

IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,707

IN RE: AMENDMENT TO FLORIDA
RULES OF CRIMINAL PROCEDURE
AND FLORIDA RULES OF
APPELLATE PROCEDURE

**COMMENTS ON EMERGENCY PETITION TO AMEND
FLORIDA RULE OF CRIMINAL PROCEDURE 3.800 AND FLORIDA
RULES OF APPELLATE PROCEDURE 9.010(H), 9.140, AND 9.600**

The “Criminal Appeal Reform Act Committee” has filed an emergency petition to amend Florida Rule of Criminal Procedure 3.800 and Florida Rules of Appellate Procedure 9.010(h), 9.140, and 9.600. The proposed rules provide for welcome improvements in the handling of sentencing error in criminal cases. They should alleviate many of the problems courts and attorneys have faced in reconciling the Criminal Appeals Reform Act of 1996 with the rights of criminal defendants and the duties of appellate courts.

Two of the proposed amendments, however, may prove to be counter-productive: The proposed amendment to Rule 3.800(b) permitting the state to file motions to correct sentencing error may create great uncertainty concerning the finality of legal sentences. And the proposed amendment to Rule 3.800(a) will prevent some defendants from correcting jail-credit errors during the pendency of their appeals. The undersigned counsel respectfully

submits the following comments concerning these proposals:

The Proposed Amendment to Rule 3.800(b) Permitting the State to File Motions to Correct Sentencing Error.

The Committee proposes to amend Rule 3.800(b) to permit the State to file motions to correct sentencing error pursuant to that subsection. The amendment would introduce confusion and uncertainty into Florida sentencing law, and may erode the rights of defendants. The proposed changes are unnecessary, and the Court should reject them.

Currently, only a defendant may file a motion to correct sentencing error pursuant to Rule 3.800(b), while both the State and the defendant may file a 3.800(a) motion to correct an illegal sentence. This distinction makes good sense: Under settled law, a legal sentence may not be increased once a defendant begins to serve it. *See Hopping v. State*, 708 So. 2d 263 (Fla. 1998); *Lippman v. State*, 633 So. 2d 1061 (Fla. 1994); *Goene v. State*, 577 So. 2d 1306 (Fla. 1991); *Troupe v. Rowe*, 283 So. 2d 857 (Fla. 1973).

Amending Rule 3.800(b) to permit the State to file motions to correct “sentencing error” as well as illegal sentences will cause considerable confusion. In adopting this rule, will the court necessarily hold that a legal sentence *may* be increased? Or is the State limited to filing 3.800(b) motions that ask the court to *reduce* a sentence? Does the amended rule impair a defendant’s expectation of finality in a legal sentence? The Court can confidently expect the State and the defense bar to litigate these questions. Adoption of the proposed rule will create great uncertainty and engender a new set of questions about how sentencing

error should be treated in the State of Florida.

The potential impact of the proposed change is not justified. In a memorandum to Justice Pariente concerning the proposed amendments, Judge Altenbernd explained the decision to extend Rule 3.800(b) to the State as follows:

“We added the right for the State to file these motions because the omission of this right in the existing rule was apparently an oversight. I doubt that the Committee would be unanimous about the State’s ability to increase a sentence due to an error after the defendant had begun to serve the sentence. To the credit of the people in the Office of the Attorney General, however, they appear to have a desire to file, at least occasionally, a motion to benefit a defendant if they discover a serious error in the sentencing documents. If some limitation needs to be placed on the State’s right to file such a motion, it is likely that this limitation can be established by case law.”

Memorandum from Judge Altenbernd to Justice Pariente (May 5, 1999) (emphasis in the original).

It was not by oversight that the Court did not extend Rule 3.800(b) to the State, however. The Court created Rule 3.800(b) to protect a *defendant’s* constitutional right to appeal, a right that the state of Florida does not have. *See Amendments to the Florida Rules of Appellate Procedure*, 696 So. 2d 1103 (Fla. 1996); *State v. Creighton*, 469 So.2d 735 (Fla.1985). The only reason Rule 3.800(b) exists is because this Court found that in light of the Criminal Appeals Reform Act’s preservation requirements, *see* § 921.054 (Fla. Stat. 1996 Supp.) a post-sentencing motion was necessary to permit the exercise of a defendant’s constitutional right of appeal. *See Amendments*, 696 So. 2d 1104-1105; *see also Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374 (Fla. 1996) (“The purpose of these amendments is to

ensure that a defendant will have the opportunity to raise sentencing errors on appeal.”). The Court’s reasons for creating Rule 3.800(b) simply do not apply to the State.

