROPOSED RULES SHOULD BE MODIFIED TO RECOGNIZE THAT REMEMBERING AND PLEADING EXACT DATES IS OFTEN IMPOSSIBLE.

Under the present Rule governing non-capital cases, a person seeking a belated appeal must swear that s/he requested counsel to file an appeal. Fla. R. App. P. 9.141(c)(3)(F). The Joint Committee would expand that rule to capital cases and require in both instances that the petitioner swear to "the date of any such request." (Petition at 12, 17 (to be codified as Fla. R. App. P. 9.141(c)(4)(F), 9.142(b)(3)(A)).

Similarly, the Joint Committee would require that a "petition seeking belated discretionary review must state whether counsel advised the petitioner of the results of the appeal and the date of any such notification." (Petition at 12 (to be codified as Fla. R. App. P. 9.141(c)(4)(F)).

Few people remember exact dates for very long, at least without some contemporaneous document memorializing that date. Asking *pro se* defendants, many of whom are illiterate or have mental health issues, to do so is unrealistic. Swearing to a specific date in the distant past is also fraught with the potential for perjury charges, even for the most honest of persons.

The FPDA respectfully recommends that this Court address this reality by using language acknowledging that this date will be approximate at best. Instead of "the date," this Court could use phrases such as "the approximate date" or "the

date, as best as possible," or any other phrase acknowledging the imprecision of human memory.

III.
THE ONLY FORMAT REQUIRMENTS FOR MOTIONS FOR POSTCONVICTION RELIEF SHOULD BE LEGIBILITY AND LENGTH.

For years, FPDA members have slogged their way through all manner of *pro se* pleadings and communications and therefore understand the motivation of the Joint Committee in proposing that motions under Rule 3.850 "shall be typewritten or hand-written in block letters in black ink, double-spaced, with margins no less than 1 inch on white 8 1/2-by-11 inch paper." (Petition at 5). Nevertheless, the FPDA is also aware that, because there is no constitutional or statutory right to the assistance of counsel in filing such motions, these motions are often the best efforts by *pro se* defendants who have limited resources in prison and who may be functionally illiterate.

Under the proposed rule, the most famous *pro se* petition in Florida history would have been denied: Clarence Gideon wrote his petition to the United States Supreme Court in pencil. A motion is no less worthy if the margins are only a half inch, submitted on yellow legal paper, or written in a neat script or blue ink. Double spacing handwritten documents is often unnecessary, depending on the size of the lettering. Even the proposed formatting requirements do not guarantee

legibility—FPDA members have seen block printing in which the letters are either so small or elongated (or both) that reading it is difficult at best.

The Rule should require only that the document be legible and not overly long. Any other requirements turn the clerk's office into a format police, refusing to accept motions for format errors without any consideration of the merits from the court. The Joint Committee's proposal literally elevates form over substance. While such formatting requirements are minor burdens for lawyers with access to word processors and basic office supplies, they may be formidable barriers to indigent prisoners without those resources. If this Court make any changes, it should add only a general legibility requirement and page limit (the proposed 50-page limit seems appropriate). That way, the circuit court can review the motion and decide it on the merits. A motion would be returned only if it is so illegible that the circuit court cannot determine whether it has merit.

IV.
PLEADINGS SHOULD BE SANCTIONED ONLY IF THEY ARE REPETITIOUS OR MALICIOUS, NOT BECAUSE THEY ARE FOUND TO BE SUCCESSIVE OR NON-MERITORIOUS.

This Court has established that *pro se* litigants who abuse the judicial system may be sanctioned by barring any further *pro se* pleadings after they are given an opportunity to show cause why they should not be sanctioned. *See, e.g., State v. Spencer*, 751 So. 2d 47 (Fla. 1999); *Attwood v. Singletary*, 661 So. 2d 1216 (Fla. 1995). By statute, prisoners who do so may be reported to the Department of Corrections for discipline. *See* § 944.279(1), Fla. Stat. (2009).

