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

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BELATED CRIMINAL APPEALS JOINT COMMITTEE'S RESPONSE TO COMMENTS

The Belated Criminal Appeals Joint Committee (Committee), comprising members from the Appellate Court Rules Committee (ACRC), through John G. Crabtree, Chair; the Criminal Procedure Rules Committee (CPRC), through Fleur J. Lobree, Chair; the Criminal Court Steering Committee (CCSC), through Judge Oscar H. Eaton, Jr., Chair; and John F. Harkness, Jr., Executive Director of The Florida Bar, file this Response to the Comments filed in the above-styled case, pursuant to this Court's Publication Notice of October 29, 2009. Two comments have been submitted in response to the Publication Notice, which will each be addressed in turn.

1. Comments by Kent R. Putnam, Esquire

Kent R. Putnam, Esquire, offers suggestions regarding two provisions in the proposed amendments. Mr. Putnam's first recommendation is to remove the

sentence from the proposal to Florida Rule of Criminal Procedure 3.850(i) requiring nonfinal orders to include a statement that the order is nonfinal and nonappealable. Mr. Putnam's concern is that the determination of whether an order is a final order is properly made by the appellate court, rather than the circuit court issuing the order.

The intent of the rule proposal was not to usurp the authority of the appellate court to determine whether it has jurisdiction over a case, but to clarify the proper procedure when the circuit court issues a nonfinal order in the course of a criminal postconviction proceeding which may finally dispose of one or more postconviction claims, but leaves other claims pending for further consideration. The Committee learned that appeals are frequently taken from nonfinal orders which may deny one or more claims while granting an evidentiary hearing on other claims. Defendants that are not represented by counsel become concerned that the failure to appeal the final denial of a claim within thirty days may be construed as a waiver of that claim, and often will file an appeal from an interlocutory order in an abundance of caution. The Committee concluded that unnecessary time and resources were expended getting these premature appeals dismissed for lack of jurisdiction due to the lack of finality. While the Committee appreciates Mr. Putnam's concern with the appellate court's role in determining the reach of its jurisdiction, the Committee believes that the additional guidance provided by

identifying an interlocutory order which is clearly not subject to appeal as a nonfinal, nonappealable order will improve the efficiency of postconviction litigation. The Committee has confidence that a trial judge, knowing that additional substantive claims remain pending for consideration, can determine that the denial of some claims is an interlocutory ruling, not subject to appeal at that time. Moreover, the Committee recognizes that trial judges are authorized to conclude that the final order issued on a postconviction motion is final, and are required to include a statement that advises the defendant of the right to appeal in the order itself pursuant to Rule 3.850(g). The Committee does not believe the proposed rule will preclude the appellate court from making the necessary determination whenever the question of finality is disputed.

The other suggestions offered by Mr. Putnam relate to the proposal regarding Florida Rule of Appellate Procedure 9.141(c)(4)(F).[1] Mr. Putnam suggests: (1) changing "the specific acts" to "the specific facts," as originally published when the rule was adopted in 1996; (2) changing the sentence beginning "A petition seeking belated appeal must state . . ." to "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 . . ."; and (3) requiring a defendant to provide more specific information regarding any assertion that counsel failed to

[1] Mr. Putnam's comments are equally applicable to the proposed amendments to Florida Rule of Appellate Procedure 9.142(b)(3)(A).

file a notice of appeal on request, such as the name of the attorney, and the manner that the request was communicated.

As to the first suggestion, the Committee has no knowledge as to whether the typographical error was committed before or after the publication. However, the Committee notes that this rule has been in place for over thirteen years without correction. The Committee does not see any need for a change, but does not object to Mr. Putnam's proposed modification.

As to the second suggestion, the Committee did not specifically contemplate application of the rule to any belated appeals other than those occasioned by counsel's alleged failure to file a timely notice. However, the Committee does not agree that the proposal, as written, is limited strictly to those petitions seeking belated appeals solely due to counsel's failure to file a timely notice. The current rule requires information about whether counsel was requested to appeal, despite the possibility that the belated appeal could be sought on other grounds. The Committee is concerned that limiting the scope of this pleading requirement would also be confusing, and that suggesting there are other bases for seeking belated appeal without spelling out particular factual information to be pled in the petition for those other situations will create further confusion. The proposal is not unduly burdensome even when other reasons apply; for example, a defendant that did not

timely appeal due to non-receipt of the order can simply allege that he did not request counsel to appeal because he never received the relevant order.

As to the third suggestion, the Committee does not see a need to require further details such as counsel's name, which should be a matter of record, and the manner of any request for an appeal. The Committee notes that this comment should be considered in conjunction with the Comments filed by the Public Defender's Association, which suggests that the proposed rule requires too much detail as written.

2. Comments by the Florida Public Defender's Association

The Florida Public Defender's Association has offered four areas of concern. The first concern challenges the propriety of an "absolute" deadline for the filing of a motion for belated appeal.[2] The FPDA observes that these proceedings are designed to protect a defendant from a manifest injustice, suggesting there should be no limit on the ability to correct an injustice. This same argument has been offered for years to defeat procedural bars of all sorts, yet justice understandingly requires courts to enforce reasonable rules of procedure, including statutes of limitations requiring defendants to exercise due diligence when seeking relief from the judicial system. The Committee does not feel that requiring a defendant to

[2] The Committee notes that there is no deadline proposed for petitions seeking belated direct appeals in capital cases. See Florida Rule of Appellate Procedure 9.142(b)(3)(B).

seek relief from a court if it has been nearly four years since his conviction and he has heard nothing about an appeal is too onerous.

