Chapter 12

Florida

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§ 12:1 Summary of postconviction remedies in Florida

Principal postconviction remedy:

Section 2255-type remedy, authorized by Rule 3.850, Fla. R. Crim. Proc. This remedy is applied for in the convicting court. The remedy is an independent civil action, not a postsentencing phase of the original criminal case. The remedy is authorized by a judicially promulgated court rule. There is no custody requirement applicable to the remedy. Newly discovered evidence of innocence is a ground for relief under the remedy.

Right to counsel:

There is a right to counsel in Rule 3.850 proceedings in death sentence cases, but not in noncapital cases.

Statute of limitations:

A Rule 3.850 motion to vacate a sentence that exceeds the limits provided by law may be filed at any time; no other motion shall be filed or considered pursuant to Rule 3.850 if filed more than two years after the judgment and sentence become final in a noncapital case or more than one year after the judgment and sentence become final in a 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; (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.

Secondary postconviction remedies:

Habeas corpus
Motion to correct illegal sentence
Motion to correct sentencing error
Motion to reduce or modify sentence
Mandamus

Other remedies:

Coram nobis is no longer an available postconviction remedy in Florida.

Florida has a postconviction DNA testing statute, enacted in 2001, and amended in 2006.

Florida has an erroneous convictions act, enacted in 2008.

Helpful readings:

(1) R. Batey, Habeas Corpus: The Law in Florida (The Harrison Co. 1980)

(2) Note: Trial Court and Prison Perspectives on the Collateral Post Conviction Relief Process in Florida, 21 U. Fla. L. Rev. 503 (1969)

(3) Brown, Post Conviction Remedies in Florida, 20 U. Fla. L. Rev. 306 (1968)

(4) Note: Florida's Criminal Procedure Rule Number One, 17 U. Fla. L. Rev. 617 (1965)

(5) Rivas, A Proposal to Fix Florida's Broken System of Post-Conviction Relief from Illegal Sentences, 14 Nova L. Rev. 1147 (1990)

(6) Haddad and Wolbe, Florida's Revised Rule 3.850: New Limitations on Post Conviction Collateral Attack, 59 Fla. B.J. 27 (July/Aug. 1985)

(7) Note: Illegal Judgments and Sentences in Florida Criminal Cases, 9 U. Fla. L. Rev. 348 (1956)

(8) Mello, Outlaw Judiciary: On Lies, Secrets, and Silence: The Florida Supreme Court Deals with Death Row Claims of Actual Innocence, 1 N.Y. City L. Rev. 1 (1996)

(9) Elledge, Coram Nobis Challenges to Prior Criminal Convictions: Modern Uses of an Ancient Writ, 65 Fla. B.J. 44 (Apr. 1991)

(10) Haddad and Wolbe, New Limitations on Post Conviction Collateral Attack, 59 Fla. B.J. 27 (1985)

(11) Arcabascio, Freeing the Innocent: Obtaining Post-Conviction DNA Testing in Florida, 28 Nova L. Rev. 61 (2003)

(12) Eaton, Discovery of Public Records in Capital Cases, 76 Fla. B. J. 24 (Apr. 2002)

(13) Amsel, Avoiding Deportation by Vacating State Court Convictions, 78 Fla. B. J. 42 (Feb. 2004)

(14) Note: Post-Conviction Relief Under Florida Law: The Undue Process of the Evolutionary Refinement, 57 Fla. L. Rev. 653 (2005)

(15) McConville, Yikes! Was I Wrong? A Second Look at the Viability of Monitoring Capital Post-Conviction Counsel, 64 Me. L. Rev. 485 (2012)

(16) Loren Rhodon, Postconviction Relief for the Florida Prisoner (2d ed. 2013)

(17) Loren Rhoton, Postconviction Relief for the Florida Prisoner: A Compilation of Selected Postconviction Corner Articles from the Florida Prison Legal Perspectives (2006)

§ 12:2 Florida Rule of Criminal Procedure 3.850

The principal postconviction remedy in Florida is the remedy in the nature of coram nobis, which is contained in Rule 3.850, Fla. R. Crim. Proc. and is modeled after the pre-1996 version of 28 U.S.C.A. § 2255 remedy.

The origins of the Rule 3.850 remedy may be traced back to 1963. Rule 3.850 began as Rule 1, a postconviction rule of court promulgated by the Florida Supreme Court on Apr. 1, 1963. See In re Criminal Procedure, Rule No. 1., 151 So. 2d 634 (Fla. 1963). Rule 1 was worded identically, mutatis mutandis, to 28 U.S.C.A. § 2255 as it then existed, and was promulgated in order to deal with the increase in postconviction litigation resulting from the U.S. Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799, 93 A.L.R.2d 733 (1963), which involved a Florida prison inmate. At that time Florida had thousands of prison inmates whose convictions violated the right to counsel as expanded by the Gideon decision, and who would now be entitled to postconviction relief.

A proceeding under Rule 3.850, Fla. R. Crim. Proc., is an independent civil action, not a postsentencing phase of the original criminal cases.

§ 12:3 Florida Rule of Criminal Procedure 3.850—Text

Rule 3.850, Fla. R. Crim. Proc., provides:

Rule 3.850. Motion to Vacate, set aside, or Correct Sentence

(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 provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final 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, and the claim is made within 2 years of the time the new facts were or could have been discovered with 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, and the claim is made within 2 years of the date of the mandate of the decision announcing the retroactivity, or

(3) the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion. A claim based on this exception shall not be filed more than 2 years after the expiration of the time for filing a motion for postconviction relief.

(c) Contents of Motion. The motion must be under oath stating that the defendant has read the motion or that it has been read to him or her, that the defendant understands its content, and that all of the facts stated therein are true and correct. The motion must also include an explanation of:

(1) the judgment or sentence under attack and the court that rendered the same;

(2) whether the judgment resulted from a plea or a trial;

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

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

(5) 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;

(6) the nature of the relief sought; and

(7) a brief statement of the facts and other conditions relied on in support of the motion.

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.

If the defendant is filing a newly discovered evidence claim based on recanted trial testimony or on a newly discovered witness, the defendant shall include an affidavit from that person as an attachment to his or her motion. For all other newly discovered evidence claims, the defendant shall attach an affidavit from any person whose testimony is necessary to factually support the defendant's claim for relief. If the affidavit is not attached to the motion, the defendant shall provide an explanation why the required affidavit could not be obtained.

(d) Form of Motion. Motions shall be typewritten or handwritten in legible printed lettering, in blue or black ink, double-spaced, with margins no less than one inch on white 8 1/2-by-11 inch paper. No motion, including any memorandum of law, shall exceed 50 pages without leave of the court upon a showing of good cause.

(e) Amendments to Motion. When the court has entered an order under subdivision (f)(2) or (f)(3), granting the defendant an opportunity to amend the motion, any amendment to the motion must be served within 60 days. A motion may otherwise be amended at any time prior to either the entry of an order disposing of the motion or the entry of an order pursuant to subdivision (f)(5) or directing that an answer to the motion be filed pursuant to (f)(6), whichever occurs first. Leave of court is required for the filing of an amendment after the entry of an order pursuant to subdivision (f)(5) or (f)(6). Notwithstanding the timeliness of an amendment, the court need not consider new factual assertions contained in an amendment unless the amendment is under oath. New claims for relief contained filed within the time frame specified in subdivision (b).

(f) Procedure; Evidentiary Hearing; Disposition. On filing of a motion under this rule, the clerk shall forward the motion and file to the court. Disposition of the motion shall be in accordance with the following procedures, which are intended to result in a single, final, appealable order that disposes of all claims raised in the motion.

(1) Untimely and Insufficient Motions. If the motion is insufficient on its face, and the time to file a motion under this rule has expired prior to the filing of the motion, the court shall enter a final appealable order summarily denying the motion with prejudice.

(2) Timely but Insufficient Motions. If the motion is insufficient on its face, and the motion is timely filed under this rule, the court shall enter a nonfinal, nonappealable order allowing the defendant 60 days to amend the motion. If the amended motion is still insufficient or if the defendant fails to file an amended motion within the time allowed for such amendment, the court, in its discretion, may permit the

defendant an additional opportunity to amend the motion or may enter a final, appealable order summarily denying the motion with prejudice.

(3) Timely Motions Containing Some Insufficient Claims. If the motion sufficiently states one or more claims for relief and it also attempts but fails to state additional claims, and the motion is timely filed under this rule, the court shall enter a nonappealable order granting the defendant 60 days to amend the motion to sufficiently state additional claims for relief. Any claim for which the insufficiency has not been cured within the time allowed for such amendment shall be summarily denied in an order that is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.

(4) Motions Partially Disposed of by the Court Record. If the motion sufficiently states one or more claims for relief but the files and records in the case conclusively show that the defendant is not entitled to relief as to one or more claims, the claims that are conclusively refuted shall be summarily denied on the merits without a hearing. A copy of that portion of the files and records in the case that conclusively shows that the defendant is not entitled to relief as to one or more claims shall be attached to the order summarily denying these claims. The files and records in the case are the documents and exhibits previously filed in the case and those portions of the other proceedings in the case that can be transcribed. An order that does not resolve all the claims is a nonfinal, nonappealable order, which may be reviewed when a final, appealable order is entered.

(5) Motions Conclusively Resolved by the Court Record. If the motion is legally sufficient but all grounds in the motion can be conclusively resolved either as a matter of law or by reliance upon the records in the case, the motion shall be denied without a hearing by the entry of a final order. If the denial is based on the records in the case, a copy of that portion of the files and records that conclusively shows that the defendant is entitled to no relief shall be attached to the final order.

(6) Motions Requiring a Response from the State Attorney. Unless the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, the court shall order the state attorney to file within the time fixed by the court, an answer the motion. The answer shall respond to the allegations contained in the defendant's sufficiently pleaded claims, describe any matters in avoidance of the sufficiently pleaded claims, state whether the defendant has used any other available state postconviction remedies

including any other motion under this rule, and state whether the defendant has previously been afforded an evidentiary hearing.

(7) Appointment of Counsel. The court may appoint counsel to represent the defendant under this rule. The factors to be considered by the court in making this determination include: the adversary nature of the proceeding, the complexity of the proceeding, the complexity of the claims presented, the defendant's apparent level of intelligence and education, the need for an evidentiary hearing, and the need for substantial legal research.

(8) Disposition by Evidentiary Hearing.

(A) If an evidentiary hearing is required, the court shall grant a prompt hearing and shall cause notice to be served on the state attorney and the defendant or defendant's counsel, and shall determine the issues, and make findings of fact and conclusions of law with respect thereto.

(B) At an evidentiary hearing, the defendant shall have the burden of presenting evidence and the burden of proof in support of his or her motion, unless otherwise provided by law.

(C) The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal.

(g) Defendant's Presence Not Required. The defendant's presence shall not be required at any hearing or conference held under this rule except at the evidentiary hearing on the merits of any claim.

(h) Successive Motions.

(1) A second or successive motion must be titled: "Second or Successive Motion for Postconviction Relief."

(2) A second or successive motion is an extraordinary pleading. Accordingly, a court may dismiss a second or successive motion if the court 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 defendant or the attorney to assert those grounds in a prior motion constituted an abuse of the procedure or there was no good cause for the failure of the defendant or defendant's counsel to have asserted those grounds in a prior motion. When a motion is dismissed under this subdivision, a copy of that portion of the files and records necessary to support the court's ruling shall accompany the order denying the motion.

(i) Service on Parties. The clerk of the court shall promptly

serve on the parties a copy of any order entered under this rule, noting thereon the date of service by an appropriate certificate of service.

(j) Rehearing. Any party may file a motion for rehearing of any order addressing a motion under this rule within 15 days of the date of service of the order. A motion for rehearing is not required to preserve any issue for review in the appellate court. A motion for rehearing must be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling. A response may be filed within 10 days of service of the motion. The trial court's order disposing of the motion for rehearing shall be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought.

(k) Appeals. An appeal may be taken to the appropriate appellate court only from a the final order disposing of the motion. All final orders denying motions for postconviction relief shall include a statement that the party defendant has the right to appeal within 30 days of the rendition of the order. All nonfinal, nonappealable orders entered pursuant to subdivision (f) should include a statement that the defendant has no right to appeal the order until entry of the final order.

(l) Belated Appeals and Discretionary Review. Pursuant to procedures outlined in Florida Rule of Appellate Procedure 9.141, a defendant may seek a belated appeal or discretionary review.

(m) 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.

(n) Certification of Defendant; Sanctions. No motion may be filed pursuant to this rule unless it is filed in good faith and with a reasonable belief that it is timely, has potential merit, and does not duplicate previous motions that have been disposed of by the court.

(1) By signing a motion pursuant to this rule, the defendant certifies that: the defendant has read the motion or that it has been read to the defendant and that the defendant understands its content; the motion is filed in good faith and with a reasonable belief that it is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court; and, the facts contained in the motion are true and correct.

(2) The defendant shall either certify that the defendant can understand English or, if the defendant cannot understand English, that the defendant has had the motion translated completely into a language that the defendant understands. The motion shall contain the name and address of the person who translated the motion and that person shall certify that he or she provided an accurate and complete translation to the defendant. Failure to include this information and certification in a motion shall be grounds for the entry of an order dismissing the motion pursuant to subdivision (f)(1), (f)(2), or (f)(3).

(3) Conduct prohibited under this rule includes, but is not limited to, the following: the filing of frivolous or malicious claims; the filing of any motion in bad faith or with reckless disregard for the truth; the filing of an application for habeas corpus subject to dismissal pursuant to subdivision (m); the willful violation of any provision of this rule; and the abuse of the legal process or procedures governed by this rule.

The court, upon its own motion or on the motion of a party, may determine whether a motion has been filed in violation of this rule. The court shall issue an order setting forth the facts indicating that the defendant has or may have engaged in prohibited conduct. The order shall direct the defendant to show cause, within a reasonable time limit set by the court, why the court should not find that the defendant has engaged in prohibited conduct under this rule and impose an appropriate sanction. Following the issuance of the order to show cause and the filing of any response by the defendant, and after such further hearing as the court may deem appropriate, the court shall make a final determination of whether the defendant engaged in prohibited conduct under this subsection.

(4) If the court finds by the greater weight of the evidence that the defendant has engaged in prohibited conduct under this rule, the court may impose one or more sanctions, including:

(A) contempt as otherwise provided by law;

(B) assessing the costs of the proceeding against the defendant;

(C) dismissal with prejudice of the defendant's motion;

(D) prohibiting the filing of further pro se motions under this rule and directing the clerk of court to summarily reject any further pro se motion under this rule;

(E) requiring that any further motions under this rule be signed by a member in good standing of The Florida Bar, who shall certify that there is a good faith basis for each claim asserted in the motion; and/or

(F) if the defendant is a prisoner, a certified copy of the order be forwarded to the appropriate institution or facility for consideration of disciplinary action against the defendant, including forfeiture of gain time pursuant to Chapter 944, Florida Statutes.

(5) If the court determines there is probable cause to believe that a sworn motion contains a false statement of fact constituting perjury, the court may refer the matter to the state attorney.

§ 12:4 Florida Rule of Criminal Procedure 3.850—Origins and purpose

For cases discussing the origins and purpose of the Rule 3.850 remedy, see, e.g., *Schoenwetter v. State*, 46 So. 3d 535 (Fla. 2010) (proceedings under rule 3.850 are not to be used as a second appeal; nor is it appropriate to use a different argument to relitigate the same issue); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (history of Rule 3.850 indicates that it was intended to provide a procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus; thus, this rule essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court; the purpose of the Rule 3.850 motion is to provide a means of inquiry into the alleged constitutional infirmity of a judgment or sentence, not to review ordinary trial errors cognizable by means of a direct appeal); *Richardson v. State*, 918 So. 2d 999 (Fla. 5th DCA 2006) (historically, habeas corpus proceedings were the means available to a defendant to challenge the validity of his or her conviction and sentence; prior to adoption of Rule 3.850, Fla. R. Crim. Proc., or its predecessors, habeas corpus was the primary procedural device to challenge the validity of a sentence or judgment of conviction; heavily borrowing from the provisions of 28 U.S.C.A. § 2255, the Florida Supreme Court in 1963 enacted Florida Rule of Criminal Procedure 1, which was the predecessor to current Rule 3.850; as was its federal counterpart, Rule 1 was promulgated to establish an effective procedure in the courts best equipped to adjudicate the rights of those originally tried in those courts and provided a complete and efficacious postconviction remedy to correct convictions on any grounds which subject them to collateral attack; adoption of Rule 3.850 superseded habeas corpus as the method to collaterally attack a sentence or judgment of conviction; the history of Rule 3.850 indicates that it was intended to provide a

procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus and essentially transfer consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court; since adoption of Rule 3.850 and its predecessor, the courts have consistently held that it is inappropriate to collaterally attack a conviction through the process of habeas proceedings because such claims are cognizable under Rule 3.850; a petition for habeas corpus may not be used to collaterally attack a criminal judgment and sentence because Rule 3.850 has superseded habeas corpus as the only means to raise such issues; the last clause of Rule 3.850(h) might suggest that it is permissible to file a petition for writ of habeas corpus to test the legality of a prisoner's criminal judgment rather than to seek relief through an appropriate postconviction motion; however, the courts of this state have correctly interpreted this provision to mean that habeas corpus may not be used as a substitute for an appropriate motion seeking postconviction relief pursuant to Rule 3.850; we dispel the notion, apparently held by some, that when a petition for writ of habeas corpus is filed challenging the underlying conviction, the petition must in all instances be treated as a motion for postconviction relief under Rule 3.850 and either granted or denied on the merits); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (these cases are representative of an increasingly large percentage of the petitions for writs of habeas corpus filed in this court; for the reasons set forth in this opinion, we conclude that we should no longer transfer such petitions to the lower courts for consideration as motions for postconviction relief filed pursuant to Rule 3.850; we further conclude that we should not continue denying such petitions either on the merits or on grounds that the claims raised are procedurally barred from being considered in collateral postconviction relief proceedings; instead, we conclude that we should dismiss such petitions as unauthorized; the history of Rule 3.850 indicates that it was intended to provide a procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus; thus, this rule essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court; for defendants convicted and sentenced to death, Rule 3.850 is no longer the mechanism through which they may file collateral postconviction challenges to their convictions and sentences, see Rule 3.851, Fla.

R. Crim. Proc.; habeas corpus may not be used as a substitute for an appropriate motion seeking postconviction relief pursuant to Rule 3.850; with limited exceptions, habeas corpus relief is not available to obtain collateral postconviction relief because most claims can be raised by motion pursuant to Rule 3.850; the purpose of the Rule 3.850 motion is to provide a means of inquiry into the alleged constitutional infirmity of a judgment or sentence, not to review ordinary trial errors cognizable by means of a direct appeal; the motion procedure is neither a second appeal nor a substitute for appeal; matters which were raised on appeal and decided adversely to the movant are not cognizable by motion under Rule 3.850; furthermore, any matters which could have been presented on appeal are similarly held to be foreclosed from consideration by motion under Rule 3.850; therefore, a Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied; in addition to issues that were raised on appeal and those which could have been raised, which are not proper grounds, a motion under Rule 3.850 may also be summarily denied when it is based on grounds that have been raised in prior postconviction motions under the rule and have been decided adversely to the movant on their merits; a second or successive motion for similar relief, as used in Rule 3.850, has been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the rule; furthermore, this restriction against successive motions on the same grounds is applied only when the grounds raised were previously adjudicated on their merits, and not where the previous motion was summarily denied or dismissed for legal insufficiency; on the other hand, a second or successive motion by the same prisoner attacking the same judgment or sentence but stating substantially different legal grounds is permitted under Rule 3.850 and should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion; the abuse of the procedure doctrine, as recently codified in Rule 3.850, is now expanded to allow a court to summarily deny a successive motion for postconviction relief unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed; further, the movant must show justification for the failure to raise the asserted issues in the first motion; the two-year limitations period for filing motions for collateral postconviction relief under Rule 3.850 was adopted in 1984, and became effective on Jan. 1, 1985; because this court has experienced a steady increase in the number of habeas corpus petitions filed by prisoners seeking collateral postconviction relief from noncapital criminal convictions

and sentences, we believe that it is now time to make explicit what previously may only have been implicit; the remedy of habeas corpus is not available in Florida to obtain the kind of collateral postconviction relief available by motion in the sentencing court pursuant to Rule 3.850; accordingly, from now on, we will dismiss as unauthorized, habeas corpus petitions filed by noncapital defendants that seek the kind of collateral postconviction relief available through a motion filed in the sentencing court, and which (1) would be untimely if considered as a motion for postconviction relief under Rule 3.850; (2) raise claims that could have been raised at trial or, if properly preserved, on direct appeal of the judgment and sentence; or (3) would be considered a second or successive motion under Rule 3.850 that either fails to allege new or different grounds for relief, or alleges new or different grounds for relief that were known or should have been known at the time the first motion was filed); *Lewis v. State*, 926 So. 2d 437 (Fla. 1st DCA 2006) (movant's claim for relief from sentence based upon attachment of wrong fingerprint card to his written judgment and sentence was required to be brought by Rule 3.850 motion to vacate, rather than by Rule 3.800(a) motion for correction of sentence, where claim required fact-based inquiry conducted through evidentiary hearing to test validity of fingerprint card at issue); *Ulcena v. State*, 925 So. 2d 346 (Fla. 4th DCA 2006) (only decisions of the Florida Supreme Court or the U.S. Supreme Court can be retroactive in postconviction proceedings); *Hall v. State*, 913 So. 2d 712 (Fla. 1st DCA 2005) (motion to enforce a plea agreement should be construed as a Rule 3.850 motion where the motion meets the procedural requirements of Rule 3.850 and where the motion states a facially sufficient claim for relief); *Washington v. State*, 876 So. 2d 1233 (Fla. 5th DCA 2004) (petition for habeas corpus may not be used to collaterally attack a criminal judgment and sentence because Rule 3.850 has superseded habeas corpus as the only means to raise such issues); *Rosado v. State*, 864 So. 2d 533 (Fla. 5th DCA 2004) (original habeas corpus petition filed directly in district court of appeal; the petition, filed pursuant to Rule 9.141, Fla. R. App. Proc. seeks a belated appeal from denial of petitioner's Rule 3.850 motion; relief granted); *Spratling v. State*, 851 So. 2d 228 (Fla. 1st DCA 2003) (it is well settled that a petition for habeas corpus may not be used to collaterally challenge a criminal judgment or sentence and that Rule 3.850 has superseded habeas corpus as the means of collateral attack of a judgment and sentence in Florida).

§ 12:5 Florida Rule of Criminal Procedure 3.850—History

In 1967, when the Florida Rules of Criminal Procedure were

first promulgated by the Florida Supreme Court, the text of Rule 1 was left unchanged but transferred to the new Rule 1.850, Fla. R. Crim. Proc. See *In re Florida Rules of Criminal Procedure.*, 196 So. 2d 124, 177 (Fla. 1967) (eff. Jan. 1, 1968). In 1971, when the Florida Rules of Criminal Procedure were renumbered, Rule 1.850 was redesignated Rule 3.850, but was otherwise left unchanged. *In re Florida Rules of Criminal Procedure.*, 253 So. 2d 421 (Fla. 1971).

Between 1971 and 1984, Rule 3.850 was amended three times by the Florida Supreme Court. *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972)order amended, 272 So. 2d 513 (Fla. 1973); *The Flordia Bar*, 343 So. 2d 1247, 1264–65 (Fla. 1977); *In re Florida Rules of Cr. Procedure*, 353 So. 2d 552 (Fla. 1977). These amendments did not in any way restrict the availability of the Rule 3.850 remedy. However, the next two amendments to Rule 3.850, the first in 1984 and the second in 1985, see *In re Rule 3.850 of Florida Rules of Criminal Procedure*, 481 So. 2d 480 (Fla. 1985); *The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850)*, 460 So. 2d 907 (Fla. 1984), imposed limitations on the remedy. The 1984 amendment, for example, engrafted a two-year statute of limitations on Rule 3.850.

Since 1985, Rule 3.850 has been amended nine times. *In re Amendments to Florida Rules of Criminal Procedure*, 606 So. 2d 227, 340–43 (Fla. 1992); *In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed)*, 626 So. 2d 198 (Fla. 1993); *Amendments to Florida Rules of Criminal Procedure 3.133, 3.692, 3.986, 3.987 and 3.989*, 630 So. 2d 552, 553 (Fla. 1993); *Amendments to the Florida Rules of Criminal Procedure*, 685 So. 2d 1253 (Fla. 1996); *In re Rule of Criminal Procedure 3.851 (Collateral Reli ef After Death Sentence has been Imposed) and Rule 3.850 (Motion to Vacate, Set Aside, or Correct Sentence)*, 708 So. 2d 912 (Fla. 1998); *Steele v. Kehoe*, 747 So. 2d 931 (Fla. 1999) (amending Rule 3.850(b) by adding a provision allowing a Rule 3.850 motion to be filed late if defendant retained counsel to timely file a Rule 3.850 motion and counsel, through neglect, failed to file the motion); *Wood v. State*, 750 So. 2d 592 (Fla. 1999) (we hereby amend Rule 3.850 by deleting the "in custody" requirement so that both custodial and noncustodial movants may rely on and be governed by Rule 3.850); *In re Rules Governing Capital Postconviction Actions*, 763 So. 2d 273 (Fla. 2000) (readopting Rules 3.850, 3.851, and 3.852, Fla. R. Crim. Proc., which were repealed by the Florida Death Penalty Reform Act of 2000, ch. 2000-3, 2000 Fla. Laws 4; Rules 3.850, 3.851, and 3.852 are hereby readopted as they existed prior to the effective date of the Act); *Amendment to Florida Rule of Criminal Proce-*

dure 3.850, 779 So. 2d 1290 (Fla. 2000), *Amendment To Florida Rule of Criminal Procedure 3.850(g)*, 789 So. 2d 262 (Fla. 2000).

§ 12:6 Florida Rule of Criminal Procedure 3.850—Death Penalty Reform Act of 2000

In 2000, the Florida legislature enacted a statute, the Death Penalty Reform Act of 2000 (Act of Jan. 14, 2000, ch. 2000-3, 2002 Fla. Laws 4) which repealed Rules 3.851 and 3.852 and partially repealed Rule 3.850. Most of this statute was, however, held unconstitutional by the Florida Supreme Court in *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000). Furthermore, less than a month after the statute's effective date, and over two months before the *Allen v. Butterworth* decision, the Florida Supreme Court repromulgated Rules 3.850, 3.851, and 3.852.

