

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA
RULE OF APPELLATE PROCEDURE
9.140

SC15-

PETITION OF THE CRIMINAL COURT STEERING COMMITTEE

The Florida Supreme Court's Criminal Court Steering Committee ("Committee"), by and through its chair, submits this petition to amend Florida Rule of Appellate Procedure 9.140.

A. Jurisdiction and the Committee's Charge

In AOSC14-44, the Florida Supreme Court ("Court") authorized the Committee to propose rule amendments as requested by the Chief Justice or the Court (see Appendix C). Additionally, in a referral letter dated June 19, 2015, the Court requested the Committee to decide whether a rule amendment to the appellate procedure rules was necessary to address the circumstance when a sentencing error is identified in the course of an *Anders v. California*, 386 U.S. 738 (1967) review. The Committee was also directed to consider whether other changes to the appellate rules related to the adjudication of *Anders* cases would be beneficial (see Appendix D).

B. Overview of the Committee Process

In its discussions, the Committee included liaisons from the Criminal Procedure Rules Committee (Mr. David Gillespie) and the Appellate Court Rules Committee (Mr. Steven Seliger). The Committee also received input from the Florida Public Defenders Association ("FPDA") and the Office of the Attorney General ("AG") (see Appendix E).

The FPDA highlighted the dissent in *Powell v. State*, 167 So. 3d 392 (Fla. 2015), wherein Justice Pariente identified two possible remedies: #1) Allow the appellate court to strike an *Anders* brief and allow counsel to file a rule 3.800(b)(2) motion to correct the sentence before the filing of the initial brief; or #2) have the appellate court issue an order alerting counsel to the possibility of unpreserved sentencing error and grant the appellant leave to file a rule 3.800(b)(2) motion within 15 days.

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The FPDA informed the Committee that it thought approach #1 was more viable. The FPDA sent the following proposal for rule 9.140(e) to the Committee:

Rule 9.140(e)

(e) Sentencing Errors. A sentencing error may not be raised on appeal unless the alleged error has first been brought to the attention of the lower tribunal:

(1) at the time of sentencing; or

(2) by motion pursuant to Florida Rule of Criminal Procedure 3.800(b). If appointed counsel for an indigent defendant has filed a brief stating that no reversible error could be identified, the appellate court shall, upon discovering potential sentencing error, strike the brief so that the error may be preserved under Rule 3.800(b).

The AG took a different tack and recommended the issue be addressed in Florida Rule of Criminal Procedure 3.800(b)(2). The AG's proposal was as follows:

Rule 3.800(b)(2)

(2) Motion Pending Appeal. If an appeal is pending, a defendant or the state may file in the trial court a motion to correct a sentencing error. The motion may be filed by appellate counsel and must be served before the party's first brief is served. If appellate counsel files an *Anders* brief and the court orders merits briefing by counsel, then the defendant's motion must be served before counsel's first merits brief is served. A notice of pending motion to correct sentencing error shall be filed in the appellate court, which notice automatically shall extend the time for the filing of the brief until 10 days after the clerk of circuit court transmits the supplemental record under Florida Rule of Appellate Procedure 9.140(f)(6).

The Committee did not adopt either the FPDA or the AG suggestions. With regard to the AG proposal, the Committee did not want to recommend a change to the rules of criminal procedure when the Court's referral letter discussed changing the appellate rules. Additionally, because the underlying problem exists in the appellate courts, the Committee concluded the solution should be addressed in the appellate court rules.

With regard to the FPDA proposal, the Committee agreed that option #1 in Justice Pariente’s dissent in *Powell v. State* was more viable than option #2, but the Committee thought it better for the appellate rules to address more than just sentencing error in *Anders* cases. Accordingly, instead of proposing a change to rule 9.140(e), which is the section on sentencing errors, the Committee published a proposal for rule 9.140(g), which is the section on briefs. The September 15, 2015 issue of the Bar News contained the following proposal from the Committee:

Rule 9.140(g)

(g) Briefs.

(1) Initial briefs shall be served within 30 days of service of the record or designation of appointed counsel, whichever is later. Additional briefs shall be as prescribed by rule 9.210.

(2) If counsel files a brief stating no reversible error could be identified, the court shall independently review the record. Upon the discovery of apparent error, the court may strike the brief and order briefing on issues raised by the court. If the apparent error relates to an unpreserved sentencing issue, the court shall strike the brief allowing for a rule 3.800(b)(2) or rule 8.135(b)(2) motion to be filed. The court’s order may contain deadlines for the cause to be resolved within a reasonable time.