This being the case, the only real reason for extending Rule 3.800(b) to the State is its laudable desire to file “occasional” motions to benefit defendants. This is a worthy goal, but not a pressing one. Even the Committee Chairman recognizes that the proposed change will engender uncertainty. This step should not be lightly taken, particularly where the proposed change will be useful only infrequently, and particularly in the context of an emergency petition to amend the rules. If the Court wishes to pursue the proposed amendment, it should refer the proposal to the Criminal Rules Committee for consideration of its costs and benefits. Alternatively, the Court should alter the proposed rule to expressly provide that a defendant’s sentence may not be increased pursuant to a motion filed under Rule 3.800(b).

The Proposed Amendment to Rule 3.800(a)

The proposed amendment to Rule 3.800(a) would have the unintended affect of preventing some defendants from correcting jail-credit issues during the pendency of their appeals. This change would conflict with the Court’s apparent intent to permit that jail credit issues be corrected at any time. *See Mancino v. State*, 714 So. 2d 429 (Fla. 1998).

The Committee petitions the Court to Amend Rule 3.800(a) as follows:

(a) **Correction.** A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing ~~guideline~~ scoresheet, provided that a party may not file a motion to correct an illegal

sentence pursuant to this subsection during the time allowed for the filing of a motion pursuant to subsection (b)(1) or during the pendency of a direct appeal.

Apparently, the Committee intends that parties should use Rule 3.800(b) while it is available, rather than Rule 3.800(a). The amended rule, however, would prohibit a defendant from filing a Rule 3.800(a) motion at any time during the pendency of an appeal. Consequently, once a defendant has filed his or her initial brief, there will be no avenue to challenge an illegal sentence until the court disposes of the appeal.

This result conflicts with the Court's apparent intent in *Mancino v. State*, 714 So. 2d 429 (Fla. 1998). In *Mancino*, the Court held that a sentence which fails to give a defendant full credit for time served is an illegal sentence which may be corrected at any time. Obviously, the court was concerned with the problems of defendants who discover that they have been illegally deprived of jail credit more than two years after their convictions become final. But the Court also quoted with approval the following language from Judge Altenbernd's concurring opinion in *Chojnowski v. State*, 705 So. 2d 915 (Fla. 2d DCA 1997):

Thus, rule 3.850 currently provides the best procedure for a prisoner to resolve jail credit issues because it allows for a sworn pleading and the orderly resolution of factual disputes relating to sentencing. These motions, however, cannot be filed during the pendency of an appeal. At least in this district, with our public defender's backlog, unless the defendant chooses to forego his or her constitutional right to appeal, it will be difficult for the trial court to resolve a factual issue relating to jail credit before the prisoner fully serves any sentence that is less than 3 years' imprisonment. Even if the trial court manages to reach the issue in time, a delayed evidentiary hearing is a highly inefficient method to resolve jail credit problems.

Mancino, 714 So. 2d 431. Judge Altenbernd also pointed out that jail credit issues are

typically discovered by prisoners at some point while they are serving their sentences. *Id.* Under the proposed amendment, a defendant who discovered such an error after his or her brief were filed would have no avenue to correct the error during the pendency of the appeal.

It seems clear that this result is unintended and in conflict with the Court's approach in deciding *Mancino*. This consequence could be avoided by deleting the words "or during the pendency of a direct appeal," from the proposed amendment. Alternatively, the Court could achieve the same result by amending Rule 3.800(a) as follows:

(a) **Correction.** A court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing **guideline** scoresheet. However, during the times allowed for motions pursuant to Rule 3.800(b), relief from an illegal sentence must be sought by a motion to correct sentencing error pursuant to that subsection.

Respectfully submitted,

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