

CHAPTER 13: APPEALS OF MOTIONS FOR POSTCONVICTION RELIEF

A. Introduction.

Generally, there are two different types of postconviction relief motions: (1) a motion to correct, reduce, or modify a sentence pursuant to Florida Rule of Criminal Procedure 3.800 and (2) a motion to vacate, set aside, or correct a sentence pursuant to Florida Rule of Criminal Procedure 3.850 or 3.851 (for death penalty cases). Although the rules for postconviction motions under rules 3.850 and 3.851 are similar, a defendant should be careful to consult with the rule that applies to the type of sentence imposed in his/her case. In 2013, the Florida Supreme Court adopted rule 3.801, which governs motions seeking jail credit. The new rule only applies to motions seeking in-state jail credit; motions seeking out of state jail credit should still be filed in a rule 3.850 motion. *See Gisi v. State*, 135 So. 3d 493, 495 (Fla. 2d DCA 2014). The Florida Supreme Court created a model form for postconviction relief motions filed pursuant to rule 3.850, but there is no model form for rule 3.800 or 3.801 motions. The model form for a motion for postconviction relief under rule 3.850 is found at rule 3.987, Florida Rules of Criminal Procedure.

B. Florida Rule of Criminal Procedure 3.800.

1. Rule 3.800(a).

Generally, a court may at any time correct (1) an illegal sentence (a sentence that is longer than that allowed by law), or (2) a sentencing scoresheet error. To succeed on a rule 3.800(a) motion, however, a defendant must be able to show that the court records demonstrate on their face that the defendant is entitled to relief. A rule 3.800(a) motion should be initiated by filing a motion in the court that issued the judgment and sentence from which the defendant seeks relief. It is important to remember that a defendant cannot seek relief under rule 3.800(a) while his/her direct appeal is pending.

A defendant may file a motion for rehearing in the postconviction court within 15 days of the date of the service of the order disposing of the rule 3.800(a) motion. An order denying a rule 3.800(a) motion may be appealed within 30 days of rendition of the final order or the order denying a timely motion for rehearing.

2. Rule 3.800(b).

A defendant may file a rule 3.800(b) motion to ask the sentencing court to correct any sentencing error, including an illegal sentence, during the time allowed for the filing of a notice of appeal of the sentence, or after filing a notice of appeal but before the defendant's first brief is served. A defendant may not proceed under rule 3.800(b) if a death sentence has been imposed against him/her and his/her direct appeal is pending in the Florida Supreme Court. If the defendant has not been sentenced to death and his/her appeal is not in the Florida Supreme Court, then the defendant may file a motion under rule 3.800(b). The defendant's motion must specifically describe the error in his/her sentence and provide a proposed correction to his/her sentence.

The State may file a response to that motion within 15 days, and that response must either admit or deny the alleged sentencing error. The State may also file a motion to correct a sentence under rule 3.800(b), but only if the correction of the sentencing error would benefit the defendant or correct a typographical error. A defendant may file a motion for rehearing of the denial of a rule 3.800(b) motion within 15 days of the order disposing of the motion or within 15 days of the expiration of the 60-day time period for filing an order if no order disposing of the motion is filed.

a. Filing a Rule 3.800(b) Motion Before the Direct Appeal.

A defendant may file a motion to correct, reduce, or modify his/her sentence during the time allowed for the filing of a notice of appeal. This means that the motion is filed within 30 days of rendition of the judgment and sentence. *See* Fla. R. Crim. P. 3.800(b)(1). If the defendant files the rule 3.800(b) motion before the time to file a notice of appeal expires, the filing of the rule

3.800(b) motion will stop (or toll) the running of the clock on the appeal deadline, and the defendant will not have to file a notice of appeal until after the sentencing court rules on the motion to correct, reduce, or modify a sentence. *See Fla. R. Crim. P. 3.800(b)(1)(A).*

Unless the sentencing court decides that the motion can be decided as a matter of law without a hearing, it must hold a calendar call no later than 20 days from the filing of the motion, with notice to all parties. The purpose of the calendar call is for the sentencing court to either rule on the motion or determine whether it needs to hold an evidentiary hearing. *See Fla. R. Crim. P. 3.800(b)(1)(B).* If the sentencing court decides that it needs to hold an evidentiary hearing to determine whether the defendant's sentence should be corrected, reduced, or modified, it must hold that hearing no more than 20 days after the calendar call. *See Fla. R. Crim. P. 3.800(b)(1)(B).* The sentencing court must file an order ruling on the motion within 60 days after it was filed. *See Fla. R. Crim. P. 3.800(b)(1)(B).* If the court does not enter an order on the motion within 60 days, the motion is treated as if it were denied. *See Fla. R. Crim. P. 3.800(b)(1)(B).*

b. Filing a 3.800(b) Motion During Direct Appeal.