Moreover, while the comment suggests that the absolute, four year deadline will only affect those cases where exceptional circumstance would otherwise permit an untimely appeal, the comment itself cites to Wilson v. State, 845 So. 2d 236, 237 (Fla. 2d DCA 2003), a case which would be easily time barred under the proposal. Wilson in fact demonstrates why an absolute deadline is necessary. See also, Strong v. State, 851 So. 2d 758, 761, n.4 (Fla. 2d DCA 2003) ("this case illustrates that some time limitation upon the right to seek a belated postconviction motion should be established"). The FPDA notes that, as time goes on, it is more difficult for petitioners to make the necessary showing, and the corollary to this is that, as time goes on, it becomes more difficult to defend against claims as well, as memories fade and witnesses become unavailable. The need for defendants to exercise due diligence in pursuing their judicial remedies is paramount, and this Court should adopt the proposed "absolute" deadline in order to encourage defendants to be vigilant and informed as to the progress of their cases.

To the extent the FPDA suggests that no deadline is necessary because the doctrine of laches will protect against abuse while permitting the defendant to rebut a presumption against filing requests for belated appeals that are unduly untimely, the Committee believes that all parties are better served by a rule which

provides clear notice of a reasonable time frame. The Committee prefers a stated time period for litigation rather than subjecting the parties to vague standards with inconsistent application turning on whether or not the State can demonstrate prejudice in a given circumstance. The Committee agrees with the district court decisions that have identified the need for a deadline in the rule, despite the availability of the doctrine of laches to govern the time limit for seeking belated appeals. Finally, the Committee observes that appeals are limited proceedings and that there are other equitable remedies available for manifest injustice. This Court should adopt the proposed amendments as offered, with the absolute deadline intact.

The FPDA also objects to requiring petitioners to identify "the date" of any request for an appeal or notification of an outcome under Rules 9.141(c)(4)(F) and 9.142(b)(3)(A) , as proposed, suggesting the rule should only seek an "approximate" date or some other qualifying language. The Committee does not agree that additional qualifying language is necessary. The Committee observes that pro se pleadings are to be construed liberally, and contemplates that courts will accept approximate or partial dates if pled as such. The Committee does not share the FPDA's concern that requiring an oath as to the relevant date will subject a petitioner that commits an honest mistake to a perjury charge.

A third concern expressed in the FPDA comments regards the formatting requirements proposed for motions for postconviction relief. The FPDA does not object to the page limit restriction proposed, but does object to other formatting requirements which specify motions must be completed in black ink with spacing and paper size parameters. According to the FPDA, the only relevant format requirement to be applied is one of legibility. However, the Committee feels that a rule requiring motions to be "legible" would be unnecessarily vague, difficult to enforce, and would subject petitioners to different subjective standards depending on the recipient's ability to discern the written complaint. The Committee believes that the specific formatting requirements proposed are appropriate and not unduly burdensome. The Committee observes that page limit restrictions without the other corresponding formatting requirements would be meaningless, as petitioners could adjust their printed materials to fit within the page limit in a manner which would render the pleading very difficult to read. Rather than impeding access to the courts, the formatting requirements will permit courts to attend to the substance of the pleadings.

The final concern of the FPDA addresses the sanctions for abuse of the postconviction process pursuant to proposed Rule 3.850(l). The Committee does not agree that the proposal, as written, could be extended to situations beyond the intended scope of the rule amendment. The FPDA has taken the terms

"successive" and "non-meritorious" out of context in asserting that courts will seek to impose sanctions even where no abusive conduct has occurred. The intent of the proposal is to adopt a rule which is consistent with existing case law imposing sanctions in extreme cases. Thus, the drafting of the proposal represents an attempt to incorporate the procedure outlined in Spencer v. State, 751 So. 2d 47 (Fla. 1999); the drafters were guided by decisions applying Spencer and the statutes governing the imposition of sanctions. See Simpkins v. State, 909 So. 2d 427 (Fla. 5th DCA 2005) (frivolous); Henriquez v. State, 774 So. 2d 34, 35 (Fla. 3d DCA 2000) (frivolous and successive); Green v. State, 830 So. 2d 142, 144 (Fla. 3d DCA 2002)(incessant and non-meritorious); Duncan v. State, 728 So. 2d 1237 (Fla. 3d DCA 1999)(successive); Hall v. State, 690 So. 2d 754 (Fla. 5th DCA 1997), review denied, 705 So. 2d 570 (Fla. 1998) (successive); Dennis v. State, 685 So. 2d 1373, 1375 (Fla. 3d DCA 1996) (repeated assertion of claims already heard and rejected and relabeling of same appeal under different captions was abuse of process, properly denied as successive); see also Sections 944.279, 944.28, Florida Statutes (2009).

Moreover, the Committee believes that judges will not resort to invoking this provision lightly, or undertake the additional burdens required before sanctions may be applied, including providing notice to the defendant and an opportunity to be heard, unless the judge is reasonably concerned with an abuse of process.

These procedures permit the defendant an opportunity to convince the court that the relevant motion is not subject to sanctions under existing case law. For these reasons, the Committee urges this Court to adopt the proposal for Rule 3.850(l) as currently drafted.

Respectfully submitted on January 5, 2010 by

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CERTIFICATION OF 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 Kent R. Putnam, Chief Career Attorney, First District Court of Appeal, 301 Martin Luther King, Jr. Blvd., Tallahassee, Florida 32399-1850 and the Florida Public Defender Association, Inc., through Howard K. Blumberg, Assistant Public Defender, Eleventh Judicial Circuit, 1320 N.W. 14th Street, Miami, Florida 33125, on January 5, 2010.

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