The cases in which this Court has imposed such sanctions generally involve litigants who bring multiple, repetitious claims. *See, e.g., Steele v. State*, 14 So. 3d 221, 222 (Fla. 2009) (27 separate proceedings); *Pettway v. McNeil*, 987 So. 2d 20, 21 (Fla. 2008) (20 separate petitions); *Tate v. McNeil*, 983 So. 2d 502, 503 (Fla. 2008) (18 separate petitions); *Lanier v. State*, 982 So. 2d 626, 627 (Fla. 2008) (13 separate proceedings, plus two pending petitions for discretionary review); *Armstead v. State*, 817 So. 2d 841, 842 (Fla. 2002) (20 petitions and a host of filings so incomprehensible they never became cases); *Peterson v. State*, 817 So. 2d 838, 839 n.1 (Fla. 2002) (at least 40 petitions); *Jackson v. Florida Dept. of Corrections*, 790 So. 2d 398, 398 n.1 (Fla. 2001) (13 previous petitions and 11

subsequent petitions); *Rivera v. State*, 728 So. 2d 1165, 1165-66 (Fla. 1998) (at least 20 petitions in this Court, plus litigation in other courts).

This Court has also imposed such sanctions when litigants use their pleadings as forums for malicious or abusive language. *See Tasse v. Simpson*, 842 So. 2d 793, 794-95 (Fla. 2003) (pleadings featuring profanity and accusations of Nazi and hillbilly affiliations); *Martin v. State*, 747 So. 2d 386, 388-90 (Fla. 2000) (over 30 pleadings in this Court, many containing personal attacks and accusations that various members of the judiciary are goofy, dictators, or Jewish).

The existing case law is reasonable, but the Joint Committee's proposal goes further and allow sanctions not just for repetitious or malicious pleadings, but also for pleadings determined to be successive or non-meritorious. The proposed rule would establish the following standard:

> the court shall determine whether the pleading or paper was a successive motion for postconviction relief that attempted to litigate an issue or issues that were, could, or should have been raised either on direct appeal or in a previous motion, was so readily recognizable as devoid of merit on the face of the record that there is little, if any prospect whatsoever that it can succeed, or was otherwise, frivolous, malicious, or non-meritorious. If supported by the record, the court shall enter an order with written findings that a motion for postconviction relief is repetitious, frivolous, malicious, or non-meritorious, ...

(Petition at 7-8) (emphasis supplied).

In every legal action, one party's position is ultimately found to not have merit—the losing party. A wide gulf, however, separates unsuccessful positions from sanctionable ones.

Moreover, *pro se* litigants often fail to include important legal issues in their pleadings. Failure to raise issues that could or should have been raised in prior pleadings may be grounds to deny the motion as successive. *See* Fla. R. Crim. P. 3.850(f). An initial failure to include an issue, however, does not mean that the subsequent recognition of the issue and attempt to raise it are done in bad faith. *See, e.g., Stephens v. State*, 974 So. 2d 455, 457-58 (Fla. 2d DCA 2008) (granting relief on successive claim of sentencing error to avoid manifest injustice); *Davis v. State*, 953 So. 2d 612, 614 (Fla. 2d DCA 2007) (second 3.850 motion ruled not successive because prior 3.850 motion deemed to have really been a motion under Rule 3.800); *Mancebo v. State*, 931 So. 2d 928, 929 (Fla. 3d DCA 2006) (second 3.850 motion not successive because first such motion not decided on the merits). A litigant crosses the line into bad faith only by repetitious filings after being told that no relief will be forthcoming.

The purpose of sanctions is "to ensure every citizen's access to courts. To further that end, this Court has prevented abusive litigants from continuously filing frivolous petitions, thus enabling the Court to devote its finite resources to those who have not abused the system." *Rivera*, 728 So. 2d at 1166. Accordingly, the