A defendant may also file a motion to correct, modify, or reduce his/her sentence under rule 3.800(b) in the sentencing court while the direct appeal is pending. *See Fla. R. Crim. P. 3.800(b)(2).* A defendant wanting to file a motion under rule 3.800(b)(2) must serve the motion before the first brief is served. In this situation, a defendant must also file a notice of pending motion to correct sentencing error in the appellate court. *See Fla. R. Crim. P. 3.800(b)(2).* If a defendant files a notice of pending motion to correct sentencing error, the time for filing the first brief will automatically be extended until 10 days after the sentencing court clerk transmits the supplemental record described in Florida Rule of Appellate Procedure 9.140(f)(6). *See Fla. R. Crim. P. 3.800(b)(2).*

The motion must be served on the sentencing court and on all trial and appellate counsel of record. Unless the motion expressly states that trial counsel will not represent the defendant in the sentencing court, trial counsel is supposed to represent a defendant on the motion under Florida Rule of Appellate Procedure 9.140(b)(5). *See Fla. R. Crim. P. 3.800(b)(2)(A)*.

The same procedures regarding the calendar call, hearing, and ruling on a rule 3.800(b)(1) motion filed before a direct appeal apply to the consideration of a rule 3.800(b)(2) motion filed during a direct appeal. *See Fla. R. Crim. P. 3.800(b)(2)(B)*.

Under rule 9.140(f)(6), the clerk of the lower tribunal must supplement the appellate record related to the direct appeal with the 3.800(b) motion, the order granting or denying it, any amended sentence, and, if requested, a transcript of the hearing on the 3.800(b) motion. *See Fla. R. Crim. P. 3.800(b)(2)(C)*.

C. Florida Rule of Criminal Procedure 3.801.

A defendant seeking jail credit for time spent in a Florida jail must file a motion under rule 3.801. This rule was adopted by the Florida Supreme Court and became effective on July 1, 2013. Importantly, defendants have only 1 year from the date that their judgment and sentence become final to file a motion seeking Florida jail credit. Defendants whose sentences became final prior to July 1, 2013, had to file their motions on or before July 1, 2014. *Fla. R. Crim. P. 3.801(b)*.

Rule 3.801 motions seeking jail credit must be made under oath. This means that defendants must sign the motion and swear that its contents are true. In addition to an oath, the motion should contain: (1) a brief statement of the facts that support the defendant's claim for jail credit; (2) the dates, location of incarceration, and total amount of time already awarded by the sentencing court for jail credit; (3) the date, location of incarceration, and total amount of time that the defendant claims was not awarded; (4) the location, case number, and resolution of any charges that were pending during the defendant's incarceration for which he/she now seeks credit; and (5)

whether the defendant waived any county jail credit at the time he/she was sentenced and if so, the number of days waived. It is very important to include all claims for Florida jail credit in the first motion under this rule because the postconviction court will not consider any successive motions. Fla. R. Crim. P. 3.801(d).

Under rule 3.801, the defendant may file an amended motion, receive an evidentiary hearing (unless it is clear from the record and the motion that the defendant is not entitled to the jail credit), file a motion for rehearing, and seek an appeal from the denial of the motion according to the same procedures outlined in rule 3.850, which are discussed in detail below. Most importantly, defendants should remember that a notice of appeal must be filed within 30 days of the date that the order denying the motion is rendered.

D. Florida Rule of Criminal Procedure 3.850.

A defendant who has not been sentenced to death may file a motion to vacate, set aside, or correct a sentence under rule 3.850 if the defendant has been convicted of a crime following a trial or plea of guilty or nolo contendere. The grounds for relief under rule 3.850 include: (1) the judgment or the sentence was imposed in violation of the United States or Florida constitutions or laws, (2) the court did not have jurisdiction to enter the judgment against the defendant, (3) the court did not have jurisdiction to sentence the defendant, (4) the sentence exceeded the maximum allowed by law, (5) the plea was not voluntary, and (6) the judgment or sentence is otherwise subject to collateral attack. *See* Fla. R. Crim. P. 3.850(a)(1)-(6).