§ 12:7 Florida Rule of Criminal Procedure 3.850—Availability of relief

The availability of Rule 3.850 relief is regulated not only by Rule 3.850 itself, but also by other court rules and by various statutes. See, e.g., Rule 3.851, Fla. R. Crim. Proc. (special procedural requirements for motions for postconviction relief filed by death row inmates whose death sentence has been upheld previously on direct appeal); Rule 3.852, Fla. R. Crim. Proc. (regulating production of public records in postconviction proceedings instituted by death row inmates); Rule 3.853, Fla. R. Crim. Proc. (supplementing and procedurally implementing Florida's postconviction DNA testing statute); Rule 3.987, Fla. R. Crim. Proc. (model form of Rule 3.850 motion for postconviction relief); Rules 9.140 and 9.141, Fla. R. App. Proc. (authorizing and regulating appeals in Rule 3.850 proceedings in noncapital cases); Rules 2.215(b)(10), 2.535(h), Fla. R. Jud. Admin. (chief judge shall ensure that no judge presides over a capital collateral proceeding unless the judge is qualified to handle capital cases; providing for expedited court reporting services in capital postconviction proceedings); Fla. Stat. Ann. § 27.51(5)(a) (when direct appellate proceedings prosecuted by a public defender on behalf of a death row inmate terminate in an affirmance of the sentence, the public defender shall notify the accused of his or her rights pursuant to Rule 3.850, Fla. R.Crim. Proc., including any time limits pertinent thereto, and shall advise such person that representation in any collateral proceedings is the responsibility of the capital collateral representative); Fla. Stat. Ann. § 27.7001 through § 27.711 (providing for legal representation of Florida death row inmates seeking state postconviction relief); Fla. Stat. Ann. § 27.7081 (statutory regulation of production of public re-

cords in postconviction proceedings instituted by death row inmates); Fla. Stat. Ann. § 944.279(1), (3) (at any time, and upon its own motion or on motion of a party, a court may conduct an inquiry into whether any action or appeal brought by a prisoner was brought in good faith; a prisoner who is found by a court to have brought a frivolous or malicious suit, action, claim, proceeding, or appeal in any court of this state or in any federal court, which is filed after June 30, 1996, or to have brought a frivolous or malicious collateral criminal proceeding, which is filed after Sept. 30, 2004, or who knowingly or with reckless disregard for the truth brought false information or evidence before the court, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections; the court shall issue a written finding and direct that a certified copy be forwarded to the appropriate institution or facility for disciplinary procedures pursuant to the rules of the Department as provided in Fla. Stat. Ann. § 944.09; "prisoner" means a person who is convicted of a crime and is incarcerated for that crime or who is being held in custody pending extradition or sentencing).

§ 12:8 Florida Rule of Criminal Procedure 3.850—Application and uses—Case law

For case law on the use and application of Rule 3.850, see e.g., *Reed v. State*, 116 So. 3d 260 (Fla. 2013), cert. denied, 134 S. Ct. 643, 187 L. Ed. 2d 426 (2013) (there is no unqualified general right to engage in discovery in a postconviction proceeding; availability of discovery in a postconviction case is a matter firmly within the trial court's discretion; trial court's determination with regard to a discovery request is reviewed under an abuse of discretion standard); *Rimmer v. State*, 59 So. 3d 763 (Fla. 2010) (a trial court may permit pre-hearing discovery during postconviction proceedings under rule 3.850; in ruling on such a motion for postconviction discovery, the court shall consider the issues presented, the elapsed time between the conviction and the postconviction hearing, and burdens placed on the opposing party and witnesses, alternative means of securing the evidence, and any other relevant facts); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (these cases are representative of an increasingly large percentage of the petitions for writs of habeas corpus filed in this court; for the reasons set forth in this opinion, we conclude that we should no longer transfer such petitions to the lower courts for consideration as motions for postconviction relief filed pursuant to Rule 3.850; we further conclude that we should not continue denying such petitions either on the merits or on grounds that the claims raised are procedurally barred from being considered in collateral postconviction relief proceedings;

instead, we conclude that we should dismiss such petitions as unauthorized; the history of Rule 3.850 indicates that it was intended to provide a procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus; thus, this rule essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court; for defendants convicted and sentenced to death, Rule 3.850 is no longer the mechanism through which they may file collateral postconviction challenges to their convictions and sentences, see Rule 3.851, Fla. R. Crim. Proc.; habeas corpus may not be used as a substitute for an appropriate motion seeking postconviction relief pursuant to Rule 3.850; with limited exceptions, habeas corpus relief is not available to obtain collateral postconviction relief because most claims can be raised by motion pursuant to Rule 3.850; the purpose of the Rule 3.850 motion is to provide a means of inquiry into the alleged constitutional infirmity of a judgment or sentence, not to review ordinary trial errors cognizable by means of a direct appeal; the motion procedure is neither a second appeal nor a substitute for appeal; matters which were raised on appeal and decided adversely to the movant are not cognizable by motion under Rule 3.850; furthermore, any matters which could have been presented on appeal are similarly held to be foreclosed from consideration by motion under Rule 3.850; therefore, a Rule 3.850 motion based upon grounds which either were or could have been raised as issues on appeal may be summarily denied; in addition to issues that were raised on appeal and those which could have been raised, which are not proper grounds, a motion under Rule 3.850 may also be summarily denied when it is based on grounds that have been raised in prior postconviction motions under the rule and have been decided adversely to the movant on their merits; a second or successive motion for similar relief, as used in Rule 3.850, has been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the rule; furthermore, this restriction against successive motions on the same grounds is applied only when the grounds raised were previously adjudicated on their merits, and not where the previous motion was summarily denied or dismissed for legal insufficiency; on the other hand, a second or successive motion by the same prisoner attacking the same judgment or sentence but stating substantially different legal grounds is permitted under Rule 3.850 and should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion; the

abuse of the procedure doctrine, as recently codified in Rule 3.850, is now expanded to allow a court to summarily deny a successive motion for postconviction relief unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed; further, the movant must show justification for the failure to raise the asserted issues in the first motion; the two-year limitations period for filing motions for collateral postconviction relief under Rule 3.850 was adopted in 1984, and became effective on Jan. 1, 1985; because this court has experienced a steady increase in the number of habeas corpus petitions filed by prisoners seeking collateral postconviction relief from noncapital criminal convictions and sentences, we believe that it is now time to make explicit what previously may only have been implicit; the remedy of habeas corpus is not available in Florida to obtain the kind of collateral postconviction relief available by motion in the sentencing court pursuant to Rule 3.850; accordingly, from now on, we will dismiss as unauthorized, habeas corpus petitions filed by noncapital defendants that seek the kind of collateral postconviction relief available through a motion filed in the sentencing court, and which (1) would be untimely if considered as a motion for postconviction relief under Rule 3.850; (2) raise claims that could have been raised at trial or, if properly preserved, on direct appeal of the judgment and sentence; or (3) would be considered a second or successive motion under Rule 3.850 that either fails to allege new or different grounds for relief, or alleges new or different grounds for relief that were known or should have been known at the time the first motion was filed); *Lewis v. State*, 926 So. 2d 437 (Fla. 1st DCA 2006) (movant's claim for relief from sentence based upon attachment of wrong fingerprint card to his written judgment and sentence was required to be brought by Rule 3.850 motion to vacate, rather than by Rule 3.800(a) motion for correction of sentence, where claim required fact-based inquiry conducted through evidentiary hearing to test validity of fingerprint card at issue); *Ulcena v. State*, 925 So. 2d 346 (Fla. 4th DCA 2006) (only decisions of the Florida Supreme Court or the U.S. Supreme Court can be retroactive in postconviction proceedings); *Hall v. State*, 913 So. 2d 712 (Fla. 1st DCA 2005) (motion to enforce a plea agreement should be construed as a Rule 3.850 motion where the motion meets the procedural requirements of Rule 3.850 and where the motion states a facially sufficient claim for relief); *Washington v. State*, 876 So. 2d 1233 (Fla. 5th DCA 2004) (petition for habeas corpus may not be used to collaterally attack a criminal judgment and sentence because Rule 3.850 has superseded habeas corpus as the only means to raise such issues); *Rosado v. State*, 864 So. 2d 533 (Fla. 5th DCA

2004) (original habeas corpus petition filed directly in district court of appeal; the petition, filed pursuant to Rule 9.141, Fla. R. App. Proc. seeks a belated appeal from denial of petitioner's Rule 3.850 motion; relief granted); *Spratling v. State*, 851 So. 2d 228 (Fla. 1st DCA 2003) (it is well settled that a petition for habeas corpus may not be used to collaterally challenge a criminal judgment or sentence and that Rule 3.850 has superseded habeas corpus as the means of collateral attack of a judgment and sentence in Florida).

§ 12:9 Florida Rule of Criminal Procedure 3.850—Case law regarding Rule 3.850 proceedings as civil actions

For case law on Rule 3.850 proceedings as civil actions, see, e.g., *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000).

§ 12:10 Florida Rule of Criminal Procedure 3.850—Custody requirement

There is no custody requirement in Rule 3.850 proceedings. See, e.g., *Wood v. State*, 750 So. 2d 592 (Fla. 1999) (abrogating Rule 3.850 custody requirement); *Walker v. State*, 789 So. 2d 364 (Fla. 2d DCA 2001) (in *Wood v. State*, 750 So. 2d 592 (Fla. 1999)), the state supreme court eliminated the Rule 3.850 custody requirement); *Calloway v. State*, 786 So. 2d 1195 (Fla. 2d DCA 2001) (defendant no longer needs to be in custody to meet the requirements of Rule 3.850).

§ 12:11 Florida Rule of Criminal Procedure 3.850—Right to counsel

There is a right to counsel in Rule 3.850 proceedings in death sentence cases, but not in noncapital cases. Fla. Stat. Ann. § 27.51(5)(a) (when direct appellate proceedings prosecuted by a public defender on behalf of an accused and challenging a judgment of conviction and sentence of death terminate in an affirmance of such conviction and sentence, whether by the Florida Supreme Court or by the U.S. Supreme Court or by expiration of any deadline for filing such appeal in a state or federal court, the public defender shall notify the accused of his or her rights pursuant to Rule 3.850, Fla. R.Crim. Proc., including any time limits pertinent thereto, and shall advise such person that representation in any collateral proceedings is the responsibility of the capital collateral representative); Fla. Stat. Ann. § 27.7001 (it is the intent of the legislature in Fla. Stat. Ann. § 27.7001 through § 27.711 to provide for the collateral representation of any person convicted and sentenced to death in this state, so that collateral

legal proceedings to challenge any Florida capital conviction and sentence may be commenced in a timely manner and so as to assure the people of this state that the judgments of its courts may be regarded with the finality to which they are entitled in the interests of justice); Rule 3.851(b)(1), Fla. R. Crim. Proc. (upon issuance of the mandate affirming a judgment and sentence of death on direct appeal, the Florida Supreme Court shall at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Commission on Capital Cases). See *Lugo v. Secretary, Florida Dept. of Corrections*, 750 F.3d 1198 (11th Cir. 2014), cert. denied, 135 S. Ct. 1171, 190 L. Ed. 2d 919 (2015) (under Florida Rule of Criminal Procedure 3.851(b)(1), the Florida Supreme Court, upon issuance of its mandate affirming a sentence of death, issues an order appointing the appropriate office of the Capital Collateral Regional Counsel or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Justice Administrative Commission; since 1997, there have been three CCRC regional offices—Northern, Middle and Southern; each CCRC office is responsible for representing persons convicted and sentenced to death by state courts, within their respective regions, in collateral proceedings in state and federal court; on July 1, 2003, however, CCRC-Northern was closed by the Florida legislature as part of a pilot program, and its responsibilities were transferred to a panel of registry attorneys, compiled and maintained by the Florida Commission on Capital Cases; more recently, the Florida legislature enacted the Timely Justice Act of 2013, effective July 1, 2013, which, among other things, reopened the CCRC-Northern office, see 2013 Fla. Sess. Law Serv. Ch. 2013-216 (codified in scattered sections of the Fla. Code)).

The right to counsel in Rule 3.850 proceedings in death sentence cases was created in 1985 when the office of capital collateral representative was established. Act of June 24, 1985, ch. 85-332, 1985 Fla. Laws 1976 (enacting original version of Fla. Stat. Ann. §§ 27.01 et seq.).

§ 12:12 Florida Rule of Criminal Procedure 3.850—Right to counsel—Death sentence cases—Case law

For case law on the right to counsel in Rule 3.850 proceedings in death sentence cases, see e.g., *Kilgore v. State*, 55 So. 3d 487 (Fla. 2010) (capital murder defendant's right to counsel was not violated by rule, which required mental retardation challenges for defendants sentenced to death to be raised in postconviction motion to set aside, vacate, or correct sentence, or postconviction

motion for collateral relief following imposition of death sentence and affirmance on appeal; nothing indicated that defendant's right to counsel extended to postconviction proceedings); *Barnes v. State*, 29 So. 3d 1010 (Fla. 2010) (trial court did not violate defendant's Sixth Amendment right to represent himself when the court appointed special court counsel to investigate and present mitigation evidence in penalty phase of murder trial over defendant's objection; given that defendant essentially refused to provide any mitigation evidence appointment of mitigation counsel was intended to provide a safeguard to the application of death penalty and thereby ensure that the sentencing judge was apprised of adequate and relevant information upon which she could make a reasoned decision concerning the applicability of the death penalty); *Hojan v. State*, 3 So. 3d 1204 (Fla. 2009) (competent defendants who are represented by counsel maintain the right to make choices in respect to their attorneys' handling of their cases; this includes the right to either waive presentation of mitigation evidence or to choose what mitigation evidence is introduced by counsel; defendants also have the right to proceed pro se in capital trial proceedings; a capital defendant has the right to withdraw Rule 3.850 motions filed on the defendant's behalf; although the attorney can make some tactical decisions, the ultimate choice as to which direction to sail is left up to the defendant; given that Hojan expressly and repeatedly waived presentation of mitigation and withdrew his counsel's various motions and was found competent, we conclude that the trial court committed no error in permitting Hojan to withdraw the Rule 3.850 motions he withdrew); *McDonald v. State*, 952 So. 2d 484 (Fla. 2006) (death sentence case; here, capital murder defendant's decision to represent himself in postconviction proceedings was knowing, intelligent, and voluntary); *Alston v. State*, 894 So. 2d 46 (Fla. 2004) (death sentence case; the circuit court did not abuse its discretion in finding that Alston knowingly, intelligently, and voluntarily waived his rights to postconviction counsel and proceedings); *Gaskin v. State*, 798 So. 2d 721 (Fla. 2001) (death sentence case; the various offices of capital collateral representative are financially responsible for paying the clerk's fees associated with the preparation of the record on appeal in capital postconviction proceedings; these fees may not be waived where an appellant is represented by one of the offices of capital collateral representative); *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000) (death sentence case; we have not recognized ineffective assistance of postconviction counsel claims).

§ 12:13 Florida Rule of Criminal Procedure 3.850—Right to counsel—Noncapital cases

Neither the Sixth Amendment right to counsel clause in the

U.S. Constitution nor the right to counsel clause in the Florida Constitution's Bill of Rights applies to Rule 3.850 proceedings, even in death sentence cases. *Kokal v. State*, 901 So. 2d 766 (Fla. 2005), as revised on denial of reh'g, (Apr. 28, 2005) (death sentence case; defendants have no constitutional right to representation in postconviction relief proceedings; because Kokal does not possess a constitutional right to postconviction counsel, and further, because we have refused to recognize claims of ineffective assistance of postconviction counsel, Kokal's claim regarding the ineffectiveness of counsel's representation of Kokal during his first postconviction litigation was properly summarily denied).

§ 12:14 Florida Rule of Criminal Procedure 3.850—Right to counsel—Noncapital cases—Case law

For case law on appointment of counsel for movants in noncapital Rule 3.850 proceedings, see, e.g., *Woodward v. State*, 992 So. 2d 391 (Fla. 1st DCA 2008) (defendant entitled to appointed postconviction counsel with respect to claim that his trial attorney was ineffective for failing to pursue insanity defense based on appellant's long-term use of prescribed intoxicants where expert testimony would be necessary to establish such defense and defendant's efforts as pro se litigant to obtain and serve subpoenas for witnesses at evidentiary hearing proved to no avail); *Smith v. State*, 956 So. 2d 494 (Fla. 1st DCA 2007) (no Sixth Amendment right to counsel exists in appeals of orders denying Rule 3.850 postconviction relief); *Bynum v. State*, 932 So. 2d 361 (Fla. 2d DCA 2006) (in deciding whether to appoint counsel for postconviction proceedings, the court must consider four factors: the adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research; the need for an evidentiary hearing itself implies that the first three of the four factors are involved; any doubt about the need for counsel in connection with postconviction proceedings must be resolved in favor of the indigent defendant; here, Rule 3.850 movant was entitled to appointment of counsel in light of complex nature of postconviction claim requiring evidentiary hearing; nature of postconviction claim involving challenge to guilty plea was such that to meet his burden of proving his allegations, movant was required to effectively cross-examine his prior counsel and at least one other witness); *Rosado v. State*, 927 So. 2d 979 (Fla. 5th DCA 2006) (there is no absolute right to appointed counsel in a postconviction proceeding; appointed counsel may be necessary if the issues are complex or require substantial legal research; here, the Rule 3.850 movant was not entitled to appointed counsel at hearing on motion for postconviction relief, where defendant's claims

required no legal research, and issues present were not complex, but were factual and simple); *Henderson v. State*, 919 So. 2d 652 (Fla. 1st DCA 2006) (although there is no absolute right to counsel in postconviction relief proceedings, the court before which the proceedings are pending must determine the need for counsel and resolve any doubts in favor of the appointment of counsel for the defendant; the adversary nature of the proceeding, its complexity, the need for an evidentiary hearing, or the need for substantial legal research are all important elements which may require the appointment of counsel; here, movant was entitled to appointment of counsel for evidentiary hearing on postconviction claim that trial counsel rendered ineffective assistance by failing to present witnesses who would testify that the victim had a reputation for violence in the community, but was not entitled to appointment of counsel for evidentiary hearing on postconviction claim that trial counsel rendered ineffective assistance by failing to provide a timely notice to state that the defense would rely on a mental health defense less than insanity); *Ganote v. State*, 916 So. 2d 997 (Fla. 2d DCA 2005) (in deciding whether to appoint counsel for defendants in collateral proceedings for postconviction relief, the postconviction court must consider four factors: (1) the adversary nature of the proceeding, (2) its complexity, (3) the need for an evidentiary hearing, or (4) the need for substantial legal research; here, movant was entitled to appointed counsel to represent him at postconviction evidentiary hearing on allegation that his trial counsel was ineffective for failing to investigate and obtain victim's medical records); *Simpson v. State*, 895 So. 2d 1210 (Fla. 5th DCA 2005) (there is no merit to Simpson's first contention that the lower court abused its discretion in failing to appoint counsel to assist him at the evidentiary hearing; he did not request it and this is not a case where counsel would be required); *Fletcher v. State*, 890 So. 2d 1167 (Fla. 5th DCA 2004) (claim that counsel—a public defender—who represented movant when he entered a negotiated no contest plea was ineffective; movant requested the appointment of postconviction counsel, which the court ultimately granted; however, the court appointed the Office of the Public Defender to represent movant in the postconviction proceedings; this was error; while there is no right to counsel in postconviction proceedings, once the court determined that Fletcher was entitled to counsel, it should have appointed conflict-free counsel); *Henderson v. State*, 883 So. 2d 891 (Fla. 5th DCA 2004) (James Henderson appeals the denial of his postconviction motion filed pursuant to Rule 3.850; he argues on appeal that the trial court erred when it refused to appoint counsel to represent him at his evidentiary hearing; we agree with the trial court that the issues were factual

and not complex and that the trial court was not required to appoint counsel to represent Henderson at the evidentiary hearing).

§ 12:15 Florida Rule of Criminal Procedure 3.850—Statute of limitations

There is a statute of limitations on applying for Rule 3.850 relief. Rule 3.850(b), Fla. R. Crim. Proc. (Rule 3.850 motion to vacate a sentence that exceeds the limits provided by law may be filed at any time; no other motion shall be filed or considered pursuant to Rule 3.850 if filed more than two years after the judgment and sentence become final in a noncapital case or more than one year after the judgment and sentence become final in a 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, (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); Rule 3.851(d), Fla. R. Crim. Proc. (any motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within one year after the judgment and sentence become final; for the purposes of this rule, a judgment is final: (1) on the expiration of the time permitted to file in the U.S. Supreme Court a petition for writ of certiorari seeking review of the Florida Supreme Court decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or (2) on the disposition of the petition for writ of certiorari by the U.S. Supreme Court, if filed; no motion shall be filed or considered pursuant to this rule if filed beyond the one-year time limitation provided 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; (2) the fundamental constitutional right asserted was not established within the one-year time period provided and has been held to apply retroactively; or (3) postconviction counsel, through neglect, failed to file the motion; these time limitations are established with the understanding that each death sentenced prisoner will have counsel assigned and available to begin addressing the prisoner's postconviction issues within the time specified in this rule; should the governor sign a death warrant before the expiration of the one-year time limitation, the Florida Supreme Court, on a defendant's request, will grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner; furthermore, this time limitation

shall not preclude the right to amend or to supplement pending pleadings under these rules; an extension of time may be granted by the Florida Supreme Court for the filing of postconviction pleadings if the prisoner's counsel makes a showing of good cause for counsel's inability to file the postconviction pleadings within the one-year period established by this rule).

Thus, under Florida law there is no statute of limitations on filing a Rule 3.850 motion raising a claim that the sentence exceeds the limits provided by law, and, subject to three exceptions, there is for all other claims a one-year statute of limitations on Rule 3.850 motions in death sentence cases and a two-year statute of limitations on Rule 3.850 motions in noncapital cases. The pertinent limitations period begins to run when the judgment and sentence become final.

As recently as 1984, there were no time limits on applying for Rule 3.850 relief. That is, prior to 1984, Rule 3.850 did not contemplate any sort of time limitations except the expiration of the sentence under attack or the possible application of laches.

In 1984, Rule 3.850 was amended, effective Jan. 1, 1985, to add a two-year statute of limitations on applying for Rule 3.850 relief (in both death sentence and noncapital cases).

In 1993, effective Jan. 1, 1994, the time limitation on applying for Rule 3.850 relief was shortened to one year in death sentence cases. *In re Rule of Criminal Procedure 3.851 (Collateral Relief After Death Sentence has been Imposed)*, 626 So. 2d 198 (Fla. 1993). See *Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000) (in 1994, this court adopted a new version of Rule 3.851, Fla. R. Crim. Proc., which reduced to one year the time period for filing postconviction motions in capital cases). Thus, Florida is one of the few states where the postconviction statute of limitations is shorter in death sentence cases than it is in noncapital cases.