The Committee received two comments, both of which are in Appendix F. The first comment was from Assistant Attorney General Rebecca McGuigan who suggested the word “appointed” be inserted in the first sentence in proposed rule 9.140(g)(2) immediately before the word “counsel” in order for the rule to apply only to *Anders* briefs filed by a public defender or a special public defender.

A second comment was received from an ad hoc subcommittee of the Appellate Court Rules Committee. That subcommittee disagreed as to whether the underlying issue should be addressed by rule, as opposed to decisional law. The subcommittee also disagreed whether the changes should be made to the appellate rules as opposed to the criminal rules of procedure, assuming rule changes were warranted. The subcommittee of the ACRC did not endorse one particular approach, but did offer the following suggestion for rule 9.140(g):

Rule 9.140(g)

(g) Briefs.

(1) Briefs on the merits. Initial briefs shall be served within 30 days of service of the record or designation of appointed counsel, whichever is later. Additional briefs shall be served as prescribed by rule 9.210.

(2) Anders Briefs.

(A) If appointed counsel files a brief stating that an appeal would be frivolous, the court shall independently review the record to discover any arguable issues apparent on the face of the record. Upon the discovery on an arguable issue, other than an unpreserved sentencing, disposition, or commitment order error, the court shall order briefing on the issues identified by the court.

(B) Upon discovery of an unpreserved sentencing, disposition, or commitment order error, the court may strike the brief and allow for a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)(2) or Florida Rule of Juvenile Procedure 8.135(b)(2) to be filed. The court's order may contain deadlines for the cause to be resolved within a reasonable time.

The Committee published the proposal of the ACRC's ad hoc subcommittee in the November 1, 2015 issue of *The Florida Bar News*. No comments were received.

C. Committee Recommendation

While the differences in language were primarily semantic, because the ACRC subcommittee's proposal more closely tracks the language employed by this Court in *In re Appellate Court Response to Anders Briefs*, 581 So. 2d 179 (Fla. 1991), the Committee accepted the proposal from the ACRC subcommittee (which includes the word "appointed"). The benefit of this proposal is that a new section – rule 9.140(g)(2)(A) – codifies the case law regarding *Anders* reviews. Additionally, proposed rule 9.140(g)(2)(B) specifically addresses the circumstance when an appellate court discovers a possible sentencing error and allows for a motion to be filed in the trial court to correct the error. Finally, the last sentence in proposed rule 9.140(g)(2)(B) allows the court to set deadlines in order to keep the case on track for timely disposition.

D. Conclusion

The Committee unanimously recommends the Court adopt the proposal in Appendix A. The Committee does not believe any other appellate rules need to be amended or created in order for the criminal justice system to effectively adjudicate Anders cases. In the event the Court adopts the Committee's proposal or something similar, the Committee recommends the rule change be made effective on the date the Court's opinion becomes final.

This petition contains the following appendices:

- Appendix A: The Committee's rule proposal in legislative format.
- Appendix B: The Committee's rule proposal in two-column format.
- Appendix C: Administrative Order AOSC14-44.
- Appendix D: The Court's referral letter to the Committee.
- Appendix E: Suggestions from the FPDA and the AG.
- Appendix F: Comments from AAG Rebecca McGuigan and an ad hoc ACRC subcommittee to the initial Committee publication.

Respectfully submitted,

s/ Judge Jay P. Cohen
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Petition and the Appendices has been furnished by e-mail to: Heather Telfer, Attorney Liaison to the Criminal Procedure and Appellate Court Rules Committees at the Florida Bar, at HTelfer@flabar.org; Krys Godwin, Attorney Liaison to the Rules of Judicial Administration Committee at the Florida Bar, at krgodwin@flabar.org; Judge T.K. Wetherell, II, Chair of the Appellate Court Rules Committee at wetherellk@1dca.org; Amy Borman, Chair of the Rules of Judicial Administration Committee at ABorman@pbcgov.org; Meredith Charbula, Chair of the Criminal Procedure Rules Committee at MCharbula@coj.net; Ms. Julianne Holt, President of the FPDA at jholt@pd13.state.fl.us; Ms. Trisha Pate, Assistant Attorney General at Trisha.Pate@myfloridalegal.com; and Ms. Rebecca McGuigan, Assistant Attorney General at Rebecca.McGuigan@myfloridalegal.com, this 15th day of December, 2015.

s/ Bart Schneider
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CERTIFICATION OF COMPLIANCE

I certify that Rule 9.140 rule was read against West's Florida Rules of Court – State (revised edition 2015).

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

s/ Bart Schneider
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