One of the most commonly raised grounds in a motion for postconviction relief under rule 3.850 is that a defendant received ineffective assistance of counsel at trial. In order to sufficiently plead a claim of ineffective assistance of counsel, a defendant must allege both: (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show that a defendant suffered prejudice

as a result of his/her attorney's acts or failure to act, a defendant must show that there is a reasonable probability that the outcome of his/her case would have been different if it had not been for counsel's deficient performance. If the defendant entered a guilty plea, he/she must allege that but for the errors of counsel, they would not have pleaded, but would have instead proceeded to trial. *See Grosvenor v. State*, 874 So. 2d 1176, 1179 (Fla. 2004).

Like rule 3.801 motions, every rule 3.850 motion must include an oath. This means that a defendant must swear that the facts stated in that motion are true and correct and sign the motion before filing it in the postconviction court. Another person may not sign the oath on behalf of the defendant unless the defendant is physically unable to sign. *See Piper v. State*, 21 So. 3d 902, 903 n.1 (Fla. 2d DCA 2009). A defendant does not, however, have to attach any affidavits or sworn testimony to his/her motion. If the defendant fails to include the oath in the motion, it will be dismissed as facially insufficient. *See Almodovar v. State*, 74 So. 3d 1140, 1140 (Fla. 2d DCA 2011).

A defendant is not necessarily entitled to a free copy of his/her trial transcript for the purposes of preparing his/her motion. Nor is a defendant entitled to court-appointed counsel for the filing of a rule 3.850 motion for postconviction relief. The defendant may file a motion in the postconviction court seeking the appointment of counsel. A motion to appoint counsel in the postconviction court and on appeal from the order denying postconviction relief should address the adversary nature of the case, its complexity, the need for an evidentiary hearing, or the need for substantial legal research. *See Fla. R. Crim. P. 3.850(f)(7)*. If the court orders an evidentiary hearing on the defendant's motion, the defendant may request court-appointed counsel if the issues are complicated or may require expert testimony, and should state in his/her request that he/she does not have the education or the sophistication to proceed pro se in those matters. However, a

defendant is absolutely entitled to appointment of postconviction counsel for a death penalty case. *See Fla. R. Crim. P. 3.851(b)*.

Like rule 3.800, if a defendant is arguing under rule 3.850 that he/she received a sentence that is greater than that provided by law, a defendant may file the motion for postconviction relief under rule 3.850 at any time. *See Fla. R. Crim. P. 3.850(b)*. Otherwise, in a non-death-penalty case, a defendant must file his/her motion within 2 years of when his/her judgment and sentence became final. In a case in which a defendant has received a death sentence, the defendant must file his/her motion under rule 3.851 within 1 year of when the judgment and sentence became final. *See Fla. R. Crim. P. 3.850(b) and 3.851(d)*. A sentence becomes final thirty days after rendition in the postconviction court, or, when an appeal is taken, on the date that the appellate court issues its mandate.

The only exceptions to the 1- or 2-year deadlines for filing a motion for postconviction relief (that is not based on an illegal sentence) is to truthfully state in the motion that: (1) the facts on which the claim for relief is based were unknown to the defendant or his/her attorney and the defendant could not have discovered those facts if the defendant had reasonably and actively tried to do so; (2) the fundamental constitutional right the defendant asserts in the motion was not established within the filing window for the motion and the right has been held to apply retroactively; or (3) the defendant hired an attorney to file a rule 3.850 motion for him/her, but the attorney did not file the motion on time. *See Fla. R. Crim. P. 3.850(b)(1)-(3), and 3.851(d)(2)(A)-(C)*. A “fundamental constitutional right” is one that is given to a defendant under the United States or Florida constitutions.

Like a rule 3.800(a) motion, a defendant may not file a rule 3.850 or 3.851 motion for postconviction relief while his/her direct appeal is still pending. A defendant must wait until his/her direct appeal has been decided and the mandate has issued before filing a postconviction

motion. The 1- or 2-year deadline for filing a motion does not begin to run until the judgment and sentence become final, which occurs after the direct appeal has been concluded. If a direct appeal was not filed, the judgment and sentence become final 30 days after the filing of the judgment and sentence in the postconviction court clerk's office.