§ 12:16 Florida Rule of Criminal Procedure 3.850—Statute of limitations—Case law

For case law on the time limitations on applying for Rule 3.850 relief adopted beginning in 1984, see, e.g., *Jones v. Florida Parole Com'n*, 48 So. 3d 704 (Fla. 2010) (writ of habeas corpus and other postconviction remedies are not the type of "original civil action" for which the Legislature can establish deadlines pursuant to a statute of limitations; due to the constitutional and quasi-criminal nature of habeas proceedings and the fact that such proceedings are the primary avenue through which convicted defendants are able to challenge the validity of a conviction and sentence, Fla. Const. Art. V, § 2(a) grants the Supreme Court the exclusive authority to set deadlines for postconviction motions citing *Allen*

v. Butterworth, 756 So. 2d 52 (Fla. 2000)); *Thompson v. Secretary, Dept. of Corrections*, 595 F.3d 1233 (11th Cir. 2010) (application for state post-conviction or other collateral review is "properly filed," for purposes of tolling the one-year limitations period on filing federal habeas petition, when it is delivered to, and accepted by, the appropriate court officer for placement into the official record; term 'properly filed' refers to the application's compliance with the applicable laws and rules governing filings; even though an application for state post-conviction or other collateral review may not succeed in obtaining the desired relief, it may still be considered "properly filed," for purposes of tolling the one-year limitations period); *Canseco v. State*, 52 So. 3d 575 (Fla. 2010) (*State v. Green*, which overturned *Peart v. State*'s holding regarding limitations period governing motion to vacate plea on grounds that alien defendant was not advised of immigration consequences of guilty or no contest plea, and which granted defendant whose judgment of conviction and sentence were not yet final at time of Peart two-year window to file such motion, did not apply to defendant whose conviction and sentence for possession of controlled substance was final when Peart was decided); *Marshall v. State*, 983 So. 2d 680 (Fla. 4th DCA 2008) (defendant's postconviction claim that his plea was involuntary because counsel affirmatively misadvised him that plea would have no collateral consequences was required to be filed within two years after his conviction became final, and not within two years of his discovery of collateral consequences of his plea; defendant had the burden to exercise due diligence to discover collateral consequences that were of such importance to him that they would cause him not to enter a plea); *Sweet v. Secretary, Dept. of Corrections*, 467 F.3d 1311 (11th Cir. 2006) (death sentence case; Rule 3.851(d)(1), Fla. R. Crim. Proc, which provides the time requirements for Rule 3.850 postconviction capital motions, says that "[a]ny motion to vacate judgment of conviction and sentence of death shall be filed by the prisoner within 1 year after the judgment and sentence become final;" that rule provides exceptions, however); *State v. Green*, 944 So. 2d 208 (Fla. 2006); *Spicer v. State*, 898 So. 2d 984 (Fla. 5th DCA 2005) (postconviction movant adequately established timely service of his motion for rehearing under mailbox rule, thereby tolling time for taking appeal from summary denial of his motion to vacate, set aside, or correct sentence; in response to order to show cause, movant submitted response received by him to his inmate request form, in which officer stated that he observed defendant sealing legal document and placing it into prison mail within deadline for service of motion, and circuit court clerk's office supplied envelope containing motion for rehearing, which was prior to date referred to by mov-

ant and officer); *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) (death sentence case; judgment and death sentence following murder defendant's second trial became final, for purposes of rule requiring postconviction motion to be filed within one year after judgment of conviction and sentence of death becomes final, when the U.S. Supreme Court denied certiorari); *Lormeus v. State*, 957 So. 2d 117 (Fla. 4th DCA 2007) (Rule 3.850 motion for postconviction relief from conviction by no contest plea to child neglect, though denied on the merits, should have been denied as untimely, having been filed nearly three years after conviction and sentence became final, without any allegation of any of the exceptions to the two-year time limit found in Rule 3.850); *Ruffin v. State*, 957 So. 2d 40 (Fla. 1st DCA 2007) (although motions for postconviction relief must be filed within two years of the date that the judgment and sentence become final, claims of newly discovered evidence fall within the exceptions to the time limitation); *Matos v. State*, 953 So. 2d 572 (Fla. 4th DCA 2007) (the supplemental Rule 3.850 motion was under oath and in it counsel alleged that he was retained to file the supplemental motion and failed to timely file the motion because of neglect; the motion stated a sufficient claim of an exception to the time limitation in Rule 3.850(b)(3), Fla. R. Crim. Proc.); *Brigham v. State*, 950 So. 2d 1274 (Fla. 2d DCA 2007) (movant's amended postconviction motion, which was filed more than two years after his sentence and judgment became final, was not untimely, where the postconviction court had stated in its original order dismissing the motion that movant could amend the facially insufficient claims, but did not specify a deadline on when movant could refile his motion); *Fratello v. State*, 950 So. 2d 440 (Fla. 4th DCA 2007) (two-year limitations period governing addendum and supplement to motion for postconviction relief began to run when conviction and sentence for first-degree murder became final, absent showing that any exceptions to two-year period applied); *State v. Haddad*, 950 So. 2d 434 (Fla. 1st DCA 2007) (movant's motion to vacate, set aside, or correct sentence on grounds that when defendant entered plea to drug offense in 1981 he did not know that the conviction would become a mandatory basis for deportation in the future, was timely, where motion was filed within two years of the day movant first learned of the possibility of deportation); *Lopez-Merced v. State*, 949 So. 2d 362 (Fla. 5th DCA 2007) (trial court could not summarily deny defendant's motion for postconviction relief as untimely without considering defendant's argument that two-year limitation period for filing such motions was tolled by defendant's incarceration in another state and lack of access to Florida legal materials); *Henry v. State*, 933 So. 2d 28 (Fla. 2d DCA 2006) (we affirm the postconviction court's ruling

dismissing Henry's ineffective assistance of counsel claims because they are facially insufficient; our affirmance is without prejudice to Henry's right to file a facially sufficient Rule 3.850 motion; because the two-year limit for filing Rule 3.850 motions expired while this appeal was pending and the postconviction court's order did not indicate Henry could refile a facially sufficient Rule 3.850 motion, we direct that Henry may file another Rule 3.850 motion within thirty days of the date of this court's mandate; the postconviction court shall not deem it untimely or successive based upon the motion Henry filed in this proceeding); *Ambroise v. State*, 932 So. 2d 1245 (Fla. 3d DCA 2006) (where a judgment is not appealed, the Rule 3.850 time limit is two years and thirty days; the time for filing a Rule 3.850 motion may be extended; denial of such a motion has been treated as an appealable order; under Rule 3.850(b)(1), the two-year time limit does not apply if 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); *Rogers v. State*, 932 So. 2d 620 (Fla. 5th DCA 2006) (newly discovered evidence exception to two-year limitations period was inapplicable, and Rule 3.850 motion was time-barred); *Walker v. State*, 928 So. 2d 407 (Fla. 3d DCA 2006) (Rule 3.850 claims are time-barred because they were filed more than two years after the defendant's conviction and sentence became final); *Robinson v. State*, 925 So. 2d 373 (Fla. 5th DCA 2006) (it appears that Robinson is utilizing the all writs argument in an attempt to circumvent Rule 3.850's limitation period; we, therefore, dismiss Robinson's habeas petition); *Weidner v. State*, 925 So. 2d 361 (Fla. 4th DCA 2006) (movant's contention that he was coerced into the mid-trial plea by prosecutorial misconduct during the preparation of trial witnesses was time-barred, as it was filed more than two years after his judgment and sentence became final; as it is apparent that the movant knew of the facts giving rise to his claim at the time of his plea, we agree with the trial court that it is time-barred); *Moore v. State*, 924 So. 2d 840 (Fla. 4th DCA 2006) (claim that movant was convicted of a non-existent offense; a conviction for a non-existent crime is fundamental error that can be raised at any time; the trial court erred in denying this claim as untimely and successive; relief granted); *Jones v. State*, 922 So. 2d 1088 (Fla. 4th DCA 2006) (Rule 3.850(b) describes the time frame during which postconviction relief can be sought; it states that no motion shall be filed or considered pursuant to this Rule 3.850 if filed more than two years after the judgment and sentence become final in a noncapital case; three exceptions are enumerated, though none apply in the instant case; generally, collateral proceedings will not toll the time to file a Rule 3.850 motion;

here, Rule 3.850 motion for postconviction relief that was filed more than two years after the convictions and sentences became final was untimely); *Colombo v. State*, 917 So. 2d 307 (Fla. 1st DCA 2005) (claim of illegal sentence may be raised at any time, including collaterally, in a Rule 3.850 motion); *Franklin v. State*, 917 So. 2d 303 (Fla. 3d DCA 2005) (Rule 3.850(b)(3) authorizes the filing of a motion more than two years after a judgment and sentence become final where the defendant retained counsel to timely file a 3.850 motion and counsel, through neglect, failed to file the motion); *Butler v. State*, 917 So. 2d 244 (Fla. 2d DCA 2005) (two-year period for filing postconviction motion challenging consecutive sentences imposed following conviction of multiple counts of aggravated stalking began to run on date of issuance of affirming mandate); *Quintanilla v. State*, 913 So. 2d 687 (Fla. 3d DCA 2005) (motion for reconsideration of denial of motion for postconviction relief was effectively a second motion for postconviction relief, and thus motion for reconsideration was subject to two-year limitations period for motions for postconviction relief); *Morgan v. State*, 912 So. 2d 642 (Fla. 5th DCA 2005) (newly discovered evidence exception to the two year time period for filing of a motion for postconviction relief requires an allegation and eventual proof that the newly discovered evidence was unknown to the court, party, or counsel at the time of the trial and that the defendant or counsel could not have discovered the evidence by the use of due diligence); *Parker v. State*, 907 So. 2d 694 (Fla. 4th DCA 2005) (motion for extension of time in which to file Rule 3.850 motion was properly denied, where the request for extension was itself filed after the two-year limitations period had run; when the request for extension is made before the statute of limitations expires, the request made be granted on a showing of good cause; however, when the request is made after the statute of limitations has run, a showing of excusable neglect is required before the extension may be granted); *Dol v. State*, 900 So. 2d 624 (Fla. 3d DCA 2005) (Rule 3.850 motion was time barred); *Pagan v. State*, 899 So. 2d 1203 (Fla. 2d DCA 2005) (Pagan claims that his Rule 3.850 was, under the prison mailbox rule, filed within the two-year statute of limitations; under the mailbox rule, a pro se inmate's document is deemed filed when the inmate entrusts the document to prison officials for further delivery or processing; we conclude that Pagan's allegation that he timely filed the original motion by delivering it to prison officials is a facially sufficient claim requiring an evidentiary hearing); *Chavez v. State*, 899 So. 2d 430 (Fla. 3d DCA 2005) (Rule 3.850 motion was untimely); *Alguno v. State*, 892 So. 2d 1200 (Fla. 4th DCA 2005) (Rule 3.850 motion raising ineffective counsel claim based on alleged affirmative misadvice given to movant

before he pleaded guilty; original motion was filed within two years of when movant allegedly discovered that his counsel's affirmative misadvice was erroneous, and was therefore timely); *Ortiz v. State*, 895 So. 2d 1100 (Fla. 3d DCA 2004) (claims of newly discovered evidence are properly raised on Rule 3.850 motion to vacate, set aside, or correct a sentence, and are not subject to the usual two-year time limit of Rule 3.850(b); in order to vacate a conviction under Rule 3.850, the newly discovered evidence must be of such nature that it would probably produce acquittal on retrial); *Rodriguez v. State*, 892 So. 2d 510 (Fla. 2d DCA 2004) (defendant's motion for postconviction relief from conviction by guilty plea to second degree murder was timely filed and, thus, should have been considered on the merits, even though defendant filed motion beyond two-year time limit following entry of final judgment and sentence; defendant did not discover that his gain time had been forfeited until he filed administrative grievances with the Department of Corrections, and once the Department responded and informed him of the forfeiture, defendant had two years to file his motion based on this newly discovered information); *White v. State*, 886 So. 2d 286 (Fla. 1st DCA 2004) (generally, Rule 3.800(a) is appropriate only where the claim can be resolved from the face of the record, i.e., without resort to factfinding after an evidentiary hearing); *LeBron v. State*, 885 So. 2d 448 (Fla. 5th DCA 2004) (under mailbox rule, motion for postconviction relief was filed when delivered to prison officials for mailing, for purposes of two-year limitations period for filing motion after conviction became final); *Pritchett v. State*, 884 So. 2d 417 (Fla. 2d DCA 2004) (defendant was entitled to amend postconviction motion and to assert additional claim, where two-year statutory period had not expired, and trial court had not yet ruled on initial claims).

§ 12:17 Florida Rule of Criminal Procedure 3.850—Filing

Application for relief under Rule 3.850 is made by filing a motion for postconviction relief in the convicting court. See *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (Rule 3.850 essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court). A model form of motion for postconviction relief, for use in Rule 3.850 proceedings, is included in the Florida Rules of Criminal Procedure. See Rule 3.987, Fla. R. Crim. Proc.

The prescribed contents of a Rule 3.850 motion in a death sentence case are set forth in Rule 3.851(e), Fla. R. Crim. Proc., and the prescribed contents of a Rule 3.850 motion in a noncapital case are set forth in Rule 3.850(c), Fla. R. Crim. Proc.

The amendment of Rule 3.850 motions in death sentence cases is governed by Rule 3.851(f)(4), Fla. R. Crim. Proc.

Successive Rule 3.850 motions filed in behalf of the same person are governed by Rule 3.850(f), Fla. R. Crim. Proc.; for special procedural requirements with respect to successive Rule 3.850 motions in death sentence cases, see Rule 3.851(e)(2), Fla. R. Crim. Proc.

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. Rule 3.850(d), Fla. R. Crim. Proc.

Numerous special requirements applicable only to Rule 3.850 proceedings involving a death sentence are set forth in Rule 3.851, Fla. R. Crim. Proc.

§ 12:18 Florida Rule of Criminal Procedure 3.850—Amendment of motion—Case law

For case law, see, e.g., *Petz v. State*, 917 So. 2d 381 (Fla. 2d DCA 2005) (before denying relief on defendant's claim in his motion for postconviction relief that defense counsel was ineffective for failing to call alibi witness, postconviction court was required to grant defendant an opportunity to amend claim, even though claim was facially insufficient); *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) (death sentence case; while defendants should not be given an unlimited opportunity to amend their motions for postconviction relief, due process demands that some reasonable opportunity be given to defendants who make good faith efforts to file their claims in a timely manner and whose failure to comply with the rule is more a matter of form than substance).

§ 12:19 Florida Rule of Criminal Procedure 3.850—Evidentiary hearings

Evidentiary hearings in Rule 3.850 proceedings are governed by Rule 3.850(d), Fla. R. Crim. Proc. A Rule 3.850 motion may be determined without requiring the production of the movant at the hearing. Rule 3.850(e), Fla. R. Crim. Proc. In a death sentence case, the Rule 3.850 movant has a right to be present at any evidentiary hearing conducted by the court. Rule 3.851(c)(3), Fla. R. Crim. Proc. For special procedural requirements with respect to evidentiary hearings in Rule 3.850 proceedings in death sentence cases, see Rule 3.851(c)(3), (f)(5), Fla. R. Crim. Proc.

§ 12:20 Florida Rule of Criminal Procedure 3.850—Evidentiary hearings—Case law

For case law on evidentiary hearings in Rule 3.850 proceed-

ings, see, e.g., *Foster v. State*, 132 So. 3d 40 (Fla. 2013) (a court's decision whether to grant an evidentiary hearing on a rule 3.850 motion or claim is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law; postconviction court may summarily deny a defendant's claim asserted in a rule 3.850 motion if (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient; legally insufficient claims include those that are procedurally barred in collateral proceedings because they should have been raised on direct appeal; in establishing a prima facie case based on a legally valid claim, mere conclusory allegations are insufficient); *Jennings v. State*, 123 So. 3d 1101 (Fla. 2013) (generally, a defendant is entitled to an evidentiary hearing on a rule 3.850 motion unless: (1) the motion, files, and records in the case conclusively demonstrate that the movant is entitled to no relief; or (2) the motion or particular claim is legally insufficient; the defendant bears the burden of establishing a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient); *Nordelo v. State*, 93 So. 3d 178 (Fla. 2012) (the determination of whether the statements in an affidavit provided as newly discovered evidence are true and meet the due diligence and probability prongs of test for determining whether newly discovered evidence compels postconviction relief usually requires an evidentiary hearing to evaluate credibility unless the affidavit is inherently incredible or obviously immaterial to the verdict and sentence; when taken as true for purposes of evaluating the legal sufficiency of defendant's motion for postconviction relief based on newly discovered evidence that defendant was not involved in the crime, the factual allegations and codefendant's proposed exculpatory testimony presented a legally sufficient claim triggering an evidentiary hearing, where the motion and accompanying affidavit from defendant's codefendant alleged that defendant did not participate in the crime with codefendant and that codefendant was afraid to come forward with the exculpatory testimony and refused to testify because he was afraid that the State Attorney would take away his plea offer); *Franqui v. State*, 59 So. 3d 82 (Fla. 2011) (a defendant is entitled to an evidentiary hearing on a post-conviction relief motion unless (1) the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or (2) the motion or particular claim is legally insufficient; defendant bears the burden to establish a prima facie case based on a legally valid claim; mere conclusory allegations are insufficient); *Jones v. State*, 998 So. 2d 573 (Fla. 2008), as revised on denial of reh'g, (Dec. 23, 2008) (to support summary denial of a claim, the trial court must

either state its rationale in the order denying relief or attach portions of the record that would refute the claims; where no evidentiary hearing is held, we must accept the defendant's factual allegations as true to the extent the record does not refute them. However, the defendant must establish a legally sufficient claim; this Court has consistently held that to be entitled to an evidentiary hearing on a motion claiming ineffective assistance of counsel, the defendant must allege specific facts establishing both deficient performance of counsel and prejudice to the defendant; here, however, Jones makes a conclusory allegation of prejudice and fails to specifically plead any prejudice sufficient to warrant an evidentiary hearing); *Pooler v. State*, 980 So. 2d 460 (Fla. 2008) (defendant seeking evidentiary hearing on postconviction relief motion bears the burden of establishing a prima facie case based upon a legally valid claim; mere conclusory allegations are not sufficient); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005) (death sentence case; a Rule 3.850 movant is entitled to an evidentiary hearing on a postconviction relief motion unless (1) the motion, files, and records in the case conclusively show that the prisoner is entitled to no relief, or (2) the motion or a particular claim is legally insufficient; where a motion for postconviction relief lacks sufficient factual allegations, or where alleged facts do not render the judgment vulnerable to collateral attack, the motion may be summarily denied); *Parker v. State*, 904 So. 2d 370 (Fla. 2005), as revised on denial of reh'g, (June 2, 2005) (death sentence case; in cases where there has been no evidentiary hearing, the court must accept the factual allegations made by the defendant to the extent that they are not refuted by the record); *Jacobs v. State*, 880 So. 2d 548 (Fla. 2004) (trial court's consideration of a motion under Rule 3.850 involves a number of possible steps: first, a trial court must determine whether the motion is facially sufficient, i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted; it would logically follow that if no valid claim is alleged, the court may deny the motion outright, and the court need not examine the record; second, if the court determines that the motion is facially sufficient, the court may then review the record; if the record conclusively refutes the alleged claim, the claim may be denied; in doing so, the court is required to attach those portions of the record that conclusively refute the claim to its order of denial; third, if the court determines that the motion is facially sufficient and that there are no files or records conclusively showing that the movant is not entitled to relief, the court may order the state attorney's office to file a response to the defendant's motion; the state attorney must respond to the allegations of the motion, state whether the movant has pursued any other avail-

able remedies (including any other postconviction motions), and state whether the defendant received an evidentiary hearing; fourth, after the state attorney has filed the required response, the trial judge must determine whether the claims alleged in the motion have been denied at a previous stage in the proceedings; finally, if the claims presented in the motion have not been denied previously, the judge shall then determine whether an evidentiary hearing is required in order to resolve the claims alleged in the motion; thus, if the trial court finds that the motion is facially sufficient, that the claim is not conclusively refuted by the record, and that the claim is not otherwise procedurally barred, the trial court should hold an evidentiary hearing to resolve the claim); *Smith v. State*, 956 So. 2d 1266 (Fla. 4th DCA 2007) (when a trial court denies a Rule 3.850 motion without an evidentiary hearing, it must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion); *Castillo v. State*, 955 So. 2d 1252 (Fla. 1st DCA 2007) (movant was entitled to hearing on claim that counsel was ineffective in failing to raise alternative defense theory); *Fratello v. State*, 950 So. 2d 440 (Fla. 4th DCA 2007) (trial court was precluded from denying motion for postconviction relief based on cold record after evidentiary hearing was conducted by prior judge who failed to issue ruling); *Griffith v. State*, 922 So. 2d 436 (Fla. 2d DCA 2006) (trial court was not warranted in abruptly ending evidentiary hearing on defendant's motion for postconviction relief and removing him from courtroom; trial court departed from its role as a neutral arbitrator at time of evidentiary hearing on defendant's motion for postconviction relief); *Simpson v. State*, 895 So. 2d 1210 (Fla. 5th DCA 2005) (there is no merit to Simpson's first contention that the lower court abused its discretion in failing to appoint counsel to assist him at the evidentiary hearing; he did not request it and this is not a case where counsel would be required).

§ 12:21 Florida Rule of Criminal Procedure 3.850—Dismissal of motion

For case law on dismissal of motion, see e.g., *Johnson v. State*, 104 So. 3d 1010 (Fla. 2012) (postconviction court may deny a defendant's claim asserted in a rule 3.850 motion if the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or the motion or particular claim is legally insufficient; legally insufficient claims include those that are procedurally barred; claims that should have been raised on direct appeal are procedurally barred from being raised in collateral proceedings; moreover, in establishing a prima facie case based on a legally valid claim, mere conclusory allegations are

insufficient); *Hawley v. State*, 957 So. 2d 1270 (Fla. 4th DCA 2007) (dismissal of a movant's Rule 3.850 motion for postconviction relief, as sanction for movant absconding before trial court hears motion, is appropriate only when there is a sufficient connection between the defendant's fugitive status and the court's ability to resolve the pending motion; under circumstances, dismissal of movant's motion for postconviction relief, as sanction for movant absconding before trial court heard the motion, was not warranted); *Gutierrez v. State*, 955 So. 2d 71 (Fla. 3d DCA 2007) (dismissal of Rule 3.850 postconviction motion following full evidentiary hearing on all claims should have been with prejudice).

§ 12:22 Florida Rule of Criminal Procedure 3.850—Appeals under Rule 3.850

The final order of the convicting court granting or denying Rule 3.850 relief is an appealable final judgment. Rule 3.850(g), Fla. R. Crim. Proc.; Rule 9.140(b)(1)(D), (c)(1)(P), Fla. R. App. Proc.

The time for filing a notice of appeal from a final order granting or denying Rule 3.850 relief is 30 days from rendition of the order. Rule 3.850(g) (all orders denying Rule 3.850 relief shall include a statement that the movant has the right to appeal within 30 days from rendition of the order), Fla. R. Crim. Proc; Rule 9.110(b), Fla. R. App. Proc. (notice of appeal to be filed within 30 days of rendition of the order to be reviewed on appeal).

The appeal is directly to the Florida Supreme Court in a death sentence case; otherwise, the appeal is to the appropriate district court of appeal.

Appeals from orders granting or denying a Rule 3.850 motion without an evidentiary hearing are governed by Rule 9.141(b)(2), Fla. R. App. Proc. Appeals from orders granting or denying a Rule 3.850 motion after an evidentiary hearing are governed by Rule 9.141(b)(3), Fla. R. App. Proc.

A Rule 3.850 movant may seek a belated appeal from the denial of a Rule 3.850 motion if the movant timely requested his counsel to appeal the order denying relief and counsel, through neglect, failed to do so. Rule 3.850(g), Fla. R. Crim. Proc. The proper procedure for applying for such a belated appeal is to file an original habeas corpus petition directly in the appropriate district court of appeal, pursuant to Rule 9.141, Fla. R. App. Proc.

§ 12:23 Florida Rule of Criminal Procedure 3.850—Appeals under Rule 3.850—Case law

For case law on appeals in Rule 3.850 proceedings, see e.g., *Cross v. State*, 930 So. 2d 863 (Fla. 2d DCA 2006) (appeal of a

postconviction relief matter will not deprive trial courts of jurisdiction so long as the issues raised in the two cases are unrelated; on the other hand, we have recognized that trial courts lack jurisdiction to consider the merits of a defendant's Rule 3.850 motion while the direct appeal of the defendant's judgment and sentence is pending); *Tompkins v. State*, 894 So. 2d 857 (Fla. 2005) (death sentence case; if an appeal is pending in a death sentence case and the this court denies a motion to relinquish jurisdiction for the trial court to consider a new claim, the trial court should hold any successive postconviction motion in abeyance until the appeal process is completed).

§ 12:24 Florida Rule of Criminal Procedure 3.850—Grounds for relief

The grounds for granting a Rule 3.850 motion, which are limited to defects in convictions or sentences, are set forth in Rule 3.850(a), Fla. R. Crim. Proc.; see also, Rule 3.850(d), Fla. R. Crim. Proc. Under judicial construction of these provisions, relief may be granted, broadly speaking, on grounds of lack of jurisdiction, on grounds of violation of a constitutional right, or on grounds involving a nonjurisdictional, nonconstitutional but nonetheless fundamental or egregious error.

As worded, Rule 3.850 says nothing about whether newly discovered evidence is a ground for relief. Nevertheless, newly discovered evidence of innocence is a ground for relief in a Rule 3.850 proceeding.

If the convicting court finally disposes of the Rule 3.850 motion in favor of the convicted person, it has broad powers to grant appropriate relief. Rule 3.850, Fla. R. Crim. Proc. (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).

§ 12:25 Florida Rule of Criminal Procedure 3.850—Denial of the right to effective counsel

The grounds for relief in a Rule 3.850 proceeding include denial of effective assistance of counsel.

Denial of the right to counsel at the trial, at the plea hearing, or at sentencing in the convicting court.

§ 12:26 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Ineffective assistance of counsel at trial or when pleading guilty or nolo contendere

For case law, on ineffective assistance of counsel in the convicting court at trial or when pleading guilty or nolo contendere, see e.g., *State v. Lucas*, 183 So. 3d 1027 (Fla. 2016) (defendant claiming in postconviction proceeding that trial counsel was ineffective in failing to call an ophthalmology expert at trial in prosecution for burglary of a dwelling with a battery and aggravated battery was not required to name the witness and allege that witness would have been available to testify, where allegations of fact demonstrated the specificity required to show why an expert was necessary, state presented expert testimony, and portions of the record supported a claim that an expert could have shown that eye injuries were not permanent or disfiguring as would support aggravated battery charge); *Duest v. State*, 12 So. 3d 734 (Fla. 2009) (claim of trial court error generally can be raised on direct appeal but not in a rule 3.850 motion, and a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal; defendant thus has little choice: as a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal); *Morgan v. State*, 991 So. 2d 835 (Fla. 2008) (claim of ineffective assistance of counsel can be based on counsel's advice to reject a favorable plea offer); *Marshall v. State*, 983 So. 2d 680 (Fla. 4th DCA 2008) (affirmative misadvice regarding the collateral, future sentence-enhancing consequences of a plea, should the defendant commit additional crimes, does not state a valid claim for postconviction relief); *State v. Dickey*, 928 So. 2d 1193 (Fla. 2006) (movant's claim that he had entered guilty plea based on his counsel's wrong advice about a potential sentence enhancement for a future crime did not meet requirements for a valid claim of ineffective assistance); *Holland v. State*, 916 So. 2d 750 (Fla. 2005) (death sentence case; trial counsel's purported concession of defendant's guilt to attempted first-degree murder without defendant's express prior consent was not ineffective assistance, and trial counsel's purported failure to object to comments made by state during its guilt phase closing argument was not ineffective assistance); *Davis v. State*, 953 So. 2d 612 (Fla. 2d DCA 2007) (claim that movant's counsel misadvised him of the consequences of proceeding to trial, and that he would have accepted the state's plea offer had he been properly advised); *McKune v. State*, 953 So. 2d 746 (Fla. 2d DCA 2007) (movant claims that he would not have pleaded no contest and would have insisted on going to trial

but for counsel's threats to withdraw unless movant pleaded guilty or no contest; movant also claims that he would not have pleaded no contest but for counsel's misadvice that he would face a potential "life sentence" if the case went to trial); *Hoswell v. State*, 948 So. 2d 820 (Fla. 4th DCA 2007) (defendant was entitled to postconviction review of claim not conclusively refuted by record that trial counsel was ineffective for failing to advise defendant that he could be subjected to enhanced penalty as habitual offender when state initially offered 55-month plea offer, which was prior to state's filing notice of intent to seek enhanced penalties); *Randall v. State*, 885 So. 2d 932 (Fla. 5th DCA 2004) (evidentiary hearing ordered on claim that plea counsel was ineffective for allowing defendant under influence of psychotropic medications to enter no contest pleas); *Kleppinger v. State*, 884 So. 2d 146 (Fla. 2d DCA 2004) (movant's alleged that his trial counsel failed to advise him of possible sentences he faced if he proceeded to trial, and that he would have accepted state's plea offer had he been properly advised; ineffective assistance claims based on conceding a charged offense focus on two issues: (1) whether counsel conceded a charged offense so as to render the not guilty plea a nullity; and (2) whether the defendant consented to the concession); *Cornett v. State*, 922 So. 2d 297 (Fla. 2d DCA 2006) (Cornett claims that his counsel's advice concerning the availability of gain time was erroneous and that he is therefore entitled to relief from the guilty plea he entered in reliance on the erroneous advice; relief granted); *Hollander v. State*, 920 So. 2d 204 (Fla. 4th DCA 2006) (when the alleged ineffectiveness of counsel concerns the rejection of a plea offer, the defendant must prove (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2) defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the state's plea offer would have resulted in a lesser sentence); *Julien v. State*, 917 So. 2d 213 (Fla. 4th DCA 2005) (first-time offender, movant pled guilty to grand theft and was placed on probation; as a result of his plea, the United States commenced removal proceedings to rescind his permanent residence status and remove him to Haiti; here, defense counsel's failure to inform defendant of his option to apply for the pretrial intervention program constituted ineffective assistance of counsel; relief granted); *Parson v. State*, 913 So. 2d 1270 (Fla. 4th DCA 2005) (claim by guilty-pleading movant that defense counsel's failure to investigate and advise movant that prior convictions could not be used to enhance sentence for DUI causing serious bodily injury and felony DUI causing injury constituted ineffective assistance of counsel, was a legally sufficient claim for postconviction relief).

