

APPENDIX 1

Rule 3.850. Motion to Vacate, Set Aside, or Correct Sentence Collateral Relief After Judgment And Sentence Has Been Affirmed On Direct Appeal in Noncapital Cases.

(a) **Grounds for Motion.** The following grounds may be claims for relief from judgment or release from custody by a person who has been tried and found guilty or has entered a plea of guilty or nolo contendere before a court established by the laws of Florida:

(1) The judgment was entered or sentence was imposed in violation of the Constitution or laws of the United States or the State of Florida.

(2) The court did not have jurisdiction to enter the judgment.

(3) The court did not have jurisdiction to impose the sentence.

(4) The sentence exceeded the maximum authorized by law.

(5) The plea was involuntary.

(6) The judgment or sentence is otherwise subject to collateral attack.

(b) **Time Limitations.** A motion to vacate a sentence that exceeds the ~~limits~~ maximum penalty provided by law may be filed at any time. No other motion shall be filed ~~or~~ and considered pursuant to this rule if it is filed more than 2 years after the judgment and sentence ~~become~~ becomes final in a noncapital case ~~or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed~~ unless it alleges: that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively, or

(3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion.

(c) Contents of Motion. The motion shall be under oath and include:

(1) a description of the judgment or sentence under attack and the court which rendered the same;

(2) whether there was an appeal from the judgment or sentence and the disposition thereof;

(3) whether a previous postconviction motion has been filed, and if so, how many;

(4) if a previous motion or motions have been filed, the reason or reasons the claim or claims in the present motion were not raised in the former motion or motions;

(5) the nature of the relief sought; and

(6) a brief statement of the facts (and other conditions) relied on in support of the motion. If the movant claims ineffective assistance of counsel for failure to call witnesses at trial, the motion shall state (a) a summary of the evidence expected from the witness, (b) an explanation as to how the failure to introduce this evidence prejudiced the outcome of the trial, and (c) the witness would have in fact been available to testify at trial.

This rule does not authorize relief based on grounds that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence.

(d) Amendments. The court shall allow the movant an opportunity to amend the motion to cure a procedural defect such as failing to have the motion verified or omitting a material allegation. The order authorizing the amendment shall generally describe the deficiency in the motion, grant the movant at least 30 days in which to file an amended motion, and inform the movant that failure to amend will result in a dismissal of the motion on the merits. The order shall inform the movant that it is a nonfinal, nonappealable order.

~~(d)~~ **(e) Procedure; Evidentiary Hearing; Disposition.** ~~On filing of a rule 3.850 motion, the clerk shall forward the motion and file to the court. A motion filed under this rule shall be immediately delivered to the assigned judge along with the court file.~~ If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion shall be denied without a hearing. In those instances when the denial is not predicated on the legal insufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the movant is entitled to no relief shall be attached to the order. Unless the motion, files, and records of the case conclusively show that the movant is entitled to no relief, the court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court or to take such other action as the ~~judge~~ court deems appropriate. The answer shall respond to the allegations of the motion. In addition it shall state whether the movant has used any other available state remedies including any other postconviction motion under this rule. The answer shall also state whether an evidentiary hearing was accorded the movant. If the motion has not been denied at a previous stage in the proceedings, the judge, after the answer is filed, shall determine whether an evidentiary hearing is required. If an evidentiary hearing is not required, the judge shall make appropriate disposition of the motion. If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall cause notice thereof to be served on the state attorney, determine the issues, and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the movant as to render the judgment vulnerable to collateral attack, the court shall vacate and set aside the judgment and shall discharge or resentence the movant, grant a new trial, or correct the sentence as may appear appropriate.

~~(e)~~ **(f) Movant's Presence Not Required.** A court may entertain and determine the motion without requiring the production of the movant at the hearing.

~~(f)~~ **(g) Successive Motions.** ~~A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.~~ A second or successive motion shall not be filed while the original motion remains pending in the trial court. If a movant wishes to allege new or different

grounds while the original motion is pending, the movant shall file a motion to amend, attaching the proposed amendment, and alleging good cause why the new ground was not included within the original motion. If a motion to amend is filed after the expiration of the 2 year period described in subsection (b), the motion to amend must allege one of the exceptions to the 2 year period contained in subsection (b). Once the original motion has been resolved on the merits, a second or successive motion may be filed only if it alleges a new and different ground and also alleges one of the exceptions contained in subsection b (1) or (2).

(g) (h) Appeal; Rehearing; Service on Movant. An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for writ of habeas corpus. All orders denying motions for postconviction relief shall include a statement that the movant has the right to appeal within 30 days of the rendition of the order. A petitioner may seek a belated appeal upon the allegation that the petitioner timely requested counsel to appeal the order denying petitioner's motion for postconviction relief and counsel, through neglect, failed to do so. The movant may file a motion for rehearing of any order denying a motion under this rule within 15 days of the date of service of the order. The clerk of the court shall promptly serve on the movant a copy of any order denying a motion for postconviction relief or denying a motion for rehearing noting thereon the date of service by an appropriate certificate of service.

(h) (i) Habeas Corpus. An application for writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this rule shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court that sentenced the applicant or that the court has denied the applicant relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of the applicant's detention.

Court Commentary

2005 Court Commentary. The amendments clarify that this rule applies only to noncapital cases. Motions claiming ineffective assistance of counsel must allege witness availability as required by Nelson v. State, 875 So.2d 579 (Fla. 2004). Leave to amend is required if motions are dismissed because they contain procedural or technical defects. There are other minor, editorial changes.