Once a defendant files a motion for postconviction relief under rule 3.850 the postconviction court clerk must send the defendant's motion and file to the postconviction court. *See Fla. R. Crim. P. 3.850(f)*. If the motion, the files, and the records in the case show without doubt that the defendant is not entitled to relief, the postconviction court may deny the motion without a hearing. *See Fla. R. Crim. P. 3.850(f)(5)*.

If the postconviction court's decision that the defendant is not entitled to relief is based on the contents of the record, and not the legal sufficiency of the motion, the postconviction court must attach to its order denying the motion those portions of the record that show that the defendant is not entitled to relief. *See Fla. R. Crim. P. 3.850(d)*. If the motion, files, and record do not conclusively show that the defendant is not entitled to relief, the postconviction court is required to order the state attorney to respond to the motion. *See Fla. R. Crim. P. 3.850(f)(6)*.

If the postconviction court has not otherwise denied the defendant's motion, after the state attorney files its response, the postconviction court must determine whether the defendant is entitled to an evidentiary hearing on his/her motion. If it determines that an evidentiary hearing is not required, the postconviction court must rule on the defendant's motion. If it determines that an evidentiary hearing is required, the postconviction court must promptly set a hearing and serve notice of the hearing on all parties and make findings of fact and conclusions of law on the motion. *See Fla. R. Crim. P. 3.850(f)(8)*.

A defendant is not necessarily entitled to be present at the hearing on his/her motion. *See* Fla. R. Crim. P. 3.850(g). The postconviction court has the authority and power to resolve his/her motion at a hearing without the defendant being at that hearing. *See* Fla. R. Crim. P. 3.850(g).

A defendant may be permitted to file a second or multiple motions for postconviction relief under rules 3.850 and 3.851. But that is true only if each and every motion after the first is timely and raises new grounds for relief not previously asserted and decided on the merits in any prior motion under rules 3.850 or 3.851. *See* Fla. R. Crim. P. 3.850(h). Because there is a strong preference to resolve all postconviction claims in one motion, any motion filed after the disposition of the first motion should explain why the defendant failed to assert the new grounds for relief in the first motion. If a defendant files a second motion for postconviction relief that states a ground that the defendant raised in his/her first motion for postconviction relief, the second motion will be dismissed as successive. *See* Fla. R. Crim. P. 3.850(h). The postconviction court may also dismiss his/her second motion (or other motions following the first motion), if the lower tribunal determines that the defendant's motion for postconviction relief raises new grounds that could have been raised in an earlier motion and that the filing of the second motion was an abuse of postconviction procedures. *See* Fla. R. Crim. P. 3.850(h).

If the postconviction court denies the defendant's rule 3.850 motion, the defendant may appeal that denial within 30 days of the date the order is filed in the postconviction court clerk's office. *See* Fla. R. Crim. P. 3.850(k). If the defendant hired an attorney to file an appeal for him/her, but the attorney did not file the appeal on time, the defendant may file a motion to file a belated appeal after the 30-day deadline has passed, but the defendant must allege in that motion that he/she instructed his/her attorney to appeal and that his/her attorney did not do so. *See* Fla. R. Crim. P. 3.850(l) and Fla. R. App. P. 9.141(c).

A defendant may also file a motion for rehearing of any order denying the motion for postconviction relief under rule 3.850. *See Fla. R. Crim. P. 3.850(j)*. The motion for rehearing must be filed within 15 days of the date of the service of the order denying the defendant's motion. *See Fla. R. Crim. P. 3.850(i)*. The postconviction court must rule on the motion for rehearing within 15 days of the State's response, if there is one, but not less than 40 days from the date of the order disposing of the postconviction motion. *Fla. R. Crim. P. 3.850(j)*. The defendant has 30 days from the date the order on a timely motion for rehearing is rendered to file an appeal. *Fla. R. App. P. 9.020(i)*. The postconviction court clerk must promptly serve the defendant with a copy of any order denying his/her motion for postconviction relief or denying his/her motion for rehearing. *See Fla. R. Crim. P. 3.850(g)*. The clerk must also note on the order the date that the clerk served the defendant with that order. *See Fla. R. Crim. P. 3.850(i)*.

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