§ 12:27 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Ineffective assistance of counsel—Failure to investigate—Case law

For case law on counsel's failure to investigate as ineffective assistance of counsel, see e.g., *Ponticelli v. State*, 941 So. 2d 1073 (Fla. 2006) (death sentence case; trial counsel's failure to conduct adequate investigation for mitigation evidence to support mental health mitigators prior to sentencing for capital murder did not prejudice defendant); *Ganote v. State*, 916 So. 2d 997 (Fla. 2d DCA 2005) (movant was entitled to appointed counsel to represent him at postconviction evidentiary hearing on allegation that his trial counsel was ineffective for failing to investigate and obtain victim's medical records); *Chouquer v. State*, 950 So. 2d 1276 (Fla. 2d DCA 2007) (claim that trial counsel was ineffective for failing to investigate and file a motion to suppress was legally sufficient); *Badger v. State*, 933 So. 2d 729 (Fla. 4th DCA 2006) (claim that trial counsel was ineffective for failing to investigate and call two witnesses at trial and for failing to object to jury instruction); *Ganote v. State*, 916 So. 2d 997 (Fla. 2d DCA 2005) (movant was entitled to appointed counsel to represent him at postconviction evidentiary hearing on allegation that his trial counsel was ineffective for failing to investigate and obtain victim's medical records); *Gonzalez v. State*, 913 So. 2d 707 (Fla. 3d DCA 2005) (movant was entitled to evidentiary hearing on his claim that trial counsel was ineffective for failing to investigate a list of defense witnesses); *Gonzalez v. State*, 913 So. 2d 707 (Fla. 3d DCA 2005) (movant was entitled to evidentiary hearing on his claim that trial counsel was ineffective for failing to investigate a list of defense witnesses); *Bulley v. State*, 900 So. 2d 596 (Fla. 2d DCA 2004) (claim of ineffective assistance of counsel based on alleged failure of counsel to adequately investigate, prepare, and call crucial defense witnesses at trial); *Spooner v. State*, 889 So. 2d 900 (Fla. 1st DCA 2004) (identity and availability to testify are necessary allegations in a facially sufficient claim of ineffective assistance of counsel for failure to investigate, interview, or call witnesses); *Cipriano v. State*, 883 So. 2d 363 (Fla. 4th DCA 2004) (claim that trial counsel was ineffective for failing to investigate state's key witness, and for failing to impeach witness with his probationary status and his violation of probation at the time of trial); *Rangel-Pardo v. State*, 879 So. 2d 19 (Fla. 2d DCA 2004) (allegations that trial counsel failed to investigate the roommate of a witness for the state, and that roommate's testimony would have supported defendant's claim of self-defense, stated a facially sufficient claim of ineffective assistance); *Straitwell v. State*, 834 So. 2d 918 (Fla. 2d DCA 2003) (evidentiary hearing ordered on claim that, because he failed to explore using intoxication defense, counsel was ineffective).

§ 12:28 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Ineffective assistance of counsel—Failure to present witnesses or evidence—Case law

For case law on counsel's failure to present witnesses as ineffective assistance of counsel, see e.g., *Ibar v. State*, 190 So. 3d 1012 (Fla. 2016) (counsel's failure to procure facial identification expert or forensic anthropologist to establish difficulty in being able to positively identify defendant from videotape as one of perpetrators of murders amounted to deficient performance, as element of ineffective assistance of counsel claim; videotape and images distilled therefrom were instrumental to State's case, testimony from expert on facial identification was admissible, expert testimony would not have been inconsistent with defendant's alibi defense, and counsel completely failed to pursue defense through discrediting videotape and State's evidence as to identification); *Lukehart v. State*, 70 So. 3d 503 (Fla. 2011) (defendant, charged with capital murder for the killing of an infant, failed to establish that trial counsel rendered ineffective assistance at penalty phase by failing to present witness testimony to challenge defendant's prior child abuse conviction that constituted a prior violent felony aggravator; residual doubt was not a recognized claim for challenging an aggravator, prior conviction had not been vacated, counsel conducted a reasonable investigation into the aggravator and was aware that defendant denied committing the prior crime, testimony would have opened door to defendant's prior admission to severely injuring an infant, and testimony would likely have caused jury to conclude that defendant had a propensity for harming infants); *Coleman v. State*, 64 So. 3d 1210 (Fla. 2011) (trial counsel's deficient performance in failing to investigate, develop, and present available mitigating evidence during penalty phase of capital murder trial prejudiced defendant and, thus, constituted ineffective assistance; presentation of evidence that defendant came from an impoverished background, had an unstable childhood, had a poor relationship with his father, was traumatized by the loss his father at a young age, was traumatized by the loss of his half-brother, suffered from negative experiences, such as riots and violence, at a young age, had an erratic school record and history of special education placement, had a long history of substance abuse, was molested as a child, received a severe head injury at the age of 18, and suffered from mental health and illness deficiencies would have precluded judge from overriding jury's recommendation of life); *Clark v. State*, 35 So. 3d 880 (Fla. 2010) (death sentence case; court reviewing claim of ineffective assistance premised on trial counsel's failure in capital case to

introduce certain mitigation evidence must focus on whether the investigation resulting in counsel's decision not to introduce the evidence was itself reasonable; when making this assessment, court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further; trial counsel was not deficient in failing at penalty phase of capital murder prosecution to present the same mitigation evidence that had not worked in a previous capital murder case in which counsel had represented defendant; counsel determined that the mitigating evidence "cut both ways," and he and defendant agreed that it would not be beneficial to present the mitigation evidence in a "weaker" case when it did not work in a stronger case); *Melton v. State*, 949 So. 2d 994 (Fla. 2006) (death sentence case; trial counsel did not render ineffective assistance during penalty phase of capital murder trial by failing to paint a complete picture of defendant's unusual and isolated childhood); *Jones v. State*, 949 So. 2d 1021 (Fla. 2006) (death sentence case; under circumstances, trial counsel did not render ineffective assistance at penalty phase of capital-murder trial by not calling defendant's brother and another witness to present lay mitigation testimony); *Lamarca v. State*, 931 So. 2d 838 (Fla. 2006) (death sentence case; movant who appeared pro se during penalty phase of his capital murder prosecution could not claim ineffective assistance of counsel as grounds for subsequent reversal); *Davis v. State*, 928 So. 2d 1089 (Fla. 2005) (death sentence case; defense counsel's presentation of movant's case in mitigation during penalty phase was not ineffective assistance); *Johnson v. State*, 921 So. 2d 490 (Fla. 2005) (death sentence case; claim that defense counsel's investigation and preparation for penalty phase and his presentation of evidence at that phase was deficient); *Duckett v. State*, 918 So. 2d 224 (Fla. 2005) (death sentence case; claim that trial counsel was ineffective in failing to call additional witnesses to testify at the penalty phase of capital murder trial concerning defendant's good character); *Parker v. State*, 904 So. 2d 370 (Fla. 2005), as revised on denial of reh'g, (June 2, 2005) (death sentence case; evidentiary hearing was warranted as to claim that trial counsel was ineffective at penalty phase in failing to investigate and present additional mitigation evidence); *Arbelaez v. State*, 898 So. 2d 25 (Fla. 2005) (death sentence case; trial counsel's failure to call defendant's family members as witnesses during penalty phase of capital murder trial was reasonable trial strategy); *Peterka v. State*, 890 So. 2d 219 (Fla. 2004) (death sentence case; when evaluating claims that counsel was ineffective for failing to present mitigating evidence during penalty phase of capital case, the defendant has the burden of

showing that counsel's ineffectiveness deprived the defendant of a reliable penalty phase proceeding); *Kimbrough v. State*, 886 So. 2d 965 (Fla. 2004) (death sentence case; trial counsel's failure to call forensic criminal psychologist or forensic psychologist to testify for mental health mitigation purposes at penalty phase of capital murder prosecution was a reasonable strategic decision and was not deficient performance); *Power v. State*, 886 So. 2d 952 (Fla. 2004) (death sentence case; trial counsel was not ineffective during penalty phase of capital murder trial for failing to object to prosecutorial comment that defendant "takes pleasure in inflicting pain"); *Hodges v. State*, 885 So. 2d 338 (Fla. 2004) (death sentence case; any deficiency in penalty phase counsel's failure to present mental health mitigating evidence did not prejudice capital murder defendant and did not amount to ineffective assistance); *Henyard v. State*, 883 So. 2d 753 (Fla. 2004) (death sentence case; defense counsel's failure to put on evidence, during penalty phase of capital murder prosecution, with respect to defendant's mental state as characterized by his suicidal ideations and suicide attempt following his arrest, was reasonable strategic decision); *Barthel v. State*, 882 So. 2d 1054 (Fla. 2d DCA 2004) (in order to allege an ineffective assistance of counsel claim for failing to call a witness, the postconviction movant must set forth four requirements: (1) the identity of the prospective witness; (2) the substance of the witness's testimony; (3) an explanation as to how the omission of this evidence prejudiced the outcome of the trial; and (4) an assertion that the witness was available to testify); *Nelson v. State*, 875 So. 2d 579 (Fla. 2004) (facially sufficient postconviction motion alleging the ineffectiveness of counsel for failing to call certain witnesses must include an assertion that those witnesses would in fact have been available to testify at trial); *Collins v. State*, 898 So. 2d 1002 (Fla. 2d DCA 2005) (failure to call a witness can constitute ineffective assistance of counsel if the witness may have been able to cast doubt on the defendant's guilt and the defendant alleges in his motion the prospective witness's identity, the substance of the witness's testimony, the availability of the witness to testify, and an explanation as to how the omission of the testimony prejudiced the outcome of the trial); *Thurman v. State*, 892 So. 2d 1085 (Fla. 2d DCA 2004) (movant convicted of grand theft of an air conditioner was entitled to evidentiary hearing on his claim that counsel was ineffective for failing to present evidence contradicting state's evidence as to value of the air conditioner).

§ 12:29 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Ineffective assistance of counsel—Failures involving jury and jury instructions—Case law

For case law on ineffective assistance of counsel involving the jury or jury instructions, see e.g., *Nelson v. State*, 73 So. 3d 77 (Fla. 2011) (notion that a jury would have reached a different verdict if trial counsel had exercised peremptory challenges in a different manner is generally considered mere speculation that fails to rise to the level of prejudice needed to establish an ineffective-assistance of counsel claim: defense counsel in a prosecution for capital murder did not render ineffective assistance by not convincing trial court to remove for cause six prospective jurors who allegedly had a predisposition in favor of the death penalty; under full interrogation, the jurors attested that they could recommend a sentence based on the evidence presented and trial court's instructions on the law and that they could weigh the aggravating and mitigating factors as they considered their recommended sentence, and defense counsel did in fact move to have the jurors removed for cause); *Pittman v. State*, 90 So. 3d 794 (Fla. 2011) (appellate counsel was not ineffective in failing to raise issue that judge's instructions regarding jury's role in the capital sentencing process were improper, where defendant failed to show that the instructions were anything but consistent with Florida's statutory scheme); *Davis v. State*, 892 So. 2d 1073 (Fla. 2d DCA 2004) (claim that counsel was ineffective for failure to challenge for cause two prospective jurors who stated that they or family members had been victims of armed robbery; the failure of trial counsel to challenge a juror for cause is a cognizable claim for postconviction relief on grounds of ineffective assistance); *Jenkins v. State*, 824 So. 2d 977 (Fla. 4th DCA 2002) (claim that attorney was ineffective with respect to the composition of the trial jury); *Gian-Grasso v. State*, 899 So. 2d 392 (Fla. 4th DCA 2005) (claim that trial counsel rendered ineffective assistance in prosecution for burglary with an assault or battery by not objecting to trial court's instructions that jury could select only one of lesser included offenses of trespass and battery indicated on verdict form); *Richardson v. State*, 890 So. 2d 1197 (Fla. 5th DCA 2005) (claim that movant's counsel was ineffective for failing to exercise a peremptory challenge to a juror whose father had been a victim of a similar crime).

§ 12:30 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Ineffective assistance of counsel—Procedural issues—Case law

For case law on procedural failures as ineffective assistance of

counsel, see e.g., *Lukehart v. State*, 70 So. 3d 503 (Fla. 2011) (pursuant to rule 3.850(f), evidence revealed after the conclusion of an evidentiary hearing is proper in a successive motion for postconviction relief, not in a motion to amend the initial motion for postconviction relief); *Seibert v. State*, 64 So. 3d 67 (Fla. 2010), as revised on denial of reh'g, (Apr. 14, 2011) (a claim of ineffectiveness generally can be raised in a rule 3.850 motion but not on direct appeal; a defendant thus has little choice: as a rule, he or she can only raise an ineffectiveness claim via a rule 3.850 motion, even if the same underlying facts also supported, or could have supported, a claim of error on direct appeal); *McDonald v. State*, 952 So. 2d 484 (Fla. 2006) (death sentence case; where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffective assistance, defendant must also prove that his Fourth Amendment claim is meritorious); *Branch v. State*, 952 So. 2d 470 (Fla. 2006) (death sentence case; trial counsel did not render ineffective assistance in capital murder trial by not filing a motion to suppress evidence seized from vehicle, since there was no valid basis for challenging the legality of the search); *Rodriguez v. State*, 892 So. 2d 510 (Fla. 2d DCA 2004) (claim that counsel was ineffective for failing to file a motion to suppress evidence allegedly obtained in violation of Fourth Amendment); *Harvin v. State*, 886 So. 2d 1041 (Fla. 1st DCA 2004) (claim that trial counsel was ineffective for failing to request curative or mistrial after trial court sustained objection to question by prosecutor to fingerprint expert as to whether anyone had reviewed and verified his work); *Higgins v. State*, 885 So. 2d 994 (Fla. 4th DCA 2004) (evidentiary hearing ordered on claim that counsel was ineffective for failing to object to photographic lineup); *Wells v. State*, 881 So. 2d 54 (Fla. 4th DCA 2004) (claim that counsel was ineffective for failing to move for discharge based on expiration of speedy trial period); *Hamilton v. State*, 915 So. 2d 1228 (Fla. 2d DCA 2005) (evidentiary hearing ordered on claim that counsel was ineffective in failing to seek suppression of movant's videotaped statement); *Ortiz v. State*, 902 So. 2d 339 (Fla. 2d DCA 2005) (motion for postconviction relief was facially sufficient to establish claim of ineffective assistance of trial counsel, for counsel's failure to impeach several state witnesses' inconsistent and conflicting testimony).

§ 12:31 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Ineffective assistance of counsel—Failure to object—Case law

For case law on failing to object as ineffective assistance of counsel, see e.g., *Hildwin v. State*, 84 So. 3d 180 (Fla. 2011) (to prevail on an ineffective assistance of counsel claim on ground

counsel failed to object to certain statements made by the state in its closing argument, the petitioner must show that the comments were improper or objectionable and that there was no tactical reason for failing to object); *Andres v. State*, 898 So. 2d 256 (Fla. 4th DCA 2005) (claim that trial counsel was ineffective in not objecting that his prior misdemeanor convictions for DUI were uncounseled and could not be used to enhance current DUI to felony).

§ 12:32 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Violations of due process—Case law

Violations of due process may also be grounds for relief. See e.g., *Conahan v. State*, 118 So. 3d 718 (Fla. 2013) (to establish a Giglio violation, three prongs must be shown: (1) the testimony was false; (2) the prosecutor knew it was false; and (3) the testimony was material; if the defendant successfully establishes the first two prongs, then the State bears the burden of proving that the testimony was not material by showing that there is no reasonable possibility that it could have affected the verdict because it was harmless beyond a reasonable doubt; to establish a Brady violation, three elements must be shown: (1) the evidence at issue was favorable to the defendant, either because it is exculpatory or is impeaching; (2) the evidence was suppressed, willfully or inadvertently, by the State; and (3) because the evidence was material, its suppression resulted in prejudice; to establish the materiality element of Brady, the defendant must demonstrate "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different"; reasonable probability is a probability sufficient to undermine confidence in the outcome); *Rodriguez v. State*, 39 So. 3d 275 (Fla. 2010) ((death sentence case) Brady requires the state to disclose material information within the state's possession or control that tends to negate the guilt of the defendant; to prevail on a Brady claim, defendant must show (1) that favorable evidence, either exculpatory or impeaching, (2) was willfully or inadvertently suppressed by the state, and (3) because the evidence was material, the defendant was prejudiced; to establish prejudice on a Brady claim, the court must ask whether the favorable evidence suppressed by state could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict; to establish a Giglio violation, defendant must show: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material); *Barnes v. State*, 29 So. 3d 1010 (Fla. 2010) (death sentence case; when reviewing the knowing, intelligent,

and voluntary nature of a plea, the Supreme Court will scrutinize the plea to ensure that the defendant was made aware of the consequences of his plea, was apprised of the constitutional rights he was waiving, and pled guilty voluntarily); *Nelson v. State*, 43 So. 3d 20 (Fla. 2010) (administration of powerful antipsychotic drug to defendant was not per se evidence of incompetency to stand trial in capital murder case, though it warranted an evidentiary hearing on postconviction claim of ineffective assistance based on a failure to seek a competency determination); *Hitchcock v. State*, 991 So. 2d 337 (Fla. 2008) (defendant's speculation that the analysis, by state's hair-analysis expert, came to incorrect conclusions due to concerns expressed in expert's subsequent poor job-performance evaluation, did not establish expert's testimony at guilt phase of capital murder trial was false); *Bolware v. State*, 995 So. 2d 268 (Fla. 2008) (revocation of driver's license was not an immediate consequence of no contest plea to driving while license suspended or revoked and did not constitute a direct consequence of which defendant must be informed to ensure voluntariness of plea; trial court did not revoke license at time of plea; revocation occurred six months later when Department of Highway Safety and Motor Vehicles noticed it was defendant's third conviction for same offense and revoked his license based on habitual offender status); *Marshall v. State*, 983 So. 2d 680 (Fla. 4th DCA 2008) (defendant asserted his plea was involuntary because counsel affirmatively misadvised him that the plea would have no collateral consequences); *Youngblood v. State*, 930 So. 2d 852 (Fla. 2d DCA 2006) (failure to file a timely Rule 3.170(l), Fla. R. Crim. Proc., motion to withdraw plea does not prevent an involuntary guilty plea claim from being raised in a Rule 3.850 motion); *Iacono v. State*, 930 So. 2d 829 (Fla. 4th DCA 2006) (no evidentiary required on movant's claim that he was under the influence of psychotropic medication at the time of his guilty pleas and that, as a result, his pleas were not knowingly and voluntarily entered); *Charles v. State*, 920 So. 2d 740 (Fla. 5th DCA 2006) (claim that nolo contendere plea was involuntary; to obtain postconviction relief based on a violation of Rule 3.172(c)(8), Fla. R. Crim. Proc., requirement that a trial judge inform a defendant that if he pleads guilty or nolo contendere and is not a United States citizen, the plea may subject him to deportation, the defendant must establish that (1) he did not know the plea might result in deportation, (2) he is threatened with deportation because of the plea, and (3) had he known of the possible consequence, he would not have entered the plea); *Smith v. State*, 915 So. 2d 287 (Fla. 4th DCA 2005) (movant claims that his plea was involuntary because he was affirmatively misled by his attorney, the prosecutor, and the trial judge as to his entitle-

ment to prison credit; evidentiary hearing ordered); *Payne v. State*, 890 So. 2d 284 (Fla. 5th DCA 2004) (claim that nolo contendere plea was involuntary; to obtain postconviction relief based on a claim that the defendant was not advised of deportation consequences of entering a plea, a defendant must establish that: (1) he did not know the plea might result in deportation; (2) he is threatened with deportation because of the plea; and (3) had he known of the possible consequence, he would not have entered the plea).

§ 12:33 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Double jeopardy violations

Double jeopardy violations may also be grounds for relief. For case law, see e.g., *State v. Florida*, 894 So. 2d 941 (Fla. 2005) (initially, we note that the defendant's double jeopardy claim was properly raised in a motion for postconviction relief; a double jeopardy claim raises a question of fundamental error which is not procedurally barred when raised initially in Rule 3.850 proceedings; double jeopardy claim rejected on merits); *Rios v. State*, 889 So. 2d 940 (Fla. 5th DCA 2004) (double jeopardy claims are appropriately the subject of motions for postconviction relief).

§ 12:34 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Newly discovered evidence of innocence

An additional ground for relief is based upon newly discovered evidence of innocence. For case law on newly discovered evidence of innocence as grounds for relief, see e.g., *Long v. State*, 183 So. 3d 342 (Fla. 2016) (to be entitled to postconviction relief based on newly-discovered evidence relating to a guilty plea, first, the evidence must not have been known by the trial court, the party, or counsel at the time of the plea, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; second, the defendant must demonstrate a reasonable probability that, but for the newly discovered evidence, the defendant would not have pleaded guilty and would have insisted on going to trial; in determining whether a reasonable probability exists that the defendant would have insisted on going to trial, a court should consider the totality of the circumstances surrounding the plea, including such factors as whether a particular defense was likely to succeed at trial, the colloquy between the defendant and the trial court at the time of the plea, and the difference between the sentence imposed under the plea and the maximum possible sentence the defendant faced at a trial); *Kormondy v. State*, 154 So. 3d 341 (Fla. 2015) (newly

discovered evidence is of such nature that it would probably produce acquittal on retrial, as required for postconviction relief, if it weakens the case against defendant so as to give rise to reasonable doubt as to his culpability; requirement that evidence must be of such nature that it would probably produce acquittal on retrial requires that newly discovered evidence would probably yield less severe sentence; determining whether to grant new trial based on newly discovered evidence, postconviction court must consider effect of newly discovered evidence, in addition to all of the admissible evidence that could be introduced at new trial); *Swafford v. State*, 125 So. 3d 760 (Fla. 2013) (to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements; first, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial; newly discovered evidence satisfies the second prong of the Jones II test if it "weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability"; if the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence; in determining whether the evidence compels a new trial, the postconviction court must consider all newly discovered evidence which would be admissible and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial); *Waterhouse v. State*, 82 So. 3d 84 (Fla. 2012) (death sentence case; to obtain relief on the basis of newly discovered evidence, a postconviction petitioner is required to demonstrate that: (1) asserted evidence was unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence, and (2) the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial; newly discovered evidence meets this test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability); *Gore v. State*, 91 So. 3d 769 (Fla. 2012) (death sentence case; to obtain relief on the basis of newly discovered evidence, a defendant must satisfy a two-prong test: first, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial; newly discovered evidence satisfies the

second prong of the test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability; if the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence); *Wyatt v. State*, 71 So. 3d 86, 92 A.L.R.6th 725 (Fla. 2011) (letters from the FBI that stated that an FBI agent testified regarding comparative bullet lead analysis in a manner that exceeded the limits of the science and could not be supported by the FBI were "newly discovered evidence" in post-conviction relief proceeding following conviction of murder in the first degree and sentence of death, although the letters did not exist at the time of trial; letters consisted of facts that defendant could not have known at the time of trial, and defendant or defense counsel could not have known of the facts by the use of diligence); *Johnston v. State*, 27 So. 3d 11 (Fla. 2010) (newly discovered evidence supports grant of postconviction relief if it weakens the case against defendant so as to give rise to a reasonable doubt as to his culpability; if defendant is seeking to vacate a sentence, the newly discovered evidence must be such that it would probably yield a less severe sentence; an evaluation of the weight to be accorded the evidence includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence; court should determine whether the evidence is cumulative to other evidence in the case and consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence); *Rivera v. State*, 995 So. 2d 191 (Fla. 2008) (death sentence case; to obtain a new trial based on newly discovered evidence, a defendant must meet two requirements: first, the evidence must not have been known to the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial); *Green v. State*, 975 So. 2d 1090 (Fla. 2008) (death sentence case; newly discovered evidence satisfies the second prong if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability; in determining whether the evidence compels a new trial, the trial court must consider all newly discovered evidence which would be admissible, and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial; this determination includes whether the evidence goes to the merits of the case, whether it constitutes impeachment evidence and whether it is cumulative to other evidence in the case; the trial court should further consider the materiality and relevance of the evidence and any inconsistencies

in the newly discovered evidence); *Hildwin v. State*, 951 So. 2d 784 (Fla. 2006) (death sentence case; we agree with Hildwin that the DNA evidence was newly discovered evidence, and we further agree that the newly discovered DNA evidence, which refutes the trial serology evidence by establishing that Hildwin's bodily fluids were not on the panties and wash cloth, is a significant new fact which must be evaluated in determining whether Hildwin is entitled to a new trial; to obtain Rule 3.850 relief based on newly discovered evidence, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial; to reach this conclusion the trial court is required to consider all newly discovered evidence which would be admissible at trial and then evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial; although the newly discovered DNA evidence is significant, this evidence is not of such nature that it would probably produce an acquittal on retrial; nor do we conclude that the DNA evidence would probably result in Hildwin not receiving the death sentence); *Melton v. State*, 949 So. 2d 994 (Fla. 2006) (death sentence case; newly discovered evidence satisfies the second prong of the test if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability; if the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence); *Rutherford v. State*, 926 So. 2d 1100 (Fla. 2006) (death sentence case; determination of whether alleged newly discovered evidence compels a new trial for postconviction relief purposes includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence, and whether this evidence is cumulative to other evidence in the case; the trial court should further consider the materiality and relevance of the evidence and any inconsistencies in the newly discovered evidence); *Robinson v. State*, 956 So. 2d 1219 (Fla. 2d DCA 2007) (convicting court, ruling on defendant's postconviction motion based on claim of newly discovered evidence in the form of third-party confession, could not summarily deny motion based on prosecutor's argument in prior postconviction proceedings regarding the "overwhelming evidence" presented at trial that identified defendant as the perpetrator); *McLin v. State*, 949 So. 2d 1123 (Fla. 3d DCA 2007) (trial court was not precluded from considering credibility of witness who recanted trial testimony, in considering motion for postconviction relief based on newly discovered evidence of witness' recantation); *Andrews v. State*, 919 So. 2d 552 (Fla. 4th DCA 2005) (affidavit submitted with defendant's motion for postconviction relief based on newly discovered evidence was inherently incredible); *Ortiz v. State*, 895

So. 2d 1100 (Fla. 3d DCA 2004) (claims of newly discovered evidence are properly raised on Rule 3.850 motion to vacate, set aside, or correct a sentence, and are not subject to the usual two-year time limit of R. 3.850(b); in order to vacate a conviction under Rule 3.850, the newly discovered evidence must be of such nature that it would probably produce acquittal on retrial); *Benton v. State*, 884 So. 2d 90 (Fla. 2d DCA 2004) (evidentiary hearing is required on a Rule 3.850 postconviction motion for new trial based on newly discovered evidence for the trial court to determine whether the newly discovered evidence would probably produce an acquittal on retrial); *Taylor v. State*, 877 So. 2d 842 (Fla. 3d DCA 2004) (affidavit submitted with defendant's motion for postconviction relief based on newly discovered evidence was inherently incredible, and thus trial court could reject affidavit and deny motion).

