

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

Case No. 09-1733

In accordance with the notice appearing in the November 15, 2009, edition of the Florida Bar News, the following comments are offered regarding the proposed amendments to the Florida Rules of Criminal Procedure and the Florida Rules of Appellate Procedure. These comments reflect the opinions of the undersigned and are not intended to represent the views of the Florida District Court of Appeal, First District, or any judges of that court.

1. AMENDMENT TO FLORIDA RULE OF CRIMINAL PROCEDURE 3.850(i).

The Committee proposes that Rule 3.850(i) include the following concluding sentence: “All nonfinal orders under this rule shall include a statement that ‘this order is a nonfinal, nonappealable order.’”

Comment. I suggest this sentence is inappropriate, likely to lead to problems, and should be omitted in its entirety. The appellate courts of this state determine whether an order is final, nonfinal, or otherwise appealable, not the trial courts.

2. AMENDMENT TO FLORIDA RULE OF APPELLATE PROCEDURE
9.141(c)(4)(F).

The Committee proposes that Rule 9.141(c)(4)(F) provide that the petition shall recite in the statement of facts “the specific acts sworn to by the petitioner or petitioner’s counsel that constitute the basis for entitlement to belated appeal or belated discretionary review. A petition seeking belated appeal must state whether the petitioner requested counsel to proceed with the appeal and the date of any such request. 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.”

Comment 1. This rule was first adopted in 1996 as Rule 9.140(j). As published in the Southern Reporter, it called for the petition to recite “the specific facts” See Amendments to the Florida Rules of Appellate Procedure, 685 So. 2d 773, 803 (Fla. 1996). It appears that “facts” was inadvertently changed to “acts” when the rules were published. It is my position that “facts” is the more appropriate word and I propose the correction be made at this time.

Comment 2. The proposed amended rule, as worded, is limited to claims for belated appeal based upon counsel’s failure to file a timely notice of appeal upon request. There are several other recognized grounds, such as a judge’s failure to advise the defendant of the right to appeal when sentence is imposed, non-receipt

of an order denying postconviction relief, non-delivery of a notice of appeal, and others. The proposed wording is likely to confuse some petitioners, especially those proceeding without counsel. I would amend the sentence beginning “A petition seeking belated appeal must state . . .” so that it reads “If the claim for belated appeal is based upon counsel’s failure to timely file a notice of appeal when requested to do so, the petition must state . . .”

Comment 3. In those cases where the claim is based on counsel’s failure to file a notice of appeal upon request, I would require more information. Thus, “the date of any such request, the name or names of counsel, and the manner in which the request was communicated to counsel.”

Respectfully submitted,

Kent R. Putnam, Chief Career Attorney
Florida Bar No. 348848
First District Court of Appeal
301 M.L. King, Jr., Blvd.
Tallahassee, Florida 32399-1850

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail and U.S. Mail this ____ day of December, 2009 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, and Judge O.H. Eaton, Jr., Chair, Criminal Court Steering Committee, Seminole County Courthouse, 301 North Park Avenue, Sanford, Florida 32771-1243.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 9.100(*l*) I certify that this computer generated response is prepared in Times New Roman 14 point font and complies with the Rule's font requirements.

Kent R. Putnam, Chief Career Attorney

KP/rs