standard this Court has followed is that there must be showing that the pleadings "substantially interfered with the orderly process of judicial administration." *Id.*; *see also Pettway*, 987 So. 2d at 22-23 (pleadings "hindered the ability of this Court to properly resolve those matters that are properly before it."); *Attwood*, 661 So. 2d at 1217 (finding "that Attwood's *pro se* activities before this Court have substantially interfered with the orderly process of judicial administration, and we therefore exercise our inherent authority to prevent abuse of the judicial system."); *Steele*, 14 So. 3d at 223-24 (finding that "Steele has repeatedly initiated frivolous proceedings, has abused the processes of this Court, and has hindered the ability of this Court to resolve other cases that are properly before it."); *Tate*, 983 So. 2d at 504 (finding that "Tate has abused the processes of the Court and has hindered the ability of this Court to properly resolve those matters that are properly before it."); *Lanier*, 982 So. 2d 628 (finding that "petitioner's repetitive filings raising criminal pretrial issues has hindered the ability of this Court to resolve those matters that are properly before the Court."); *Armstead*, 817 So. 2d 843 (finding that "Armstead's activities have sufficiently upset the normal procedures of this Court such that we find it necessary to exercise restraint upon her ability to file petitions in this Court.").

The first two paragraphs of proposed Rule 3.850(*l*) speak only of "frivolous or malicious" pleadings and are therefore consistent with this case law. The third

paragraph of that proposed subsection (quoted above), alters the case law to include pleadings found to be "non-meritorious" or "successive."[2] Thus, the proposal shifts the focus from protecting the resources of the courts to punishing litigants because a court finds a claim is not sustainable. The FPDA respectfully urges that this Court not adopt the third paragraph of proposed Rule 3.850(*l*) without excising all language suggesting that sanctions can be imposed merely because a claim in "non-meritorious, " "successive," or "could, or should have been raised" in an earlier pleading.

CONCLUSION

The FPDA believes that most of the proposed amendments are beneficial and should be adopted. The FPDA respectfully requests, however, that this Court not put time limits on curing manifest injustice by adopting time limits to the exceptions to the time limits for belated pleadings. The FPDA further urges this Court to recognize the realities of both human memory and the abilities and resources of indigent *pro se* litigants and not require petitioners to swear to exact dates or comply with any format requirements beyond legibility and length. Finally, the FDPA submits that the proposal to expand sanctionable pleadings

[2] This standard is so broad that a successful petitioner under Rule 3.850 could move for sanctions against the State (unless the State conceded error), because the State would have taken a position that was "non-meritorious."

beyond frivolous or malicious pleadings to include those that are merely successive or non-meritorious is contrary to law.

Respectfully submitted on behalf of the
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CERTIFICATES

I hereby certify that a true and correct copy of the foregoing comments has been furnished by mail to Fleur J. Lobree, Chair, Criminal Procedure Rules Committee, 1350 NW 12th Avenue, Room S-539, Miami, Florida 33136-2102, John G. Crabtree, Chair, Appellate Court Rules Committee, 328 Crandon Blvd, Suite 225, Key Biscayne, Florida 33149-1398, Judge O.H. Eaton, Jr., Chair, Criminal Court Steering Committee, Seminole County Courthouse, 301 North Park Avenue, Sanford, Florida 32771-1243, and Kent R. Putnam, Chief Career Attorney, First District Court of Appeal, 301 M.L. King Blvd., Tallahassee, Florida 32399-1850, this 14th day of December 2009.

I hereby certify that these comments were printed in 14-point Times New Roman.

BY:_____
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IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA RULES OF CRIMINAL PROCEDURE 3.850 AND 3.851 AND FLORIDA RULES OF APPELLATE PROCEDURE 9.141 AND 9.142
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SC09-1733

REQUEST FOR ORAL ARGUMENT

The Florida Public Defender Association, Inc., respectfully requests to participate in any oral argument scheduled in this matter.

CERTIFICATE OF SERVICE

I hereby certify that a copy of this request has been furnished by mail to Fleur J. Lobree, Chair, Criminal Procedure Rules Committee, 1350 NW 12th Avenue, Room S-539, Miami, Florida 33136-2102, John G. Crabtree, Chair, Appellate Court Rules Committee, 328 Crandon Blvd, Suite 225, Key Biscayne, Florida 33149-1398, Judge O.H. Eaton, Jr., Chair, Criminal Court Steering Committee, Seminole County Courthouse, 301 North Park Avenue, Sanford, Florida 32771-1243, and Kent R. Putnam, Chief Career Attorney, First District Court of Appeal, 301 M.L. King Blvd., Tallahassee, Florida 32399-1850, this 14th day of December 2009

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