§ 12:35 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Illegal or unconstitutional sentence

Illegal or unconstitutional sentence is also grounds for relief. See e.g., *Falcon v. State*, 162 So. 3d 954 (Fla. 2015) (resentencing proceeding is warranted when a juvenile seeks postconviction relief from sentence that was unconstitutional under United States Supreme Court's decision in *Miller v. Alabama*, which held that mandatory life imprisonment without parole for those under the age of 18 at the time of their crimes violated the Eighth Amendment's prohibition on cruel and unusual punishments); *Renaud v. State*, 926 So. 2d 1241 (Fla. 2006) (Rule 3.800(a), Fla. R. Crim. Proc., motion to correct an illegal sentence on the face of the record does not contemplate the necessity of an evidentiary hearing; when the alleged illegality of the sentence is not apparent on the face of the record, a Rule 3.850, Fla. R. Crim. Proc., motion for postconviction relief to vacate, set aside, or correct sentence is the only available remedy); *Martens v. State*, 948 So. 2d 938 (Fla. 2d DCA 2007) (Rule 3.850 movant claims his twenty-five-year mandatory minimum sentence exceeds the maximum penalty allowed by law; a postconviction claim that a mandatory minimum sentence was illegally imposed is cognizable in a Rule 3.850 proceeding); *Jones v. State*, 931 So. 2d 282 (Fla. 5th DCA 2006) (jail credit claim that movant was entitled to receive 264 days of jail credit pursuant to his plea agreement but was only being allowed 37 days by the Department of Corrections is a facially valid Rule 3.850 claim); *Murphy v. State*, 930 So. 2d 794 (Fla. 1st DCA 2006) (jail credit claims are cognizable in Rule 3.850 motions for postconviction relief); *Dorn v. State*, 928 So. 2d 507 (Fla. 3d DCA 2006) (inmate was entitled to hearing on his

Rule 3.850 motion for correction, reduction, or modification of sentence, seeking credit against sentence for jail time served, where record failed to demonstrate conclusively that inmate was not entitled to any relief); *Finan v. State*, 927 So. 2d 72 (Fla. 2d DCA 2006) (jail credit issues involving disputed issues of fact are not appropriate for resolution on a motion filed pursuant to Rule 3.800(a) and are matters that can only be resolved pursuant to Rule 3.850); *Brunache v. State*, 901 So. 2d 412 (Fla. 3d DCA 2005) (movant's claim that he should have been personally present at his resentencing was not cognizable by Rule 3.800(a) motion, but rather was required to be brought by way of Rule 3.850 motion); *Houser v. State*, 901 So. 2d 374 (Fla. 2d DCA 2005) (Houser alleges several claims of scoresheet error; however, such errors are not readily apparent from the face of the scoresheet; such claims are not cognizable under Rule 3.800, but rather, they are correctable on direct appeal or under Rule 3.850); *Decoste v. State*, 898 So. 2d 1201 (Fla. 5th DCA 2005) (rather than a Rule 3.800(a) motion to correct illegal sentence, jail credit issues are more appropriately brought in a Rule 3.850 postconviction relief proceeding to vacate, set aside, or correct sentence if the defendant is requesting additional jail credit due to factual matters not ascertainable from the trial court's records); *Hannah v. State*, 876 So. 2d 655 (Fla. 2d DCA 2004) (convicting court erred in summarily dismissing claims that movant was eligible for additional days of jail credit for time spent in juvenile detention, and that certain previous convictions used against him for sentencing purposes were voidable).

§ 12:36 Florida Rule of Criminal Procedure 3.850—Grounds for relief—Unconstitutional statute defining offense

An unconstitutional statute defining an offense may serve as grounds for relief. See e.g., *Pass v. State*, 922 So. 2d 279 (Fla. 2d DCA 2006) (movant could raise claim of unconstitutionality of statute prohibiting driving while license permanently revoked for first time in motion for postconviction relief; application of facially unconstitutional statute was fundamental error and thus could be raised for first time in postconviction motion; relief granted).

§ 12:37 Florida Rule of Criminal Procedure 3.850—Inadequate or ineffective clause

Under the inadequate or ineffective clause of Rule 3.850(h), Fla. R. Crim. Proc., a court lacks jurisdiction to entertain an application for habeas relief if the convicted person has failed to apply for relief under Rule 3.850, or has previously been denied

Rule 3.850 relief, unless the Rule 3.850 remedy is inadequate or ineffective. Collateral claims involving the validity of the conviction or sentence must, therefore, except in the rare situations where Rule 3.850 is ineffective or inadequate, be raised via Rule 3.850 rather than by the writ of habeas corpus. Collateral claims not going to the conviction or sentence, on the other hand, may still be raised via habeas corpus.

§ 12:38 Florida Rule of Criminal Procedure 3.850—Inadequate or ineffective clause—Case law regarding Rule 3.850 to be used to attack convictions and sentences

For case law on the general requirement that Rule 3.850, rather than habeas corpus, be used to collaterally attack convictions and sentences in Florida, see, e.g., *Sanders v. State*, 35 So. 3d 864 (Fla. 2010) (when a scoresheet error is challenged on direct appeal, via a motion under Florida Rule of Criminal Procedure 3.850, the error is harmless if the record conclusively shows that the trial court would have imposed the same sentence using a correct scoresheet); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (history of Rule 3.850 indicates that it was intended to provide a procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus; thus, this rule essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court; habeas corpus may not be used as a substitute for an appropriate motion seeking postconviction relief pursuant to Rule 3.850; with limited exceptions, habeas corpus relief is not available to obtain collateral postconviction relief because most claims can be raised by motion pursuant to Rule 3.850); *Washington v. State*, 876 So. 2d 1233 (Fla. 5th DCA 2004) (petition for habeas corpus may not be used to collaterally attack a criminal judgment and sentence because Rule 3.850 has superseded habeas corpus as the only means to raise such issues).

§ 12:39 Florida Rule of Criminal Procedure 3.850—Raising either claims not raised at trial or on direct appeal, or claims previously decided against movant on direct appeal

Generally, a Rule 3.850 motion is barred if it raises claims which could have been, but were not, raised at trial or on direct appeal. Rule 3.850(c), Fla. R. Crim. Proc. (Rule 3.850 does not au-

thorize 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). A Rule 3.850 motion is also barred, as a general rule, if it raises claims previously decided against the movant on the direct appeal.

§ 12:40 Florida Rule of Criminal Procedure 3.850—Raising claims not raised at trial or on direct appeal—Case law

For case law on Rule 3.850 motions raising claims that could have been but were not raised at the movant's trial or on the movant's direct appeal, see, e.g., *Stewart v. State*, 37 So. 3d 243 (Fla. 2010) (death sentence case; in *Ake v. Oklahoma*, 470 U.S. 68, 84, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), the United States Supreme Court concluded that in a sentencing proceeding, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase; while ordinarily a postconviction claim based on Ake is procedurally barred because it could have been raised on direct appeal, a defendant is entitled to litigate during postconviction a claim that a prior mental health expert's examination was so 'grossly insufficient' that the expert ignored clear indications of either mental retardation or organic brain damage); *Lamarca v. State*, 931 So. 2d 838 (Fla. 2006) (death sentence case; claims were procedurally barred, where such claims could have been raised on direct appeal); *Miller v. State*, 926 So. 2d 1243 (Fla. 2006) (death sentence case; failing to raise a contemporaneous objection when improper closing argument comments are made waives any claim concerning such comments for appellate review; the sole exception to this general rule is where appellate counsel fails to raise a claim which, although not preserved at trial, rises to the level of fundamental error); *Bryant v. State*, 901 So. 2d 810 (Fla. 2005) (death sentence case; claim that defense counsel had rendered ineffective assistance by filing to preserve issue of suppression of defendant's confession was procedurally barred, as claim could have been raised on direct appeal, but was not); *Arbelaez v. State*, 898 So. 2d 25 (Fla. 2005) (death sentence case; movant's postconviction challenge to jury qualification procedure in county in which he had been prosecuted was procedurally barred, as defendant failed to raise this issue at trial, but raised it for first time in postconviction proceeding); *State v. Florida*, 894 So. 2d 941 (Fla. 2005) (initially, we note that the defendant's double jeopardy claim was properly raised in a motion for postconviction relief; a double jeopardy claim raises a question of fundamental error which is not procedurally barred when raised initially in Rule 3.850 proceed-

ings); *Monlyn v. State*, 894 So. 2d 832 (Fla. 2004) (death sentence case; claim that jury was improperly instructed on pecuniary gain aggravator during sentencing phase of capital murder trial should have been raised in direct appeal of murder conviction, and thus, was procedurally barred in postconviction relief proceeding); *Hodges v. State*, 885 So. 2d 338 (Fla. 2004) (death sentence case; postconviction petitioner's claim that comments by prosecutor and trial court during his capital murder prosecution diminished jury's sense of responsibility for sentencing process was not cognizable on collateral review, where petitioner could have but did not raise such argument on appeal); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (any matters which could have been presented on appeal are held to be foreclosed from consideration by motion under Rule 3.850; therefore, a Rule 3.850 motion based upon grounds which could have been raised as issues on appeal may be summarily denied); *Turner v. State*, 920 So. 2d 1217 (Fla. 2d DCA 2006) (movant was not procedurally barred from raising claim in postconviction motion that trial counsel was ineffective for failing to argue that the evidence was insufficient to support a violation of particular condition of his probation, where movant did not raise such claim on direct appeal); *Acosta v. State*, 884 So. 2d 278 (Fla. 2d DCA 2004) (unless a direct appeal is affirmed with a written opinion that expressly addresses the issue of ineffective assistance of counsel, an affirmance on direct appeal should rarely, if ever, be treated as a procedural bar to a claim for ineffective assistance of counsel on a Rule 3.850 postconviction motion).

§ 12:41 Florida Rule of Criminal Procedure 3.850—Raising claims previously decided against movant on direct appeal—Case law

For case law on Rule 3.850 motions raising claims previously decided against the movant on direct appeal, see, e.g., *Mungin v. State*, 932 So. 2d 986 (Fla. 2006) (death sentence case; claim raised and rejected on direct appeal was procedurally barred in Rule 3.850 proceeding); *Robinson v. State*, 913 So. 2d 514 (Fla. 2005) (death sentence case; movant's claim that his trial counsel had rendered ineffective assistance for failing to move to recuse trial judge before new penalty phase proceedings was procedurally barred, as this claim had been raised on direct appeal); *Peterka v. State*, 890 So. 2d 219 (Fla. 2004) (death sentence case; defendant's claim that trial counsel rendered ineffective assistance by failing to challenge aggravating circumstances argued by state during penalty phase of capital murder trial was procedurally barred from being raised in postconviction relief proceeding, where defendant challenged applicability of aggravating circumstances on direct appeal).

§ 12:42 Florida Rule of Criminal Procedure 3.850—Raising claims which were or could have been raised in a prior Rule 3.850 motion

Generally, a Rule 3.850 motion is barred if it raises claims which were litigated in a prior Rule 3.850 motion filed by the movant, or if it raises claims which could have been but were not raised in a prior Rule 3.850 motion that was filed by the movant. Rule 3.850(f), Fla. R. Crim. Proc. (second or successive Rule 3.850 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).

§ 12:43 Florida Rule of Criminal Procedure 3.850—Raising claims which were or could have been raised in a prior Rule 3.850 motion—Case law

For case law on Rule 3.850 motions raising a claim which was or could have been litigated in a prior Rule 3.850 motion that was filed by the movant, see, e.g., *Rivera v. State*, 187 So. 3d 822 (Fla. 2015) (a second or successive motion for postconviction relief can be denied on the ground that it is an abuse of process if there is no reason for failing to raise the issues in the previous motion; although claims that could have been raised in a prior postconviction motion are procedurally barred, a defendant may file successive postconviction relief motions that are based on newly discovered evidence; to overcome a procedural bar, a defendant must show that the newly discovered facts could not have been discovered with due diligence by collateral counsel and raised in an initial rule 3.850 motion); *Spera v. State*, 971 So. 2d 754 (Fla. 2007) (trial court may not summarily dismiss successive motion for postconviction relief that raises issues that were either summarily denied or dismissed for legal insufficiency in initial motion; prohibition against successive motions applies only when the grounds raised were previously adjudicated on their merits); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (motion under Rule 3.850 may be summarily denied when it is based on grounds that have been raised in prior postconviction motions under the rule and have been decided adversely to the movant on their merits; a second or successive motion for similar relief, as used in Rule 3.850, has been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the rule; furthermore, this restriction against successive motions on the same grounds is applied

only when the grounds raised were previously adjudicated on their merits, and not where the previous motion was summarily denied or dismissed for legal insufficiency; on the other hand, a second or successive motion by the same prisoner attacking the same judgment or sentence but stating substantially different legal grounds is permitted under Rule 3.850 and should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion; the abuse of the procedure doctrine, as recently codified in Rule 3.850, is now expanded to allow a court to summarily deny a successive motion for postconviction relief unless the movant alleges that the asserted grounds were not known and could not have been known to the movant at the time the initial motion was filed; further, the movant must show justification for the failure to raise the asserted issues in the first motion); *Adlington v. State*, 948 So. 2d 839 (Fla. 4th DCA 2007) (defendant was barred from further relief on his claim of involuntary plea relating to promises of medical treatment, under the doctrine of law of the case, where the claim had been raised, denied, and the denial affirmed, in previous postconviction proceedings); *Mancebo v. State*, 931 So. 2d 928 (Fla. 3d DCA 2006) (movant's prior Rule 3.850 motion, filed in 2003, was denied for legal insufficiency; because there was no denial on the merits and the Rule 3.850 time limit had not expired, the defendant was allowed to file a second Rule 3.850 motion in an attempt to allege legally sufficient claims; the Rule 3.850 motion filed in 2004 amounted to an amended pleading, since it raised the same eight issues but with a modified or restated text); *Mason v. State*, 949 So. 2d 1127 (Fla. 3d DCA 2007) (on appeal from a summary denial, this court must reverse unless the postconviction record, see Rule 9.141(b)(2)(A), Fla. R. App. Proc., shows conclusively that the appellant is entitled to no relief); *Muccio v. State*, 949 So. 2d 376 (Fla. 4th DCA 2007) (pro se motion for postconviction relief filed by defendant who was represented by counsel, but which was not adopted by counsel, was a nullity); *Wallace v. State*, 931 So. 2d 173 (Fla. 5th DCA 2006) (instant Rule 3.850 motions are frivolous and an abuse of process; the clerk of this court is directed not to accept any further pro se filings concerning these cases from the defendant, and the clerk is further directed to forward a certified copy of this opinion to the appropriate institution for consideration of disciplinary procedures pursuant to Fla. Stat. Ann. § 944.279(1)); *Lister v. State*, 925 So. 2d 400 (Fla. 5th DCA 2006) (to uphold the trial court's summary denial of postconviction claims, claims must be either facially invalid or conclusively refuted by record); *Soroa v. State*, 923 So. 2d 1222 (Fla. 3d DCA 2006) (appeal from denial of Rule 3.850 motion for postconviction relief was

premature, where district court did not rule on all claims raised in such motion); *Neal v. State*, 915 So. 2d 746 (Fla. 5th DCA 2005) (because the Rule 3.850 movant's motion for rehearing was filed more than fifteen days after service of the order denying postconviction relief, it was untimely and did not toll the time for taking an appeal); *Goolsby v. State*, 914 So. 2d 494 (Fla. 5th DCA 2005) (Rule 1.540, Fla. R. Civ. Proc., relating to relief from judgments, has no application to this Rule 3.850, Fla. R. Crim. Proc., proceeding; by its own terms, Rule 1.540 applies only to civil matters, not to collateral claims associated with criminal convictions); *Little v. State*, 913 So. 2d 1289 (Fla. 2d DCA 2005); *Cole v. State*, 913 So. 2d 709 (Fla. 5th DCA 2005) (under Fla. Stat. Ann. § 944.279(1), postconviction motion court lacked authority to order Department of Corrections to forfeit specific amount of movant's gain time as sanction for filing of third and fourth motions for postconviction relief; rather, court was authorized to recommend particular sanction for institution of frivolous or malicious proceedings).

§ 12:44 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.851

In death sentence cases, Rule 3.850 is supplemented and procedurally implemented by Rules 3.851 and 3.852, Fla. R. Crim. Proc. Originally adopted in 1987, Rule 3.851 is entitled "Collateral Relief After Death Sentence Has Been Imposed and Affirmed on Direct Appeal." It "provides the procedural framework for postconviction relief sought by capital prisoners." *Allen v. Butterworth*, 756 So. 2d 52, 61 (Fla. 2000). Originally adopted in 1996, Rule 3.852, entitled "Capital Postconviction Public Records Production," is intended, in death sentence cases, "to govern public records requests in postconviction proceedings." *Allen v. Butterworth*, 756 So. 2d 52, 58 (Fla. 2000).

The original version of Rule 3.851, Fla. R. Crim. Proc., was adopted by the Florida Supreme Court on Feb. 5, 1987, effective Apr. 1, 1987. Since its original adoption in 1987, Rule 3.851 has been amended eight times.

§ 12:45 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.851—Text of Rule 3.851

Rule 3.851, Fla. R. Crim. Proc., provides:

Rule 3.851. Collateral Relief After Death Sentence Has Been Imposed And Affirmed on Direct Appeal

(a) Scope. This rule shall apply to all postconviction proceed-

ings that commence upon issuance of the appellate mandate affirming the death sentence to include all motions and petitions for any type of postconviction or collateral relief brought by a defendant in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after January 1, 2015, by defendants who are under sentence of death. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date.

(b) Appointment of Postconviction Counsel.

(1) Upon the issuance of the mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida shall at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Justice Administrative Commission. The name of Registry Counsel shall be filed with the Supreme Court of Florida.

(2) Within 30 days of the issuance of the mandate, the Capital Collateral Regional Counsel or Registry Counsel shall file either a notice of appearance or a motion to withdraw in the trial court. Motions to withdraw filed more than 30 days after the issuance of the mandate shall not be entertained unless based on a specific conflict of interest as set forth in section 27.703, Florida Statutes.

(3) Within 15 days after Capital Collateral Regional Counsel or Registry Counsel files a motion to withdraw, the chief judge or assigned judge shall rule on the motion and appoint new postconviction counsel if necessary. The appointment of new collateral counsel shall be from the Registry of attorneys maintained by the Justice Administrative Commission unless the case is administratively transferred to another Capital Collateral Regional Counsel.

(4) In every capital postconviction case, one lawyer shall be designated as lead counsel for the defendant. The lead counsel shall be the defendant's primary lawyer in all state court litigation. No lead counsel shall be permitted to appear for a limited purpose on behalf of a defendant in a capital postconviction proceeding.

(5) After the filing of a notice of appearance, Capital Collateral Regional Counsel, Registry Counsel, or a private attorney shall represent the defendant in the state courts until a judge allows withdrawal or until the sentence is reversed, reduced, or carried out, regardless of whether another attorney represents the defendant in a federal court.

(6) A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only bases for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule.

(c) Preliminary Procedures.

(1) Judicial Assignment and Responsibilities. Within 30 days of the issuance of mandate affirming a judgment and sentence of death on direct appeal, the chief judge shall assign the case to a judge qualified under the Rules of Judicial Administration to conduct capital proceedings. The assigned judge is responsible for case management to ensure compliance with statutes, rules, and administrative orders that impose processing steps, time deadlines, and reporting requirements for capital postconviction litigation. From the time of assignment, the judge must issue case management orders for every step of the capital postconviction process, including at the conclusion of all hearings and conferences.

(2) Status Conferences. The assigned judge shall conduct a status conference not later than 90 days after the judicial assignment, and shall hold status conferences at least every 90 days thereafter until the evidentiary hearing has been completed or the motion has been ruled on without a hearing. The attorneys, with leave of the trial court, may appear electronically at the status conferences. Requests to appear electronically shall be liberally granted. Pending motions, disputes involving public records, or any other matters ordered by the court shall be heard at the status conferences.

(3) Defendant's Presence Not Required. The defendant's presence shall not be required at any hearing or conference held under this rule, except at the evidentiary hearing on the merits of any claim and at any hearing involving conflict with or removal of collateral counsel.

(4) Duties of Defense Counsel. Within 45 days of appointment of postconviction counsel, the defendant's trial counsel shall provide to postconviction counsel a copy of the original file including all work product not otherwise subject to a protective order and information pertaining to the defendant's capital case which was created and obtained during the representation of the defendant. Postconviction counsel shall maintain the confidentiality of all confidential information received. Postconviction counsel shall bear the costs of any copying. The defendant's trial counsel must retain the defendant's original file.

(5) Record on Direct Appeal. The Clerk of the Circuit Court

shall retain a copy of the record for the direct appeal when the record is transmitted to the Supreme Court of Florida. The Clerk of the Supreme Court of Florida shall deliver the record on appeal to the records repository within 30 days after the appointment of postconviction counsel.

(d) Time Limitation.

(1) Any motion to vacate judgment of conviction and sentence of death shall be filed by the defendant within 1 year after the judgment and sentence become final. For the purposes of this rule, a judgment is final:

(A) on the expiration of the time permitted to file in the United States Supreme Court a petition for writ of certiorari seeking review of the Supreme Court of Florida decision affirming a judgment and sentence of death (90 days after the opinion becomes final); or

(B) on the disposition of the petition for writ of certiorari by the United States Supreme Court, if filed.

(2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges:

(A) 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

(B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or

(C) postconviction counsel, through neglect, failed to file the motion.

(3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writs of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced defendant in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

(4) If the governor signs a death warrant before the expiration of the time limitation in subdivision (d)(1), the Supreme Court of Florida, on a defendant's request, will grant a stay of execution to allow any postconviction relief motions to proceed in a timely and orderly manner.

(5) An extension of time may be granted by the Supreme Court of Florida for the filing of postconviction pleadings if the defendant's counsel makes a showing that due to exceptional circumstances, counsel was unable to file the

postconviction pleadings within the 1-year period established by this rule.

(e) Contents of Motion.

(1) Initial Motion. A motion filed under this rule is an initial postconviction motion if no state court has previously ruled on a postconviction motion challenging the same judgment and sentence. An initial motion and memorandum of law filed under this rule shall not exceed 75 pages exclusive of the attachments. Each claim or subclaim shall be separately pled and shall be sequentially numbered beginning with claim number 1. If upon motion or upon the court's own motion, a judge determines that this portion of the rule has not been followed, the judge shall give the movant 30 days to amend. If no amended motion is filed, the judge shall deem the non-compliant claim, subclaim, and/or argument waived. Attachments shall include, but are not limited to, the judgment and sentence. The memorandum of law shall set forth the applicable case law supporting the granting of relief as to each separately pled claim. This rule does not authorize relief based upon claims that could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence. If claims that were raised on appeal or should have or could have been raised on appeal are contained in the motion, the memorandum of law shall contain a brief statement explaining why these claims are being raised on postconviction relief. The motion need not be under oath or signed by the defendant but shall include:

(A) a description of the judgment and sentence under attack and the court that rendered the same;

(B) a statement of each issue raised on appeal and the disposition thereof;

(C) the nature of the relief sought;

(D) a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought;

(E) a detailed allegation as to the basis for any purely legal or constitutional claim for which an evidentiary hearing is not required and the reason that this claim could not have been or was not raised on direct appeal; and

(F) a certification from the attorney that he or she has discussed the contents of the motion fully with the defendant, that he or she has complied with Rule 4-1.4 of the Rules of Professional Conduct, and that the motion is filed in good faith.

(2) Successive Motion. A motion filed under this rule is successive if a state court has previously ruled on a postconviction motion challenging the same judgment and sentence.

A claim raised in a successive motion shall be dismissed if the trial court 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 trial court finds that the failure to assert those grounds in a prior motion constituted an abuse of the procedure; or, if the trial court finds there was no good cause for failing to assert those grounds in a prior motion; or, if the trial court finds the claim fails to meet the time limitation exceptions set forth in subdivision (d)(2)(A), (d)(2)(B), or (d)(2)(C). A successive motion shall not exceed 25 pages, exclusive of attachments, and shall include:

(A) all of the pleading requirements of an initial motion under subdivision (e)(1);

(B) the disposition of all previous claims raised in postconviction proceedings and the reason or reasons the claim or claims raised in the present motion were not raised in the former motion or motions;

(C) if based upon newly discovered evidence, *Brady v. Maryland*, 373 U.S. 83 (1963), or *Giglio v. United States*, 405 U.S. 150 (1972), the following:

(i) the names, addresses, and telephone numbers of all witnesses supporting the claim;

(ii) a statement that the witness will be available, should an evidentiary hearing be scheduled, to testify under oath to the facts alleged in the motion or affidavit;

(iii) if evidentiary support is in the form of documents, copies of all documents shall be attached, including any affidavits obtained; and

(iv) as to any witness or document listed in the motion or attachment to the motion, a statement of the reason why the witness or document was not previously available.

(f) Procedure; Evidentiary Hearing; Disposition.

