

IN THE SUPREME COURT OF FLORIDA

In re AMENDMENTS TO
FLORIDA RULE OF
APPELLATE PROCEDURE 9.141.

Case No. SC09-

OUT-OF-CYCLE REPORT OF THE APPELLATE COURT RULES COMMITTEE AND MOTION TO CONSOLIDATE WITH SC09-1733

The Appellate Court Rules Committee (ACRC), through John G. Crabtree, Chair, and John F. Harkness, Jr., Executive Director of The Florida Bar, files this out-of-cycle report requesting amendments to Florida Rule of Appellate Procedure 9.141, pursuant to Florida Rule of Judicial Administration 2.140. This report responds to the Court's opinion in case number SC08-1226, 1 So. 3d 168 (Fla. 2008). (*See* Appendix 1.)

1. Background.

On September 25, 2008, the Court issued its opinion in *Sims v. State*, 998 So. 2d 494 (Fla. 2008), wherein the Court granted the defendant's belated petition for discretionary review. On the same day that *Sims* was issued, the Court, *sua sponte*, amended rule 9.141 to add subdivision (c)(6), which states:

Supreme Court. Petitioners seeking belated discretionary review or belated appeal in the supreme court shall follow procedures prescribed in this rule.

In re: Amendments to Florida Rule of Appellate Procedure 9.141, 992 So. 2d 233 (Fla. 2008). Because the Court did not publish the amendment for comment prior to its adoption, the Court invited interested persons to comment on the amendment. The ACRC subsequently filed a comment and recommended that rule 9.141 be revised to clarify whether certain provisions contained therein are or are not applicable to petitions for discretionary review. The ACRC also suggested that rule 9.141 may benefit from a more comprehensive revision.

On January 29, 2009, the Court amended rule 9.141 and directed the ACRC to pursue a comprehensive review of rule 9.141. See *In re Amendments to Florida Rule of Appellate Procedure 9.141*, 1 So. 3d 168 (Fla. 2009).

However, just prior to the Court's January 29, 2009, opinion, on December 30, 2008, in *In re Amendments to Florida Rule of Criminal Procedure 3.851 and Florida Rule of Appellate Procedure 9.142*, 1 So. 3d 163 (Fla. 2008), the Court *sua sponte* added a new subdivision (j) to Florida Rule of Criminal Procedure 3.851 and a new subdivision (d) to Florida Rule of Appellate Procedure 9.142. Both amendments address petitions seeking belated appeals in capital cases. In the opinion, the Court referred:

rules 3.850(g) and 3.851(j) to The Florida Bar's Criminal Procedure Rules Committee, and rules 9.141(c) and 9.142(d) to The Florida Bar's Appellate Procedure Rules Committee, for joint consideration by the committees, in conjunction with the consideration of the specified rules also to be done by the Florida Supreme Court Criminal Court Steering Committee. The committees, in preparing one joint

report, should consider procedural matters pertaining to belated appeals, including, but not limited to, the placement of the provisions authorizing belated appeals, the need for cross-referencing the corresponding rules to the extent the rules remain in both the criminal and appellate rules, and time limits for seeking a belated appeal. *See* § 924.09, Fla. Stat. (2008) (“An appeal may be taken by the defendant only within the time provided by the Florida Rules of Appellate Procedure after the judgment, sentence, or order appealed from is entered . . .”).

Id. at 163. Therefore, pursuant to the Court’s December 30, 2008, opinion appointing a Joint Committee, the comprehensive review of rule 9.141 that had been conducted by the Criminal Practice Subcommittee of the ACRC was transferred to the Joint Committee.

2. The Joint Committee’s Proposed Amendments to Rule 9.141.

On September 15, 2009, the Joint Committee filed its report with the Court (case number SC09-1733). (*See* Appendix 2.) In the report, the Joint Committee proposed changes to rule 9.141. In particular, the Joint Committee believed that rule 9.141 would be improved by separating 9.141(c), which currently governs both petitions for belated appeals and petitions alleging ineffective assistance of appellate counsel, into separate subdivisions. As a result, in the changes to rule 9.141 proposed by the Joint Committee, subdivision (c) now pertains to belated appeals and belated discretionary review petitions, and subdivision (d) governs petitions alleging ineffective assistance of appellate counsel. Each subdivision includes a statement of applicability. While each provision currently includes a

time limit, the limit may be extended where the defendant was not aware of essential facts and could not have discovered these facts with due diligence. Currently, this extension is limited only by case law requiring due diligence, and the Joint Committee determined that a more specific time limit should be adopted. The Joint Committee felt that a four-year deadline is a reasonable time limit on these petitions when attorney neglect is demonstrated. This time limit was also adopted with regard to petitions alleging ineffective assistance of appellate counsel which are filed belatedly due to attorney neglect.

Therefore, the Joint Committee asked the Court to make the following amendments to rule 9.141:

RULE 9.141. REVIEW PROCEEDINGS IN COLLATERAL OR POST-CONVICTION CRIMINAL CASES; ~~BELATED APPEALS; BELATED DISCRETIONARY REVIEW; INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL~~

(a) – (b) [No change.]