(1) Filing and Service. All pleadings in the postconviction proceeding shall be filed with the clerk of the trial court and served on the assigned judge, opposing party, and the attorney general. Upon the filing of any original court document in the postconviction proceeding, the clerk of the trial court shall determine that the assigned judge has received a copy. All motions other than the postconviction motion itself shall be accompanied by a notice of hearing.

(2) Duty of Clerk. A motion filed under this rule shall be immediately delivered to the chief judge or the assigned judge along with the court file.

(3) Answer.

(A) Answer to the Initial Motion. Within 60 days of the filing of an initial motion, the state shall file its answer. The answer and accompanying memorandum of law shall not exceed 75 pages, exclusive of attachments and exhibits. The answer shall address the legal insufficiency of any claim in the motion, respond to the allegations of the motion, and address any procedural bars. The answer shall use the same claim numbering system contained in the defendant's initial motion. As to any claims of legal insufficiency or procedural bar, the state shall include a short statement of any applicable case law.

(B) Answer to a Successive Motion. Within 20 days of the filing of a successive motion, the state shall file its answer. The answer shall not exceed 25 pages, exclusive of attachments and exhibits. The answer shall use the same claim numbering system contained in the defendant's motion. The answer shall specifically respond to each claim in the motion and state the reason(s) that an evidentiary hearing is or is not required.

(4) Amendments. A motion filed under this rule may not be amended unless good cause is shown. A copy of the claim sought to be added must be attached to the motion to amend. The trial court may in its discretion grant a motion to amend provided that the motion to amend was filed at least 45 days before the scheduled evidentiary hearing. Granting a motion under this subdivision shall not be a basis for granting a continuance of the evidentiary hearing unless a manifest injustice would occur if a continuance was not granted. If amendment is allowed, the state shall file an amended answer within 20 days after the judge allows the motion to be amended.

(5) Case Management Conference; Evidentiary Hearing.

(A) Initial Postconviction Motion. No later than 90 days after the state files its answer to an initial motion, the trial court shall hold a case management conference. At the case management conference, the defendant shall disclose all documentary exhibits that he or she intends to offer at the evidentiary hearing and shall file and serve an exhibit list of all such exhibits and a witness list with the names and addresses of any potential witnesses. All expert witnesses shall be specifically designated on the witness list and copies of all expert reports shall be attached. Within 60 days after the case management conference, the state shall disclose all documentary exhibits that it intends to offer at the evidentiary hearing and shall file and serve an exhibit list of all such exhibits and a witness list with

the names and addresses of any potential witnesses. All expert witnesses shall be specifically designated on the witness list and copies of all expert reports shall be attached. At the case management conference, the trial court shall:

(i) schedule an evidentiary hearing, to be held within 150 days, on claims listed by the defendant as requiring a factual determination;

(ii) hear argument on any purely legal claims not based on disputed facts; and

(iii) resolve disputes arising from the exchange of information under this subdivision.

(B) Successive Postconviction Motion. Within 30 days after the state files its answer to a successive motion for postconviction relief, the trial court shall hold a case management conference. At the case management conference, the trial court also shall determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall schedule the hearing to be held within 90 days. If a death warrant has been signed, the trial court shall expedite these time periods in accordance with subdivision (h) of this rule.

(C) Extension of Time to Hold Evidentiary Hearing. The trial court also may for good cause extend the time for holding an evidentiary hearing for up to 90 days.

(D) Taking Testimony. Upon motion, or upon its own motion and without the consent of any party, the court may permit a witness to testify at the evidentiary hearing by contemporaneous video communication equipment that makes the witness visible to all parties during the testimony. There must be appropriate safeguards for the court to maintain sufficient control over the equipment and the transmission of the testimony so the court may stop the communication to accommodate objections or prevent prejudice. If testimony is taken through video communication equipment, there must be a notary public or other person authorized to administer oaths in the witness's jurisdiction who is present with the witness and who administers the oath consistent with the laws of the jurisdiction where the witness is located. The cost for the use of video communication equipment is the responsibility

of either the requesting party or, if upon its own motion, the court.

(E) Procedures After Evidentiary Hearing. Immediately following an evidentiary hearing, the trial court shall order a transcript of the hearing, which shall be filed within 10 days if real-time transcription was utilized, or within 45 days if real-time transcription was not utilized. The trial judge may permit written closing arguments instead of oral closing arguments. If the trial court permits the parties to submit written closing arguments, the arguments shall be filed by both parties within 30 days of the filing of the transcript of the hearing. No answer or reply arguments shall be allowed. Written arguments shall be in compliance with the requirements for briefs in rule 9.210(a)(1) and (a)(2), shall not exceed 60 pages without leave of court, and shall include proposed findings of facts and conclusions of law, with citations to authority and to appropriate portions of the transcript of the hearing.

(F) Rendition of the Order. If the court does not permit written closing arguments, the court shall render its order within 30 days of the filing of the transcript of the hearing. If the court permits written closing arguments, the court shall render its order within 30 days of the filing of the last written closing argument and no later than 60 days from the filing of the transcript of the hearing. The court shall rule on each claim considered at the evidentiary hearing and all other claims raised in the motion, making detailed findings of fact and conclusions of law with respect to each claim, and attaching or referencing such portions of the record as are necessary to allow for meaningful appellate review. The order issued after the evidentiary hearing shall resolve all the claims raised in the motion and shall be considered the final order for purposes of appeal. The clerk of the trial court shall promptly serve upon the parties and the attorney general a copy of the final order, with a certificate of service.

(6) Experts and Other Witnesses. All expert witnesses who will testify at the evidentiary hearing must submit written reports, which shall be disclosed to opposing counsel as provided in subdivision (f)(5)(A). If the defendant intends to offer expert testimony of his or her mental status, the state shall be entitled to have the defendant examined by its own mental health expert. If the defendant fails to cooperate with the state's expert, the trial court may, in its discretion, proceed as provided in rule 3.202(e).

(7) Rehearing. Motions for rehearing shall be filed within 15 days of the rendition of the trial court's order and a re-

sponse thereto filed within 10 days thereafter. A motion for rehearing shall be based on a good faith belief that the court has overlooked a previously argued issue of fact or law or an argument based on a legal precedent or statute not available prior to the court's ruling. The trial court's order disposing of the motion for rehearing shall be rendered not later than 30 days from the filing of the motion for rehearing. If no order is filed within 30 days from the filing of the motion for rehearing, the motion is deemed denied. A motion for rehearing is not required to preserve any issue for review.

(8) Appeals. Any party may appeal a final order entered on a defendant's motion for rule 3.851 relief by filing a notice of appeal with the clerk of the lower tribunal within 30 days of the rendition of the order to be reviewed. Pursuant to the procedures outlined in Florida Rule of Appellate Procedure 9.142, a defendant under sentence of death may petition for a belated appeal.

(g) Incompetence to Proceed in Capital Collateral Proceedings.

(1) A death-sentenced defendant pursuing collateral relief under this rule who is found by the court to be mentally incompetent shall not be proceeded against if there are factual matters at issue, the development or resolution of which require the defendant's input. However, all collateral relief issues that involve only matters of record and claims that do not require the defendant's input shall proceed in collateral proceedings notwithstanding the defendant's incompetency.

(2) Collateral counsel may file a motion for competency determination and an accompanying certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the death-sentenced defendant is incompetent to proceed.

(3) If, at any stage of a postconviction proceeding, the court determines that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed and that factual matters are at issue, the development or resolution of which require the defendant's input, a judicial determination of incompetency is required.

(4) The motion for competency examination shall be in writing and shall allege with specificity the factual matters at issue and the reason that competent consultation with the defendant is necessary with respect to each factual matter specified. To the extent that it does not invade the lawyer-client privilege with collateral counsel, the motion shall contain a recital of the specific observations of, and conversa-

tions with, the death-sentenced defendant that have formed the basis of the motion.

(5) If the court finds that there are reasonable grounds to believe that a death-sentenced defendant is incompetent to proceed in a postconviction proceeding in which factual matters are at issue, the development or resolution of which require the defendant's input, the court shall order the defendant examined by no more than 3, nor fewer than 2, experts before setting the matter for a hearing. The court may seek input from the death-sentenced defendant's counsel and the state attorney before appointment of the experts.

(6) The order appointing experts shall:

(A) identify the purpose of the evaluation and specify the area of inquiry that should be addressed;

(B) specify the legal criteria to be applied; and

(C) specify the date by which the report shall be submitted and to whom it shall be submitted.

(7) Counsel for both the death-sentenced defendant and the state may be present at the examination, which shall be conducted at a date and time convenient for all parties and the Department of Corrections.

(8) On appointment by the court, the experts shall examine the death-sentenced defendant with respect to the issue of competence to proceed, as specified by the court in its order appointing the experts to evaluate the defendant, and shall evaluate the defendant as ordered.

(A) The experts first shall consider factors related to the issue of whether the death-sentenced defendant meets the criteria for competence to proceed, that is, whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational as well as factual understanding of the pending collateral proceedings.

(B) In considering the issue of competence to proceed, the experts shall consider and include in their report:

(i) the defendant's capacity to understand the adversary nature of the legal process and the collateral proceedings;

(ii) the defendant's ability to disclose to collateral counsel facts pertinent to the postconviction proceeding at issue; and

(iii) any other factors considered relevant by the experts and the court as specified in the order appointing the experts.

(C) Any written report submitted by an expert shall:

(i) identify the specific matters referred for evaluation;

(ii) describe the evaluative procedures, techniques, and tests used in the examination and the purpose or purposes for each;

(iii) state the expert's clinical observations, findings, and opinions on each issue referred by the court for evaluation, and indicate specifically those issues, if any, on which the expert could not give an opinion; and

(iv) identify the sources of information used by the expert and present the factual basis for the expert's clinical findings and opinions.

(9) If the experts find that the death-sentenced defendant is incompetent to proceed, the experts shall report on any recommended treatment for the defendant to attain competence to proceed. In considering the issues relating to treatment, the experts shall report on:

(A) the mental illness or intellectual disability causing the incompetence;

(B) the treatment or treatments appropriate for the mental illness or intellectual disability of the defendant and an explanation of each of the possible treatment alternatives in order of choices; and

(C) the likelihood of the defendant attaining competence under the treatment recommended, an assessment of the probable duration of the treatment required to restore competence, and the probability that the defendant will attain competence to proceed in the foreseeable future.

(10) Within 30 days after the experts have completed their examinations of the death-sentenced defendant, the court shall schedule a hearing on the issue of the defendant's competence to proceed.

(11) If, after a hearing, the court finds the defendant competent to proceed, or, after having found the defendant incompetent, finds that competency has been restored, the court shall enter its order so finding and shall proceed with a postconviction motion. The defendant shall have 60 days to amend his or her rule 3.851 motion only as to those issues that the court found required factual consultation with counsel.

(12) If the court does not find the defendant incompetent, the order shall contain:

(A) findings of fact relating to the issues of competency;

(B) copies of the reports of the examining experts; and

(C) copies of any other psychiatric, psychological, or social work reports submitted to the court relative to the mental state of the death-sentenced defendant.

(13) If the court finds the defendant incompetent or finds the defendant competent subject to the continuation of appropriate treatment, the court shall follow the procedures set forth in rule 3.212(c), except that, to the extent practicable, any treatment shall take place at a custodial facility under the direct supervision of the Department of Corrections.

(h) After Death Warrant Signed.

(1) Judicial Assignment. The chief judge of the circuit shall assign the case to a judge qualified under the Rules of Judicial Administration to conduct capital cases as soon as notification of the death warrant is received.

(2) Calendar Advancement. Proceedings after a death warrant has been issued shall take precedence over all other cases. The assigned judge shall make every effort to resolve scheduling conflicts with other cases including cancellation or rescheduling of hearings or trials and requesting senior judge assistance.

(3) Schedule of Proceedings. The time limitations in this rule shall not apply after a death warrant has been signed. All motions shall be heard expeditiously considering the time limitations set by the date of execution and the time required for appellate review.

(4) Location of Hearings. The location of hearings after a death warrant is signed shall be determined by the trial judge considering the availability of witnesses or evidence, the security problems involved in the case, and any other factor determined by the trial court.

(5) Postconviction Motions. All motions filed after a death warrant is issued shall be considered successive motions and subject to the content requirement of subdivision (e)(2) of this rule.

(6) Case Management Conference. The assigned judge shall schedule a case management conference as soon as reasonably possible after receiving notification that a death warrant has been signed. During the case management conference the court shall set a time for filing a postconviction motion and shall schedule a hearing to determine whether an evidentiary hearing should be held and hear argument on any purely legal claims not based on disputed facts. If the motion, files, and records in the case conclusively show that the movant is entitled to no relief, the motion may be denied without an evidentiary hearing. If the trial court determines that an evidentiary hearing should be held, the court shall

schedule the hearing to be held as soon as reasonably possible considering the time limitations set by the date of execution and the time required for appellate review.

(7) Reporting. The assigned judge shall require the proceedings conducted under death warrant to be reported using the most advanced and accurate technology available in general use at the location of the hearing. The proceedings shall be transcribed expeditiously considering the time limitations set by the execution date.

(8) Procedures After Hearing. The court shall obtain a transcript of all proceedings and shall render its order as soon as possible after the hearing is concluded. A copy of the final order shall be electronically transmitted to the Supreme Court of Florida and to the attorneys of record.

(9) Transmittal of Record. The record shall be immediately delivered to the clerk of the Supreme Court of Florida by the clerk of the trial court or as ordered by the assigned judge. The record shall also be electronically transmitted if the technology is available. A notice of appeal shall not be required to transmit the record.

(i) Dismissal of Postconviction Proceedings.

(1) This subdivision applies only when a defendant seeks both to dismiss pending postconviction proceedings and to discharge collateral counsel.

(2) If the defendant files the motion pro se, the Clerk of the Court shall serve copies of the motion on counsel of record for both the defendant and the state. Counsel of record may file responses within 10 days.

(3) The trial judge shall review the motion and the responses and schedule a hearing. The defendant, collateral counsel, and the state shall be present at the hearing.

(4) The judge shall examine the defendant at the hearing and shall hear argument of the defendant, collateral counsel, and the state. No fewer than 2 or more than 3 qualified experts shall be appointed to examine the defendant if the judge concludes that there are reasonable grounds to believe the defendant is not mentally competent for purposes of this rule. The experts shall file reports with the court setting forth their findings. Thereafter, the court shall conduct an evidentiary hearing and enter an order setting forth findings of competency or incompetency.

(5) If the defendant is found to be incompetent for purposes of this rule, the court shall deny the motion without prejudice.

(6) If the defendant is found to be competent for purposes of this rule, the court shall conduct a complete (Durocher/

Faretta) inquiry to determine whether the defendant knowingly, freely and voluntarily wants to dismiss pending postconviction proceedings and discharge collateral counsel.

(7) If the court determines that the defendant has made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely, and voluntarily, the court shall enter an order dismissing all pending postconviction proceedings and discharging collateral counsel. But if the court determines that the defendant has not made the decision to dismiss pending postconviction proceedings and discharge collateral counsel knowingly, freely, and voluntarily, the court shall enter an order denying the motion without prejudice.

(8) If the court grants the motion:

(A) a copy of the motion, the order, and the transcript of the hearing or hearings conducted on the motion shall be forwarded to the Clerk of the Supreme Court of Florida within 30 days; and

(B) discharged counsel shall, within 10 days after issuance of the order, file with the clerk of the circuit court 2 copies of a notice seeking review in the Supreme Court of Florida, and shall, within 20 days after the filing of the transcript, serve an initial brief. Both the defendant and the state may serve responsive briefs. Briefs shall be served as prescribed by rule 9.210.

(9) If the court denies the motion, the defendant may seek review as prescribed by Florida Rule of Appellate Procedure 9.142(b).

(j) Attorney General Notification to Clerk. The Office of the Attorney General shall notify the clerk of the supreme court when it believes the defendant has completed his or her direct appeal, initial postconviction proceeding in state court, and habeas corpus proceeding and appeal therefrom in federal court. The Office of the Attorney General shall serve a copy of the notification on defendant's counsel of record.

§ 12:46 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.851—Case law on Rule 3.851

For case law on Rule 3.851, Fla. R. Crim. Proc., see, e.g., *Farina v. State*, 191 So. 3d 454 (Fla. 2016) (motions for a new trial based on newly discovered evidence should not be delayed until after the death sentence is final, but instead, should be brought as soon as possible after the discovery of the new evidence; motion for new trial in capital case, based on newly discovered evidence

alleging potential juror misconduct in guilt phase of trial, was not premature on basis that case had been remanded for resentencing following vacation of death sentence; there was no requirement to wait until sentence was final before filing motion); *Salazar v. State*, 188 So. 3d 799 (Fla. 2016) (an evidentiary hearing must be held on an initial 3.851 motion whenever the defendant makes a facially sufficient claim that requires a factual determination; however, a court may summarily deny a postconviction claim when the claim is legally insufficient, procedurally barred, or refuted by the record; because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling constitutes a pure question of law, subject to de novo review); *Long v. State*, 183 So. 3d 342 (Fla. 2016) (defendant who had been sentenced to death was not entitled to relief on successive motion for postconviction relief from his guilty plea based on alleged newly-discovered evidence, which consisted of FBI examiner's questionable methods of forensic testing, where defendant failed to timely file motion after he was first notified as to problems with examiner and his inadequate work); *Guardado v. State*, 176 So.3d 886 (Fla. 2015) (defendant's claim that penalty phase counsel were ineffective for failing to object to the State's cause challenges of jurors is proper subject of a rule 3.851 motion); *Kormondy v. State*, 154 So. 3d 341 (Fla. 2015) (even if newly discovered evidence offered by movant on successive motion to vacate murder conviction and death sentence, consisting of inmates' statements that movant's accomplice told them that he was the shooter, would have been admissible at trial, it was not of such nature that it would probably produce acquittal on retrial or yield less severe sentence; trial evidence demonstrated that movant was shooter separate from any testimony from accomplice); *McKenzie v. State*, 153 So. 3d 867 (Fla. 2014), on reh'g, (Dec. 11, 2014) (challenge not raised on direct appeal, that capital defendant was not provided access to a competent psychiatrist to assist in evaluation, preparation, and presentation of a possible insanity defense, was procedurally barred as raised in a subsequent motion for postconviction relief; finding of trial court, in rejecting statutory mitigating circumstance of extreme mental or emotional disturbance, that capital defendant was in complete control of his faculties when murders were committed, conclusively refuted any assertion on motion for postconviction relief that defendant was insane at time of murders, as that finding was supported by the record; any claims by capital defendant of a deficiency in presentence investigation report or of error in trial court's failure to consider electronic recordings of two interrogations as possible drug abuse or mental health mitigation before

imposing death sentence were waived in postconviction relief proceeding; trial court asked defendant at Spencer hearing if anything was missing from the report, and he replied in the negative, defendant was on notice that the interrogation recordings existed but did nothing to bring them to the court's attention, and he expressly informed the trial court that he did not wish to present any mitigation with regard to his childhood); *Chavez v. State*, 132 So. 3d 826 (Fla. 2014), cert. denied, 134 S. Ct. 1156 (2014) (capital defendant making a public records request bears the burden of demonstrating that the records sought relate to a colorable claim for postconviction relief; summary denial of a lethal injection challenge is proper where the asserted reasons for holding an evidentiary hearing are based upon conjecture or speculation; capital defendant seeking postconviction relief failed to establish that he was denied minimal due process during clemency proceeding or that his clemency proceeding was merely a formality; defendant did not dispute that a clemency proceeding was held, but instead expressed displeasure with the sufficiency of the proceeding, a matter within the exclusive purview of the executive branch); *Franklin v. State*, 137 So. 3d 969 (Fla. 2014) (to determine whether a defendant is competent to proceed at trial or in postconviction proceedings, the postconviction court must discern whether he has sufficient present ability to consult with counsel with a reasonable degree of rational understanding, and whether he has a rational, as well as a factual, understanding of the pending collateral proceedings); *Barnes v. State*, 124 So. 3d 904 (Fla. 2013), as revised on denial of reh'g, (Oct. 17, 2013) (evidentiary hearing must be held on an initial 3.851 motion whenever the movant makes a facially sufficient claim that requires factual determination; to the extent there is any question as to whether a rule 3.851 movant has made a facially sufficient claim requiring a factual determination, the Court will presume that an evidentiary hearing is required); *Mann v. State*, 112 So. 3d 1158 (Fla. 2013) (movant seeking collateral relief following final affirmance of death sentence had no right to effective assistance of collateral counsel); *Howell v. State*, 109 So. 3d 763 (Fla. 2013) (a successive motion for postconviction relief must state the nature of the relief the defendant seeks, and must include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought); *Merck v. State*, 124 So. 3d 785 (Fla. 2013) (when reviewing a court's summary denial of a capital defendant's initial postconviction motion, the Supreme Court must accept the movant's factual allegations as true, and will affirm the ruling only if the filings show that the movant has failed to state a facially sufficient claim or that there is no issue of material fact to be determined; however, to the extent there is

any question as to whether the defendant has made a facially sufficient claim requiring a factual determination, the Supreme Court will presume that an evidentiary hearing is required); *Ferguson v. State*, 101 So. 3d 362 (Fla. 2012) (defendant's postconviction claim, that State's statute, which governed proceedings when person under sentence of death appears to be insane, was an unconstitutional delegation of powers, became ripe, triggering one-year period to file postconviction motion to vacate judgment of conviction and sentence of death, when defendant's judgment became final after the federal court denied habeas relief and the United States Supreme Court denied defendant's petition for writ of certiorari); *Lukehart v. State*, 103 So. 3d 134 (Fla. 2012) (Rule 3.851(f)(5)(B) permits the denial of a successive postconviction motion without an evidentiary hearing if the motion, files, and records in the case conclusively show that the movant is entitled to no relief; when determining whether an evidentiary hearing is required on a successive rule 3.851 motion, the court may look at the entire record; because a court's decision whether to grant an evidentiary hearing on a rule 3.851 motion is ultimately based on written materials before the court, its ruling is tantamount to a pure question of law; Rule 3.851 governs the timeliness of postconviction motions in capital cases and prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final; an exception to the rule permits otherwise untimely motions if the movant alleges that 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; to be considered timely filed as newly discovered evidence, a successive rule 3.851 motion is required to have been filed within one year of the date upon which the claim became discoverable through due diligence); *Gore v. State*, 91 So. 3d 769 (Fla. 2012) (to obtain relief on the basis of newly discovered evidence, a defendant must satisfy a two-prong test: first, the evidence must not have been known by the trial court, the party, or counsel at the time of trial, and it must appear that the defendant or defense counsel could not have known of it by the use of diligence, second, the newly discovered evidence must be of such nature that it would probably produce an acquittal on retrial; newly discovered evidence satisfies the second prong if it weakens the case against the defendant so as to give rise to a reasonable doubt as to his culpability; if the defendant is seeking to vacate a sentence, the second prong requires that the newly discovered evidence would probably yield a less severe sentence); *Walton v. State*, 77 So. 3d 639 (Fla. 2011) (successive motion for collateral relief from a sentence of death may be denied without an evidentiary hearing

if the motion, files, and records in the case conclusively show that the movant is entitled to no relief, or if the motion or a particular claim by the defendant is legally insufficient; postconviction court's decision to deny an evidentiary hearing for a successive motion for collateral relief from a sentence of death must be based on the written materials before the court, and is for all practical purposes tantamount to a pure question of law); *Trease v. State*, 41 So. 3d 119 (Fla. 2010) (rule 3.851(i) applies when a defendant seeks to dismiss pending postconviction proceedings and discharge collateral counsel; the rule requires the trial judge to hold a hearing, and, if the defendant is found to be competent, the trial court is required to conduct an inquiry to determine whether the prisoner knowingly and voluntarily wishes to discharge counsel and dismiss postconviction proceedings; if the trial judge grants the motion, discharged counsel must seek review in the Supreme Court); *Wainwright v. State*, 43 So. 3d 45 (Fla. 2010) (defendant failed to explain why the facts upon which he based his claim were not previously known and could not have been discovered through due diligence; Fla. R.Crim. Pro. 3.851(e)(2)(C)(iv)); *Clark v. State*, 35 So. 3d 880 (Fla. 2010) (death sentence case; claims of newly discovered evidence must be raised within one year of the time of discovery; capital defendant's postconviction claim of newly discovered evidence, in form of another individual's alleged confession to fellow inmate that he was the actual shooter, was procedurally barred based on defendant's failure to raise claim within one year of discovering it and his failure to raise claim at all in his pleadings); *Nelson v. State*, 43 So. 3d 20 (Fla. 2010) (death sentence case; claim under *Pate v. Robinson* that trial court erred by failing in capital murder prosecution to sua sponte order a competency hearing had to be raised on direct appeal and was therefore procedurally barred when raised for the first time in defendant's motion for postconviction relief); *Grossman v. State*, 29 So. 3d 1034 (Fla. 2010) (rule 3.851 governs the filing of postconviction motions in capital cases; rule 3.851(d)(1) generally prohibits the filing of a postconviction motion more than one year after the judgment and sentence become final; an exception permits filing beyond this deadline if the movant alleges that 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; rule also has certain pleading requirements for initial and successive postconviction motions — the motion must state the nature of the relief sought, and must include a detailed allegation of the factual basis for any claim for which an evidentiary hearing is sought; denial of a successive postconviction motion without an evidentiary hearing is allowed if the motion, files, and records in the

case conclusively show that the movant is entitled to no relief; postconviction court's decision regarding whether to grant evidentiary hearing depends on the written materials before the court); *Walton v. State*, 3 So. 3d 1000 (Fla. 2009) (death sentence case, 3.851 requires any motion to vacate judgment of conviction and death sentence to be filed within one year after the judgment and sentence become final unless the motion alleges that a fundamental constitutional right, held to apply retroactively, was established after that period; as the circuit court determined, Walton's claim is procedurally barred because the case on which he relies for this motion did not recognize a new fundamental constitutional right that applies retroactively); *Franqui v. State*, 14 So. 3d 238 (Fla. 2009) (death sentence case; in making a determination of whether Franqui is mentally retarded, the circuit court shall consider the requirements set forth in *Cherry v. State*, 959 So. 2d 702 (Fla. 2007), including the following requirement: the defendant must establish that he has significantly subaverage general intellectual functioning; if significantly subaverage general intellectual functioning is established, the defendant must also establish that this significantly subaverage general intellectual functioning exists with deficits in adaptive behavior; finally, he must establish that the significantly subaverage general intellectual functioning and deficits in adaptive behavior manifested before the age of eighteen); *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008) (death sentence case; in appropriate capital collateral cases involving extraordinary circumstances, registry attorneys may request and if there is competent, substantial evidence in the record to support the request, with judicial approval, attorneys may receive compensation in excess of the statutory fee schedule, despite the language to the contrary in FLS § 27.7002); *Doorbal v. State*, 983 So. 2d 464 (Fla. 2008) (capital defendant may not raise claims of ineffective assistance of counsel on a piecemeal basis by refining his or her claims to include additional factual allegations after the postconviction court concludes that no evidentiary hearing is required); *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004) (Rule 3.851(e)(2)(B) requires petitioners to plead the reasons that their claims were not raised in the former motion or motions); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (Rule 3.850 is no longer the mechanism through which they may file collateral postconviction challenges to their convictions and sentences, see Rule 3.851, Fla. R. Crim. Proc.).

§ 12:47 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.851—Procedures under Appellate Procedure Rule 9.142—Case law

For case law on Florida Rule of Appellate Procedure 9.142, see

e.g., *Barnes v. State*, 29 So. 3d 1010 (Fla. 2010) (death sentence case; even if a defendant convicted of capital murder has not presented a challenge to the sufficiency of the evidence, the Supreme Court has an independent obligation to review the record to determine whether sufficient evidence exists to support the conviction); *Miller v. State*, 42 So. 3d 204 (Fla. 2010) (Supreme Court has mandatory obligation to independently review the sufficiency of the evidence in every case in which a sentence of death has been imposed); *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) (as is the case with rule 3.850, belated appeals may under specifically narrow circumstances be sought from the denial of rule 3.851 relief; the counterpart to rule 3.851, Rule 9.141(c)(4) refines the belated appeal provision of rule 3.850(g), setting forth a time limit for making the request, and qualifying the circumstances that support an exception to the time limit; in turn, we amend rule 9.142 to qualify the circumstances upon which a belated appeal may be sought in a capital postconviction case; specifically, a petitioner under a sentence of death, seeking to bring a belated appeal from the denial of rule 3.851 relief, must file the petition within one year after the expiration of time for filing a timely notice of appeal Fla. R.App. P. 9.142(d); an exception to that one-year period exists upon an allegation, made under oath and on a sufficient factual basis, that the petitioner was unaware the appeal had not been timely filed or that he or she had not been advised of the right to appeal, and could not have ascertained those facts through the exercise of reasonable diligence).

§ 12:48 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.852

Rule 3.852, Fla. R. Crim. Proc., entitled "Capital Postconviction Public Records Production," was originally adopted by the Florida Supreme Court in 1996. See *In re Amendment to Florida Rules of Criminal Procedure-Capital Postconviction Public Records Production*, 683 So. 2d 475 (Fla. 1996). Rule 3.852 is "a discovery rule for public records production ancillary to proceedings pursuant to [R]ule[s] 3.850 and 3.851." *Allen v. Butterworth*, 756 So. 2d 52, 66 (Fla. 2000). See also Fla. Stat. Ann. § 27.7081 (statutory regulation of capital postconviction public records production).

Since its original promulgation in 1996, Rule 3.852 has been amended numerous times. Rule 3.993, Fla. R. Crim. Proc., contains various model forms for use with respect to capital postconviction public records production under Rule 3.852.

§ 12:49 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.852—Text of Rule 3.852

Rule 3.852, Fla. R. Crim. Proc., provides:

Rule 3.852. Capital Postconviction Public Records Production

(a) Applicability and Scope.

(1) This rule is applicable only to the production of public records for capital postconviction defendants and does not change or alter the time periods specified in Florida Rule of Criminal Procedure 3.851. Furthermore, this rule does not affect, expand, or limit the production of public records for any purposes other than use in a proceeding held pursuant to rule 3.850 or rule 3.851.

(2) This rule shall not be a basis for renewing requests that have been initiated previously or for relitigating issues pertaining to production of public records upon which a court has ruled prior to October 1, 1998.

(3) This rule is to be used in conjunction with the forms found at Florida Rule of Criminal Procedure 3.993.

(b) Definitions.

(1) "Public records" has the meaning set forth in section 119.011, Florida Statutes.

(2) "Trial court" means:

(A) the judge who entered the judgment and imposed the sentence of death; or

(B) the judge assigned by the chief judge.

(3) "Records repository" means the location designated by the secretary of state pursuant to section 27.7081, Florida Statutes, for archiving capital postconviction public records.

(4) "Collateral counsel" means a capital collateral regional counsel from one of the three regions in Florida; a private attorney who has been appointed to represent a capital defendant for postconviction litigation; or a private attorney who has been hired by the capital defendant or who has agreed to work pro bono for a capital defendant for postconviction litigation.

(5) "Agency" means an entity or individual as defined in section 119.011, Florida Statutes, that is subject to the requirements of producing public records for inspection under section 119.07, Florida Statutes.

(6) "Index" means a list of the public records included in each container of public records sent to the records repository.

(c) Filing and Service.

(1) The original of all notices, requests, or objections filed under this rule must be filed with the clerk of the trial court. Copies must be served on the trial court, the attorney general, the state attorney, collateral counsel, and any affected person or agency, unless otherwise required by this rule.

(2) Service shall be made pursuant to Florida Rule of Criminal Procedure 3.030.

(3) In all instances requiring written notification or request, the party who has the obligation of providing a notification or request shall provide proof of receipt.

(4) Persons and agencies receiving postconviction public records notifications or requests pursuant to this rule are not required to furnish records filed in a trial court prior to the receipt of the notice.

(d) Action Upon Issuance of Mandate.

(1) Within 15 days after receiving written notification of the Supreme Court of Florida's mandate affirming the sentence of death, the attorney general shall file with the trial court a written notice of the mandate and serve a copy of it upon the state attorney who prosecuted the case, the Department of Corrections, and the defendant's trial counsel. The notice to the state attorney shall direct the state attorney to submit public records to the records repository within 90 days after receipt of written notification and to notify each law enforcement agency involved in the investigation of the capital offense, with a copy to the trial court, to submit public records to the records repository within 90 days after receipt of written notification. The notice to the Department of Corrections shall direct the department to submit public records to the records repository within 90 days after receipt of written notification. The attorney general shall make a good faith effort to assist in the timely production of public records and written notices of compliance by the state attorney and the Department of Corrections with copies to the trial court.

(2) Within 90 days after receiving written notification of issuance of the Supreme Court of Florida's mandate affirming a death sentence, the state attorney shall provide written notification to the attorney general and to the trial court of the name and address of any additional person or agency that has public records pertinent to the case.

(3) Within 90 days after receiving written notification of issuance of the Supreme Court of Florida's mandate affirming a death sentence, the defendant's trial counsel shall provide written notification to the attorney general and to

the trial court of the name and address of any person or agency with information pertinent to the case which has not previously been provided to collateral counsel.

(4) Within 15 days after receiving written notification of any additional person or agency pursuant to subdivision (d)(2) or (d)(3) of this rule, the attorney general shall notify all persons or agencies identified pursuant to subdivisions (d)(2) or (d)(3), with a copy to the trial court, that these persons or agencies are required by law to copy, index, and deliver to the records repository all public records pertaining to the case that are in their possession. The person or agency shall bear the costs related to copying, indexing, and delivering the records. The attorney general shall make a good faith effort to assist in the timely production of public records and a written notice of compliance by each additional person or agency with a copy to the trial court.

(e) Action Upon Receipt of Notice of Mandate.

(1) Within 15 days after receipt of a written notice of the mandate from the attorney general, the state attorney shall provide written notification to each law enforcement agency involved in the specific case to submit public records to the records repository within 90 days after receipt of written notification. A copy of the notice shall be served upon the defendant's trial counsel and the trial court. The state attorney shall make a good faith effort to assist in the timely production of public records and a written notice of compliance by each law enforcement agency with a copy to the trial court.

(2) Within 90 days after receipt of a written notice of the mandate from the attorney general, the state attorney shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, that were produced in the state attorney's investigation or prosecution of the case. The state attorney shall bear the costs. The state attorney shall also provide written notification to the attorney general and the trial court of compliance with this section, including certifying that, to the best of the state attorney's knowledge or belief, all public records in the state attorney's possession have been copied, indexed, and delivered to the records repository as required by this rule.

(3) Within 90 days after receipt of written notification of the mandate from the attorney general, the Department of Corrections shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, determined by the department to be relevant to the subject matter of a proceeding under rule 3.851, unless such copying, indexing, and delivering would be un-

duly burdensome. To the extent that the records determined by the department to be relevant to the subject matter of a proceeding under rule 3.851 are the defendant's medical, psychological, substance abuse, or psychiatric records, upon receipt of express consent by the defendant or pursuant to the authority of a court of competent jurisdiction, the department shall provide a copy of the defendant's medical, psychological, substance abuse, and psychiatric records to the defendant's counsel of record. The department shall bear the costs. The secretary of the department shall provide written notification to the attorney general and the trial court of compliance with this section certifying that, to the best of the secretary of the department's knowledge or belief, all such public records in the possession of the secretary of the department have been copied, indexed, and delivered to the records repository.

(4) Within 90 days after receipt of written notification of the mandate from the state attorney, a law enforcement agency shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, which were produced in the investigation or prosecution of the case. Each agency shall bear the costs. The chief law enforcement officer of each law enforcement agency shall provide written notification to the attorney general and the trial court of compliance with this section including certifying that, to the best of the chief law enforcement officer's knowledge or belief, all such public records in possession of the agency or in possession of any employee of the agency, have been copied, indexed, and delivered to the records repository.

(5) Within 90 days after receipt of written notification of the mandate from the attorney general, each additional person or agency identified pursuant to subdivision (d)(2) or (d)(3) of this rule shall copy, index, and deliver to the records repository all public records, in a current, nonproprietary technology format, which were produced during the prosecution of the case. The person or agency shall bear the costs. The person or agency shall provide written notification to the attorney general and the trial court of compliance with this subdivision and shall certify, to the best of the person or agency's knowledge and belief, all such public records in the possession of the person or agency have been copied, indexed, and delivered to the records repository.

(f) Exempt or Confidential Public Records.

(1) Any public records delivered to the records repository pursuant to these rules that are confidential or exempt from the requirements of section 119.07, Florida Statutes, or

article I, section 24(a), Florida Constitution, must be separately contained, without being redacted, and sealed. The outside of the container must clearly identify that the public record is confidential or exempt and that the seal may not be broken without an order of the trial court. The outside of the container must identify the nature of the public records and the legal basis for the exemption.

(2) court shall be shipped to the clerk of court. The containers may be opened only for inspection by the trial court in camera. The moving party shall bear all costs associated with the transportation and inspection of such records by the trial court. The trial court shall perform the unsealing and inspection without ex parte communications and in accord with procedures for reviewing sealed documents.

(3) Collateral counsel must file a motion for in camera inspection within 30 days of receipt of the notice of delivery of the sealed records to the central records repository, or the in camera inspection will be deemed waived.

(g) Demand for Additional Public Records.

(1) Within 240 days after collateral counsel is appointed, retained, or appears pro bono, such counsel shall send a written demand for additional public records to each person or agency submitting public records or identified as having information pertinent to the case under subdivision (d) of this rule, with a copy to the trial court. However, if collateral counsel was appointed prior to October 1, 2001, then within 90 days after collateral counsel is appointed, retained, or appears pro bono, such counsel shall send a written demand for additional public records to each person or agency submitting public records or identified as having information pertinent to the case under subdivision (d) of this rule.

(2) Within 90 days of receipt of the written demand, each person or agency notified under this subdivision shall deliver to the records repository any additional public records in the possession of the person or agency that pertain to the case and shall certify to the best of the person or agency's knowledge and belief that all additional public records have been delivered to the records repository or, if no additional public records are found, shall recertify that the public records previously delivered are complete. To the extent that the additional public records are the defendant's Department of Corrections' medical, psychological, substance abuse, or psychiatric records, upon receipt of express consent by the defendant or pursuant to the authority of a court of competent jurisdiction, the department shall provide a copy of the defendant's medical, psychological, substance abuse, and

psychiatric records to the defendant's counsel of record. A copy of each person's or agency's certification shall be provided to the trial court.

(3) Within 60 days of receipt of the written demand, any person or agency may file with the trial court an objection to the written demand described in subdivision (g)(1). The trial court shall hear and rule on any objection no later than the next 90-day status conference after the filing of the objection, ordering a person or agency to produce additional public records if the court determines each of the following exists:

(A) Collateral counsel has made a timely and diligent search as provided in this rule.

(B) Collateral counsel's written demand identifies, with specificity, those additional public records that are not at the records repository.

(C) The additional public records sought are relevant to the subject matter of a proceeding under rule 3.851, or appear reasonably calculated to lead to the discovery of admissible evidence.

(D) The additional public records request is not overly broad or unduly burdensome.

(h) Cases in Which Mandate was Issued Prior to Effective Date of Rule.

(1) If the mandate affirming a defendant's conviction and sentence of death was issued prior to October 1, 1998, and no initial public records requests have been made by collateral counsel by that date, the attorney general and the state attorney shall file notifications with the trial court as required by subdivisions (d) and (e) of this rule.

(2) If on October 1, 1998, a defendant is represented by collateral counsel and has initiated the public records process, collateral counsel shall, within 90 days after October 1, 1998, or within 90 days after the production of records which were requested prior to October 1, 1998, whichever is later, file with the trial court and serve a written demand for any additional public records that have not previously been the subject of a request for public records. The request for these records shall be treated the same as a request pursuant to subdivisions (d)(3) and (d)(4) of this rule, and the records shall be copied, indexed, and delivered to the repository as required in subdivision (e)(5) of this rule.

(3) Within 10 days of the signing of a defendant's death warrant, collateral counsel may request in writing the production of public records from a person or agency from which collateral counsel has previously requested public records. A person or agency shall copy, index, and deliver to the repository any public record:

(A) that was not previously the subject of an objection;

(B) that was received or produced since the previous request; or

(C) that was, for any reason, not produced previously.

The person or agency providing the records shall bear the costs of copying, indexing, and delivering such records. If none of these circumstances exist, the person or agency shall file with the trial court and the parties an affidavit stating that no other records exist and that all public records have been produced previously. A person or agency shall comply with this subdivision within 10 days from the date of the written request or such shorter time period as is ordered by the court.

(4) In all instances in subdivision (h) which require written notification the receiving party shall provide proof of receipt by return mail or other carrier.

(i) Limitation on Postproduction Request for Additional Records.

(1) In order to obtain public records in addition to those provided under subdivisions (e), (f), (g), and (h) of this rule, collateral counsel shall file an affidavit in the trial court which:

(A) attests that collateral counsel has made a timely and diligent search of the records repository; and

(B) identifies with specificity those public records not at the records repository; and

(C) establishes that the additional public records are either relevant to the subject matter of the postconviction proceeding or are reasonably calculated to lead to the discovery of admissible evidence; and

(D) shall be served in accord with subdivision (c)(1) of this rule.

(2) Within 30 days after the affidavit of collateral counsel is filed, the trial court may order a person or agency to produce additional public records only upon finding each of the following:

(A) collateral counsel has made a timely and diligent search of the records repository;

(B) collateral counsel's affidavit identifies with specificity those additional public records that are not at the records repository;

(C) the additional public records sought are either relevant to the subject matter of a proceeding under rule 3.851 or appear reasonably calculated to lead to the discovery of admissible evidence; and

(D) the additional records request is not overly broad or unduly burdensome.

(j) Authority of the Court. In proceedings under this rule the trial court may:

(1) compel or deny disclosure of records;

(2) conduct an in-camera inspection;

(3) extend the times in this rule upon a showing of good cause;

(4) require representatives from government agencies to appear at status conferences to address public records issues;

(5) impose sanctions upon any party, person, or agency affected by this rule including initiating contempt proceedings, taxing expenses, extending time, ordering facts to be established, and granting other relief; and

(6) resolve any dispute arising under this rule unless jurisdiction is in an appellate court.

(k) Scope of Production and Resolution of Production Issues.

(1) Unless otherwise limited, the scope of production under any part of this rule shall be that the public records sought are not privileged or immune from production and are either relevant to the subject matter of the proceeding under rule 3.851 or are reasonably calculated to lead to the discovery of admissible evidence.

(2) Any objections or motions to compel production of public records pursuant to this rule shall be filed within 30 days after the end of the production time period provided by this rule. Counsel for the party objecting or moving to compel shall file a copy of the objection or motion directly with the trial court. The trial court shall hold a hearing on the objection or motion on an expedited basis.

(l) Destruction of Records Repository Records. Sixty days after a capital sentence is carried out, after a defendant is released from incarceration following the granting of a pardon or reversal of the sentence, or after a defendant has been resentenced to a term of years, the attorney general shall provide written notification of this occurrence to the secretary of state with service in accord with subdivision (c)(1). After the expiration of the 60 days, the secretary of state may then destroy the copies of the records held by the records repository that pertain to that case, unless an objection to the destruction is filed in the trial court and served upon the secretary of state and in accord with subdivision (c)(1). If no objection has been served within the 60-day period, the records may then be destroyed. If an objection is served, the records shall not be destroyed until a final disposition of the objection.

§ 12:50 Florida Rule of Criminal Procedure 3.850—Death Sentences and Florida Rule of Criminal Procedure 3.852—Case law on Rule 3.852

For case law on Rule 3.852, Fla. R. Crim. Proc., see, e.g., *Twilegar v. State*, 2015 WL 2458011 (Fla. 2015) (defendant failed to establish that his request for additional public records in connection with petition for postconviction relief resulted in denial of access to records at all or that any such records related to a colorable claim, where defendant failed to allege anything more than speculation that he could have been denied access to records since he was required to articulate a claim to which the records related; production of public records is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief; accordingly, where a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a public records request); *Chavez v. State*, 132 So. 3d 826 (Fla. 2014), cert. denied, 134 S. Ct. 1156 (2014) (trial court acted within its discretion in denying capital defendant's request for public records created by the Department of Corrections and the Florida Department of Law Enforcement relating to lethal injection procedure, where the Supreme Court had previously held that such records requests were not related to a colorable claim; disclosure of the witness list from a prior execution would not lead to a colorable claim, and thus capital defendant was not entitled to grant of such records request; capital defendant was not entitled to disclosure of autopsy records of certain previously executed inmates to support his challenge to capital sentencing scheme, where the bases for which defendant sought the autopsy records would not establish when the inmates became unconscious or whether they experienced pain during their executions); *Muhammad v. State*, 132 So. 3d 176 (Fla. 2013), cert. denied, 134 S. Ct. 894, 187 L. Ed. 2d 700 (2014) (public records request procedure applicable in capital cases is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief; requests for records after the issuance of a death warrant in a capital case may be denied as far exceeding the scope of the applicable statute, if they are overbroad, of questionable relevance, and unlikely to lead to discoverable evidence); *Mann v. State*, 112 So. 3d 1158 (Fla. 2013) (a defendant must show how the requested records relate to a colorable claim for postconviction relief and good cause as to why the public records request was not made until after the death warrant was signed; while the language of the rule and statute provide for the production of records after a death warrant has

been signed by the Governor, this discovery tool is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief; accordingly, where a defendant cannot demonstrate that he or she is entitled to relief on a claim or that records are relevant or may reasonably lead to the discovery of admissible evidence, the trial court may properly deny a public records request); *Tanzi v. State*, 94 So. 3d 482 (Fla. 2012) (scope of requests made pursuant to Florida Rule of Criminal Procedure 3.852(g) and (i) are governed by Fla. R. Crim. P. 3.852(l), which provides that the records must not be privileged or immune from production and that the records are either relevant to the subject matter of the proceeding or reasonably calculated to lead to the discovery of admissible evidence); *Valle v. State*, 70 So. 3d 530 (Fla. 2011) (circuit court has the discretion to deny public records requests that are overly broad, of questionable relevance, and unlikely to lead to discoverable evidence; rule 3.852 is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief); *Rimmer v. State*, 59 So. 3d 763 (Fla. 2010) (denial of capital murder defendant's request for postconviction public records production relating to 34 people whose names appeared in various police reports or case records was not an abuse of discretion; among the information considered by postconviction trial court was the ability of the agencies to conduct searches of the degree required by defendant's demand; rule 3.852 is not intended to be a procedure authorizing a fishing expedition for records unrelated to a colorable claim for postconviction relief); *Geralds v. State*, 111 So. 3d 778 (Fla. 2010), as revised on denial of reh'g, (Feb. 2, 2012) (capital murder defendant's public records request for any and all files related to 48 individuals who were witnesses or provided statements about crime, without listing any other specific information regarding relevancy to prosecution, was unduly broad and vague, with result that defendant was not entitled to records under public records statute); *Walton v. State*, 3 So. 3d 1000 (Fla. 2009) (denial of defendant's request for public records from the office of the state attorney, including all records, files, documents, notes, pleadings, memoranda, and attorney work product relating to codefendant postconviction proceedings and all records, files, documents, notes, pleadings, memoranda, statements, and transcripts relating to jailhouse informant where he was either a party or a witness, was not an abuse of discretion; defendant did not demonstrate that discovery of the codefendant's postconviction documents, the boxes of material relating to the informant in the federal court order, the case files in which the informant was a defendant, and the cases where, based on the best information

that was available, counsel believed that the informant was a state witness, would reasonably have led to evidence that would support his postconviction claim); *Hill v. State*, 921 So. 2d 579 (Fla. 2006) (death sentence case; after a death warrant has been signed, Rule 3.852(h)(3) authorizes public records requests from agencies who have received public records requests from the defendant at an earlier time).

§ 12:51 Writ of habeas corpus

The writ of habeas corpus is the most important of Florida's secondary postconviction remedies. The Rule 3.850 remedy being the principal postconviction remedy in Florida for collaterally attacking convictions and sentences, the writ of habeas corpus is, as a general rule, restricted to cases where the Rule 3.850 remedy in inadequate or ineffective, or where the postconviction claim does not question the validity of the conviction or sentence.

The writ of habeas corpus in Florida is guaranteed under the state constitution, Florida statutory law, and Florida rules of court. Fla. Const. art. 5, § 3(b)(9) (Florida Supreme Court, or any justice thereof, may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge); Fla. Const. art. 5, § 4(b)(3) (district court of appeal or any judge thereof may issue writs of habeas corpus returnable before the court or any judge thereof or before any circuit judge within the territorial jurisdiction of the court); Fla. Const. art. 5, § 5(b) (circuit courts shall have the power to issue writs of habeas corpus); Fla. Stat. Ann. § 79.01 through § 79.12 (Florida's Habeas Corpus Act); Rule 9.030(a)(3), Fla. R. App. Proc. (as part of its original jurisdiction, the Florida Supreme Court or any justice may issue writs of habeas corpus returnable before the supreme court or any justice, a district court of appeal or any judge thereof, or any circuit judge); Rule 9.030(b)(3), Fla. R. App. Proc. (as part of the original jurisdiction of the district court of appeal, any judge of a district court of appeal may issue writs of habeas corpus returnable before the court or any judge thereof, or before any circuit judge within the territorial jurisdiction of the court); Rule 9.030(c)(3), Fla. R. App. Proc. (as part of their original jurisdiction, circuit courts may issue writs of habeas corpus); Rule 9.141(c), Fla. R. App. Proc. (petitions filed originally in appellate courts in noncapital cases seeking belated appeal or alleging ineffective assistance of appellate counsel).

§ 12:52 Writ of habeas corpus—Custody requirement

In order to be eligible to apply for habeas relief, the petitioner

must be in custody. Fla. Stat. Ann. § 79.01 (habeas corpus available to any person detained in custody).

§ 12:53 Writ of habeas corpus—Filing

Unless the habeas petition seeks review of the actions of an appellate court or presents issues of unusual importance, it usually should be filed in a circuit court. See, e.g., *Williams v. Moore*, 752 So. 2d 574 (Fla. 2000) (original habeas corpus petition filed directly in state supreme court raising claim that inmate is entitled to overcrowded credits; we will decline jurisdiction and transfer or dismiss without prejudice writ petitions which raise substantial issues of fact or present individual issues that do not require immediate resolution by this court, or are not of the type of case in which an opinion from this court would provide important guiding principles for the other courts of this state; the circuit courts are fully capable of interpreting and applying the legal principles set forth in our previous decisions relating to overcrowding gain time credit; petition for habeas relief dismissed without prejudice to its being filed in the appropriate circuit court).

§ 12:54 Writ of habeas corpus—Denial of relief—Appeal

A convicted person who is denied habeas relief in one Florida court should not then file another original habeas application in another Florida court. Instead, the person should seek appellate review of the order denying habeas corpus relief. Thus, if the habeas petition was originally filed in the circuit court, the denial of relief should, in a death sentence case, be appealed to the Florida Supreme Court, and, in a noncapital case, be appealed to the appropriate state district court of appeal; and if on the appeal the district court of appeal affirms the circuit court's denial of habeas relief, further review may be had by seeking a writ of certiorari in the Florida Supreme Court. See, e.g., *Martin v. Florida Parole Com'n*, 951 So. 2d 84 (Fla. 1st DCA 2007) (in noncapital case, circuit court's denial of postconviction habeas relief appealed to district court of appeal).

When a final order of a circuit court denying habeas relief is appealed, the notice of appeal must be filed within 30 days of rendition of the order. See, e.g., *Chubb v. State*, 951 So. 2d 901 (Fla. 1st DCA 2007).

Under some circumstances, however, as where the postconviction habeas petition attacks a decision or order of the state parole commission, a circuit court order denying habeas corpus relief is unappealable and may be reviewed by the appropriate district court of appeal only via the discretionary writ of certiorari. See,

e.g., *Jones v. Florida Parole Com'n*, 48 So. 3d 704 (Fla. 2010) (application of one-year statute of limitations applicable to a petition for extraordinary writ to a habeas petition violates the doctrine of separation of powers); *Sylvis v. State*, 916 So. 2d 915 (Fla. 5th DCA 2005) (parole revocation claim; inmate filed his habeas petition in the circuit court, which denied relief, and now seeks to appeal that denial of relief to this court; because the appealed order was entered in a review proceeding in circuit court, Sylvis may seek relief only by certiorari; once an inmate has had a full review on the merits of a parole commission order in the circuit court, he or she is not entitled to a second plenary appeal of the order in the district court; we therefore treat the appeal as a petition for certiorari; this court's second-tier review is limited to two considerations: whether the circuit court afforded procedural due process. and whether the circuit court applied the correct law; a ruling departs from the essential requirements of law when it violates a clearly established principle of law, resulting in a miscarriage of justice; the departure must be more than a simple legal error to justify issuing a writ of certiorari; it is inappropriate to exercise certiorari review when the district court merely disagrees with the interpretation of a circuit court sitting in its appellate capacity).