(c) Petitions Seeking Belated Appeal or Belated Discretionary Review ~~or Alleging Ineffective Assistance of Appellate Counsel.~~

(1) Applicability. This subdivision governs petitions seeking belated appeals or belated discretionary review in an appellate court.

(1)(2) Treatment as Original Proceedings. Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100, except as modified by this rule.

(2)(3) Forum. Petitions seeking belated appeal ~~or alleging ineffective assistance of appellate counsel review~~ shall be filed in the

appellate court to which the appeal was or discretionary review should have been taken. ~~Petitions seeking belated discretionary review or belated appeal of a decision of a district court of appeal shall be filed in the supreme court.~~

(3)(4) Contents. The petition shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts

(A) the date and nature of the lower tribunal's order sought to be reviewed;

(B) the name of the lower tribunal rendering the order;

(C) the nature, disposition, and dates of all previous court proceedings;

(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;

(E) the nature of the relief sought; and

(F) the specific acts sworn to by the petitioner or petitioner's counsel that constitute the ~~alleged ineffective assistance of counsel or~~ basis for entitlement to belated appeal or belated discretionary review, ~~including in the case of a petition for belated appeal~~ 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.

(4)(5) Time Limits.

(A) A petition for belated appeal ~~or belated discretionary review~~ shall not be filed more than 2 years after the expiration of time for filing the notice of appeal ~~or notice to invoke discretionary jurisdiction~~ from a final order, unless it alleges under oath with a specific factual basis that the petitioner ~~(i)~~ 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 ~~or to seek discretionary review pro se;~~ and ~~(ii) should~~ 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.

~~(B) A petition alleging ineffective assistance of appellate counsel on direct review for belated discretionary review shall not be filed more than 2 years after the judgment and sentence becomes final on direct review 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 affirmatively misled about the results of the appeal by counsel 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.~~

~~(C) Time periods under this subdivision shall not begin to run prior to January 1, 1997.~~

~~(5)~~(6) Procedure.

(A) The petitioner shall serve ~~copies a~~ copy of the a petition for belated appeal on the attorney general and state attorney. The petitioner shall serve a copy of a petition for belated discretionary review on the attorney general.

(B) The court may by order identify any provision of this rule that the petition fails to satisfy and, pursuant to rule 9.040(d), allow the petitioner a specified time to serve an amended petition.

(C) The court may dismiss a second or successive petition if it does not allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure.

(D) An order granting a petition for belated appeal shall be filed with the lower tribunal and treated as the notice of appeal, if no previous notice has been filed. An order granting a petition for belated discretionary review or belated appeal of a decision of a district court of appeal shall be filed with the district court and treated as a notice to invoke discretionary jurisdiction or notice of appeal, if no previous notice has been filed.

(d) Petitions Alleging Ineffective Assistance of Appellate Counsel.

(1) Applicability. This subdivision governs petitions alleging ineffective assistance of appellate counsel.

(2) Treatment as Original Proceedings. Review proceedings under this subdivision shall be treated as original proceedings under rule 9.100, except as modified by this rule.

(3) Forum. Petitions alleging ineffective assistance of appellate counsel shall be filed in the appellate court to which the appeal was taken.

(4) Contents. The petition shall be in the form prescribed by rule 9.100, may include supporting documents, and shall recite in the statement of facts

(A) the date and nature of the lower tribunal's order subject to the disputed appeal;

(B) the name of the lower tribunal rendering the order;

(C) the nature, disposition, and dates of all previous court proceedings;

(D) if a previous petition was filed, the reason the claim in the present petition was not raised previously;

(E) the nature of the relief sought; and

(F) the specific acts sworn to by the petitioner or petitioner's counsel that constitute the alleged ineffective assistance of counsel.

(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.

(6) Procedure.

(A) The petitioner shall serve a copy of the petition on the attorney general.

(B) The court may by order identify any provision of this rule that the petition fails to satisfy and, pursuant to rule 9.040(d), allow the petitioner a specified time to serve an amended petition.

(C) The court may dismiss a second or successive petition if it does not allege new grounds and the prior determination was on the merits, or if a failure to assert the grounds was an abuse of procedure.

Committee Notes

[No change.]

The changes to rule 9.141 proposed by the Joint Committee were approved by the ACRC at the June 2009 Annual Meeting of The Florida Bar.

In light of the fact that the ACRC's proposed changes to rule 9.141 are contained in the Joint Committee's report filed on September 15, 2009, the ACRC suggests that it would be appropriate to consolidate the instant case with case

number SC09-1733 (i.e., the case number assigned to the Joint Committee's report).

Respectfully submitted on October ____, 2009 by

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CERTIFICATION OF COMPLIANCE

I certify that these rules were read against *West's Florida Rules of Court – State* (2008) and subsequent court amendments published in <http://web2.westlaw.com>.

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

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