§ 12:55 Writ of habeas corpus—Denial of original habeas petition filed directly in district court of appeal—Appellate review via certiorari petition filed in state supreme court

If the habeas petition was originally filed in a district court of appeal, the convicted person should, if relief is denied, file a certiorari petition in the state supreme court, seeking appellate review of the denial of habeas corpus relief. See, e.g., *State ex rel. Scaldeferri v. Sandstrom*, 285 So. 2d 409 (Fla. 1973).

§ 12:56 Writ of habeas corpus—Laches

Laches is a bar to postconviction habeas corpus relief in Florida. See, e.g., *Pinder v. State*, 779 So. 2d 309 (Fla. 2d DCA 1999); *Strange v. State*, 732 So. 2d 1117 (Fla. 5th DCA 1999).

§ 12:57 Writ of habeas corpus—Grounds for relief—Ineffective assistance of appellate counsel—Death sentence cases

The writ of habeas corpus may, notwithstanding Rule 3.850, be invoked as a postconviction remedy in Florida under the following circumstances.

In the first instance, a habeas corpus petition, filed originally

in the Florida Supreme Court, may be used in a death sentence case to raise a claim that the petitioner received ineffective assistance of counsel on the previous direct appeal in that same court. *Lugo v. Secretary, Florida Dept. of Corrections*, 750 F.3d 1198 (11th Cir. 2014), cert. denied, 135 S. Ct. 1171, 190 L. Ed. 2d 919 (2015) (under Florida law, a capital habeas petitioner may file a petition for a writ of habeas corpus in the Florida Supreme Court, but such a petition must be filed at the same time as the initial brief is filed in an appeal of a state circuit court's order on a Rule 3.851 motion, see Fla. R.Crim. P. 3.851(d)(3); in Florida, a state habeas petition is the proper procedural vehicle for bringing claims of ineffective assistance of appellate counsel, for example, but not for raising claims that should have been brought on direct appeal or in a postconviction motion).

Original habeas corpus proceedings in the Florida Supreme Court are regulated by Rule 9.100, Fla. R. App. Proc.

A death row inmate filing an original habeas petition in the Florida Supreme Court which raises an ineffective appellate counsel claim has a statutory right to counsel, i.e., a right to be represented by the capital collateral representative. See, e.g., *Durocher v. Singletary*, 623 So. 2d 482 (Fla. 1993). However, a claim that trial counsel was ineffective is not cognizable on habeas corpus review. *Merck v. State*, 124 So. 3d 785 (Fla. 2013).

Although generally there is no statute of limitations on the filing of habeas corpus petitions in the Florida Supreme Court, Rule 3.851(d)(3), Fla. R. Crim. Proc., provides that all petitions for extraordinary relief in which the Florida Supreme Court has original jurisdiction, including petitions for writ of habeas corpus, shall be filed simultaneously with the initial brief filed on behalf of the death sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this Rule.

§ 12:58 Writ of habeas corpus—Grounds for relief—Ineffective assistance of appellate counsel—Death sentence cases—Case law

For case law on the use of original habeas corpus petitions filed directly in the Florida Supreme Court to challenge the effectiveness of counsel who represented the defendant on the direct appeal in a death sentence case, see, e.g., *Brooks v. State*, 175 So. 3d 204 (Fla. 2015) (claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus; to determine whether a claim alleging ineffective assistance of appellate counsel warrants habeas relief, the court evaluates: (1) whether the alleged omissions are of such magni-

tude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance; and (2) whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result; in raising such a claim, the defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based); *Boyd v. State*, 2015 WL 9170916 (Fla. 2015) (claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus; ineffective assistance of appellate counsel claims may not be used to camouflage issues that should have been presented on direct appeal or in a postconviction motion; further, appellate counsel cannot be deemed ineffective for not pursuing a meritless claim); *Pham v. State*, 177 So. 3d 955 (Fla. 2015) (petition for habeas corpus is not the proper method for raising a claim that could have or should have been raised on appeal or in a postconviction proceeding); *Frances v. State*, 143 So. 3d 340 (Fla. 2014) (if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective); *Diaz v. State*, 132 So. 3d 93 (Fla. 2013) (habeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal or in postconviction proceedings; habeas process is therefore most often used in death penalty cases to challenge the effectiveness of appellate counsel); *Jackson v. State*, 127 So. 3d 447 (Fla. 2013) (habeas petitioner, on a claim for ineffective assistance of appellate counsel, has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based); *Dennis v. State*, 109 So. 3d 680 (Fla. 2012) (claims of ineffective assistance of appellate counsel may not be used to camouflage issues that should have been raised on direct appeal or in a postconviction motion); *Merck v. State*, 124 So. 3d 785 (Fla. 2013) (appellate counsel will not be deemed ineffective for failing to raise a meritless issue); *Robinson v. State*, 95 So. 3d 171 (Fla. 2012) (there is a strong presumption that trial counsel's performance was not deficient; a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time; defendant carries the burden to overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy; counsel will not be held to be ineffective for failing to present evidence that is

duplicative of other evidence presented at the penalty phase; if additional evidence presented through postconviction testimony would have provided a reasonable basis for a life recommendation and sentence by the judge following a Spencer-like penalty phase hearing, then prejudice occurred; mitigating evidence presented by defendant during his postconviction evidentiary hearing provided a reasonable basis for the jury's life recommendation, and thus defendant was prejudiced by counsel's failure to present the evidence during a Spencer-like penalty phase proceeding in which court disagreed with jury's decision and sentenced defendant to death); *Bradley v. State*, 33 So. 3d 664 (Fla. 2010), as revised on denial of reh'g, (Apr. 22, 2010) (to grant habeas relief on the basis of ineffectiveness of appellate counsel, the Supreme Court must determine: first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance, and second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result; he defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based); *Bates v. State*, 3 So. 3d 1091 (Fla. 2009) (death sentence case; claims of ineffective assistance of appellate counsel are appropriately presented in a petition for writ of habeas corpus; consistent with the Strickland standard, to grant habeas relief based on ineffectiveness of counsel, this Court must determine, first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result; in raising such a claim, the defendant has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of counsel can be based; while Bates has alleged generally that error occurred he has not pointed to specific error; Bates has not (1) explained what juror was dismissed; (2) explained why the dismissal was discriminatory; or (3) pointed to facts which support his contention; there is no basis for relief in this claim); *Branch v. State*, 952 So. 2d 470 (Fla. 2006) (this court has consistently stated that appellate counsel cannot be ineffective for failing to raise claims which were not preserved due to trial counsel's failure to object; the sole exception to the general rule is where appellate counsel fails to raise a claim which, although not preserved at trial, rises to the level of fundamental error; in order for an error to be fundamental and justify reversal

in the absence of a timely objection, the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error); *Jones v. State*, 949 So. 2d 1021 (Fla. 2006) (to grant habeas relief based on ineffectiveness of appellate counsel, this court must determine, first, whether the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and, second, whether the deficiency in performance compromised the appellate process to such a degree as to undermine confidence in the correctness of the result); *Nixon v. State*, 932 So. 2d 1009 (Fla. 2006) (claims of ineffective assistance of direct appellate counsel are properly raised in a habeas petition before the court that heard the defendant's direct appeal; prejudice, as element of ineffective assistance of direct appellate counsel, is demonstrated by showing that the appellate process was compromised to the degree that confidence in the correctness of the appellate result is undermined; direct appellate counsel cannot be ineffective for failing to raise an issue that has not been preserved for appeal, that is not fundamental error, and that would not be supported by the record); *Mungin v. State*, 932 So. 2d 986 (Fla. 2006) (if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective); *Davis v. State*, 928 So. 2d 1089 (Fla. 2005) (habeas petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel; however, claims of ineffective assistance of appellate counsel may not be used to camouflage issues that could and should have been presented on direct appeal or in a proper postconviction motion; this court's ability to grant habeas relief on the basis of appellate counsel's ineffectiveness is limited); *Knight v. State*, 923 So. 2d 387 (Fla. 2005) (claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal; if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective; this is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal; this principle is applicable to this case unless the error is deemed to be fundamental error; fundamental error is an error that reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error);

Robinson v. State, 913 So. 2d 514 (Fla. 2005) (appellate counsel could not be deemed to have rendered ineffective assistance for failing to raise issue of whether this court had erred in precluding capital murder defendant from seeking penalty phase jury for second penalty phase proceeding); *Arbelaez v. State*, 898 So. 2d 25 (Fla. 2005) (claims of ineffective assistance of appellate counsel are properly raised in a petition for writ of habeas corpus addressed to the appellate court that heard the direct appeal; if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective); *Brown v. State*, 894 So. 2d 137 (Fla. 2004) (appellate counsel may not be deemed ineffective for failing to raise an unpreserved issue).

§ 12:59 Writ of habeas corpus—Grounds for relief—Ineffective assistance of appellate counsel on previous direct appeal in noncapital cases

The second instance in which a writ of habeas corpus may be invoked is, in a noncapital case, where an original habeas corpus petition filed directly in the district court of appeal is used to raise a claim that the petitioner received ineffective assistance of appellate counsel on the previous direct appeal in that court, or a claim that the petitioner is entitled to a belated direct appeal from the judgment of conviction, or from the denial of either a Rule 3.850, Fla. R. Crim. Proc., motion for postconviction relief or a Rule 3.800(a), Fla. R. Crim. Proc., motion to correct illegal sentence.

Rule 9.141(c), Fla. R. App. Proc. authorizes and regulates petitions, filed directly in a district court of appeal in a noncapital case, seeking belated appeal or alleging ineffective assistance of appellate counsel; see also Rule 3.850(g), Fla. R. Crim. Proc. (petitioner may seek a belated appeal upon allegation that petitioner timely requested counsel to appeal the denial of Rule 3.850 postconviction relief and counsel, through neglect, failed to do so). Under Rule 9.141(c)(4)(A), Fla. R. App. Proc., a petition for belated appeal shall not be filed more than two years after the expiration of time for filing the notice of appeal from a final order, unless it alleges under oath with a specific factual basis that the petitioner was unaware an appeal had not been timely filed or was not advised of the right to an appeal, and that the petitioner should not have ascertained such facts by the exercise of reasonable diligence. Under Rule 9.141(c)(4)(B), Fla. R. App. Proc., a petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction 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.

A petition filed under Rule 9.141(c), Fla. R. App. Proc., is a habeas corpus petition. See, e.g., *Mack v. State*, 955 So. 2d 51 (Fla. 1st DCA 2007).

§ 12:60 Writ of habeas corpus—Grounds for relief—Ineffective assistance of appellate counsel on previous direct appeal in noncapital cases—Case law

For case law on the use, in noncapital cases, of original habeas corpus petitions filed directly in a Florida District Court of Appeal to challenge the effectiveness of counsel who represented the defendant on direct appeal in that court, or to obtain a belated appeal, see, e.g., *Espinosa v. Secretary, Dept. of Corrections*, 804 F.3d 1137 (11th Cir. 2015) (examining petitions for belated appeal filed in Florida intermediate appellate courts); *Mack v. State*, 955 So. 2d 51 (Fla. 1st DCA 2007) (in a petition for writ of habeas corpus (styled petition for habeas corpus relief) Kevin Mack contends that counsel on his direct appeal was ineffective for failing to argue that *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 6 A.L.R. Fed. 2d 619 (2004), required reversal of his sentence; we do not agree that *Apprendi* and *Blakely* have any application in his case and deny the petition; when raising a claim of ineffective appellate counsel, the petitioner must show first, that appellate counsel's performance was deficient because the alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance and second, that the petitioner was prejudiced because appellate counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result' if a legal issue would in all probability have been found to be without merit had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective; habeas corpus petitions are the proper vehicle to advance claims of ineffective assistance of appellate counsel; see Rule 9.141(c)(2), Fla. R. App.Proc. ("Petitions . . . alleging ineffective assistance of appellate counsel shall be filed in the appellate court to which the appeal was or should have been taken"); *Davis v. State*, 928 So. 2d 442 (Fla. 5th DCA 2006) (Davis petitions this court for a writ of habeas corpus, claiming ineffective assistance of appellate counsel; the criteria for proving ineffective assistance of appellate counsel parallel the standard used for

establishing ineffective assistance of trial counsel claims; appellate counsel cannot raise unpreserved issues on appeal, and cannot be deemed deficient for not raising them); *Bertke v. State*, 927 So. 2d 76 (Fla. 5th DCA 2006) (habeas corpus is the proper method to raise a claim of ineffective assistance of appellate counsel; trial court committed fundamental error in giving instruction on forcible felony exception to self-defense standard jury instruction in prosecution for aggravated battery, and failure of appellate counsel to raise trial court's error in giving that instruction was ineffective assistance of counsel; relief granted); *Jones v. State*, 922 So. 2d 1088 (Fla. 4th DCA 2006) (petition for belated appeal does not remove from the trial court its jurisdiction to entertain motions filed under Rule 3.850; because the mere filing of a petition for belated appeal does not vest the appellate court with jurisdiction to review the merits of the final order to be appealed, the trial court maintains jurisdiction to review postconviction motions; only the granting of such a petition would do so because the order granting the petition acts as a timely filed notice of appeal; our review of a petition for belated appeal does not reach the merits of the anticipated appeal or the validity of the order to be appealed, but instead reviews the grounds for relieving the petitioner of his or her failure to timely seek such an appeal); *Corner v. State*, 917 So. 2d 975 (Fla. 3d DCA 2005) (appellate counsel need not raise issues on appeal reasonably considered to be without merit; here, appellate counsel was not deficient for failing to raise on appeal prosecutor's attacks on defense counsel during closing argument; even if statements were improper, any improper inference was eliminated by trial court's curative instruction); *Hoswell v. State*, 896 So. 2d 813 (Fla. 4th DCA 2005) (this court's denial of inmate's first petition for writ of habeas corpus, which alleged ineffective assistance of appellate counsel, barred inmate from raising same claim in a subsequent habeas petition); *Edge v. State*, 893 So. 2d 610 (Fla. 4th DCA 2005) (petitions seeking belated appeal or alleging ineffective assistance of appellate counsel shall be filed in the appellate court to which the appeal was or should have been taken).

§ 12:61 Writ of habeas corpus—Grounds for relief—Claims unrelated to validity of conviction or sentence—Case law

Third, the writ of habeas corpus may be used in Florida to raise (1) claims unrelated to the validity of the conviction or sentence, and (2), in those rare and extraordinary circumstances where for one reason or another the Rule 3.850 remedy is inadequate or ineffective to protect the rights of the convicted person, claims that go to the validity of the conviction or sentence.

For case law on the use of Florida habeas corpus to raise claims that do not call into question the conviction or sentence, see, e.g., *Florida Parole Com'n v. Taylor*, 132 So. 3d 780 (Fla. 2014) (Florida Parole Commission seeks review of a decision in which the First District Court of Appeal granted a petition for second-tier certiorari and quashed an order by the Third Judicial Circuit Court; because the First District granted certiorari relief based on a de novo review of the administrative decision of the Florida Parole Commission (FPC) rather than conducting a limited certiorari review of the circuit court's order, the First District's decision expressly and directly conflicts with *Sheley v. Florida Parole Com'n*, 720 So. 2d 216, 218 (Fla. 1998), in which this Court held that once an inmate has had a full review on the merits of a Parole Commission order in the circuit court, he or she is not entitled to a second plenary appeal of the order in the district court; in addition to concluding that the First District's decision exceeded the scope of second-tier certiorari review, we hold that the First District erred in granting certiorari relief because the circuit court's decision did not result in a miscarriage of justice; we therefore quash the First District's decision; the district court's role on second-tier certiorari review is limited to a two-pronged review of the circuit court decision, not a de novo review of the agency decision; the district court is to determine only whether the circuit court: (1) afforded procedural due process; and (2) applied the correct law; furthermore, certiorari review cannot be used simply because the district court disagrees with the outcome of the circuit court's decision; district courts should act only where the error is one that is a departure from the essential requirements of law; the test that has always applied to second-tier certiorari is: it should be granted only when there is a departure from the essential requirements of law resulting in a miscarriage of justice; we remand this case for reinstatement of the circuit court's order that denied Taylor's petition for a writ of habeas corpus); *Henry v. Santana*, 62 So. 3d 1122 (Fla. 2011) (a court may not dismiss a petition for a writ of habeas corpus, in which a prisoner is seeking immediate release, based upon the petitioner's failure to allege exhaustion of administrative remedies where such failure has not been raised by the parties); *Taylor v. State*, 3 So. 3d 986 (Fla. 2009), as revised on denial of reh'g, (Jan. 29, 2009) (death sentence case; to obtain a new trial based on newly discovered evidence, Taylor must meet two requirements: first, the evidence must be newly discovered and not have been known by the party or counsel at the time of trial, and the defendant or defense counsel could not have known of it by the use of diligence; second, the newly discovered evidence must be of such quality and nature that it would probably pro-

duce an acquittal on retrial; in determining whether the evidence compels a new trial, the trial court must consider all newly discovered evidence which would be admissible, and must evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial; this determination includes whether the evidence goes to the merits of the case or whether it constitutes impeachment evidence; the trial court should also determine whether the evidence is cumulative to other evidence in the case; the trial court should further consider the materiality and relevancy of the evidence and any inconsistencies in the newly discovered evidence; the second prong of Jones requires a showing of the probability of an acquittal on retrial; *Bush v. State*, 945 So. 2d 1207 (Fla. 2006) (when challenging a sentence-reducing credit determination by the Department of Corrections, such as a gain time or provisional release credit determination, once a prisoner has exhausted administrative remedies, he or she generally may seek relief in an original proceeding filed in circuit court as an extraordinary writ petition; in such a case, if the prisoner alleges entitlement to immediate release, a petition for writ of habeas corpus is the proper remedy, whereas if the prisoner does not allege entitlement to immediate release, a petition for writ of mandamus is the proper remedy); *Martin v. Florida Parole Com'n*, 951 So. 2d 84 (Fla. 1st DCA 2007) (petitioner's challenge to his incarceration pursuant to Parole Commission's revocation of his conditional release supervision was properly presented by petition for writ of habeas corpus, and thus, trial court could not convert petitioner's habeas petition into one seeking non-habeas relief); *Richardson v. Florida Parole Com'n*, 924 So. 2d 908 (Fla. 1st DCA 2006) (following circuit court's denial of his petition for writ of habeas corpus with respect to revocation by state parole commission of his conditional release supervision, petitioner brought original proceeding in this court for writ of certiorari; although the Florida Parole Commission is an administrative agency, a special provision of the Administrative Procedure Act exempts inmate orders from review by appeal; in lieu of a statutory right to an appeal, review of the parole commission's orders remains available to inmates by petitions for habeas corpus or mandamus filed in the circuit court; we grant the petition, quash the circuit court's order, and remand for expedited proceedings); *Sylvis v. State*, 916 So. 2d 915 (Fla. 5th DCA 2005) (parole revocation claim; inmate filed his habeas petition in the circuit court, which denied relief, and now seeks to appeal that denial of relief to this court; because the appealed order was entered in a review proceeding in circuit court, Sylvis may seek relief only by certiorari; once an inmate has had a full review on the merits of a parole commission order in the circuit

court, he or she is not entitled to a second plenary appeal of the order in the district court; we therefore treat the appeal as a petition for certiorari; this court's second-tier review is limited to two considerations: whether the circuit court afforded procedural due process and whether the circuit court applied the correct law; a ruling departs from the essential requirements of law when it violates a clearly established principle of law, resulting in a miscarriage of justice; the departure must be more than a simple legal error to justify issuing a writ of certiorari; it is inappropriate to exercise certiorari review when the district court merely disagrees with the interpretation of a circuit court sitting in its appellate capacity).

§ 12:62 Writ of habeas corpus—Grounds for relief—Claims involving validity of conviction or sentence—Case law

For case law on the limited circumstances when, under Rule 3.850(h) inadequate or ineffective clause, Florida habeas corpus may be used to attack a conviction or sentence, see, e.g., *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (history of Rule 3.850 indicates that it was intended to provide a procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus; thus, this rule essentially transferred consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the sentencing court; for defendants convicted and sentenced to death, Rule 3.850 is no longer the mechanism through which they may file collateral postconviction challenges to their convictions and sentences, see Rule 3.851, Fla. R. Crim. Proc.; habeas corpus may not be used as a substitute for an appropriate motion seeking postconviction relief pursuant to Rule 3.850; with limited exceptions, habeas corpus relief is not available to obtain collateral postconviction relief because most claims can be raised by motion pursuant to Rule 3.850; the remedy of habeas corpus is not available in Florida to obtain the kind of collateral postconviction relief available by motion in the sentencing court pursuant to Rule 3.850); *Richardson v. State*, 918 So. 2d 999 (Fla. 5th DCA 2006) (history of Rule 3.850 indicates that it was intended to provide a procedural mechanism for raising those collateral postconviction challenges to the legality of criminal judgments that were traditionally cognizable in petitions for writs of habeas corpus and essentially transfer consideration of these traditional habeas claims from the court having territorial jurisdiction over the prison where the prisoner is detained to the jurisdiction of the

sentencing court; prior to adoption of Rule 3.850, habeas corpus was the primary procedural device to challenge the validity of a sentence or judgment of conviction; adoption of the Rule superseded habeas corpus as the method to collaterally attack a sentence or judgment of conviction; since adoption of Rule 3.850 and its predecessor, the courts have consistently held that it is inappropriate to collaterally attack a conviction through the process of habeas proceedings because such claims are cognizable under Rule 3.850; a petition for habeas corpus may not be used to collaterally attack a criminal judgment and sentence because Rule 3.850 has superseded habeas corpus as the only means to raise such issues; the last clause of Rule 3.850(h) might suggest that it is permissible to file a petition for writ of habeas corpus to test the legality of a prisoner's criminal judgment rather than to seek relief through an appropriate postconviction motion; however, the courts of this state have correctly interpreted this provision to mean that habeas corpus may not be used as a substitute for an appropriate motion seeking postconviction relief pursuant to Rule 3.850; we dispel the notion, apparently held by some, that when a petition for writ of habeas corpus is filed challenging the underlying conviction, the petition must in all instances be treated as a motion for postconviction relief under Rule 3.850 and either granted or denied on the merits; we believe that it is proper to dismiss a habeas petition collaterally attacking the conviction when it is clearly discernible that the claims raised are procedurally barred or do not comply with the requirements of Rule 3.850); *Corner v. State*, 917 So. 2d 975 (Fla. 3d DCA 2005) (petition for writ of habeas corpus may not be used as a vehicle to review alleged ordinary trial errors cognizable by a means of a motion for postconviction relief filed pursuant to Rule 3.850).

§ 12:63 Writ of habeas corpus—Claims barred if they were raised or could have been raised at trial or on direct appeal

Generally, a Florida postconviction habeas corpus petition is barred if it raises claims which were raised, or which could have been raised, at the trial or on direct appeal.

For case law on Florida postconviction habeas corpus petitions presenting a claim which was, or which could have been, raised at trial or on direct review, see, e.g., *Conahan v. State*, 118 So. 3d 718 (Fla. 2013) (capital murder defendant's claims on appeal of denial of his motion for postconviction relief that other crimes evidence had not been established by clear and convincing evidence, was not sufficiently similar to the charged offense, and became a "feature of the trial" were procedurally barred, as defendant could

have raised these claims on direct appeal, but did not do so); *Simmons v. State*, 105 So. 3d 475, 102 A.L.R.6th 791 (Fla. 2012) (defendant failed to raise argument at penalty phase of capital murder trial or in motion for postconviction relief, and thus defendant waived claim in proceedings on petition for habeas corpus, that he was exempt from death penalty under the Eighth Amendment because he had mental illness and neuropsychological deficits); *Butler v. State*, 100 So. 3d 638 (Fla. 2012), cert. denied, 133 S. Ct. 1726, 185 L. Ed. 2d 789 (2013) (habeas petitioner has the burden of alleging a specific, serious omission or overt act upon which the claim of ineffective assistance of appellate counsel can be based); *Gayle v. State*, 114 So. 3d 179 (Fla. 2012) ((unpublished) habeas corpus cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a motion under rule 3.850); *Rodriguez v. State*, 39 So. 3d 275 (Fla. 2010) (capital defendant's claim in habeas corpus proceeding, that the Supreme Court conducted an improper harmless error analysis on direct appeal, was an improper attempt to relitigate a claim that the Supreme Court had already rejected); *Morris v. State*, 931 So. 2d 821 (Fla. 2006) (death sentence case; habeas claim was procedurally barred, where such claim was considered and rejected on direct appeal; another habeas claim is procedurally barred because there was no objection at petitioner's trial); *Pietri v. State*, 885 So. 2d 245 (Fla. 2004) (death sentence case; habeas claim previously presented on direct appeal is barred); *Patton v. State*, 878 So. 2d 368 (Fla. 2004) (death sentence case; habeas corpus is not available for the purpose of reviewing arguments that could have been raised but were not raised by timely objection at trial and argument on appeal; we decline to re-address an issue that has already been considered and resolved on the direct appeal of the first sentencing proceeding); *Gamble v. State*, 877 So. 2d 706 (Fla. 2004) (death sentence case; petitioner's disproportionality claim was presented on direct appeal and was rejected; a habeas petition is not the proper vehicle to argue a variant of an already decided issue).

§ 12:64 Writ of habeas corpus—Claims barred if they were raised or could have been raised in convicted person's previous Rule 3.850 motion or habeas corpus petition

Generally, a Florida postconviction habeas corpus petition is barred if it raises claims which could have been but were not raised in a previous Rule 3.850 motion, habeas corpus petition, or other postconviction petition that was or could have been filed by the movant, or which were raised and decided in a previous Rule

3.850, habeas corpus, or other Florida postconviction petition filed by the movant. See, e.g., Rule 3.850(h), Fla. R. Crim. Proc.

§ 12:65 Writ of habeas corpus—Claims barred if they were raised or could have been raised in convicted person's previous Rule 3.850 motion or habeas corpus petition—Case law

For case law on Florida postconviction habeas corpus petitions raising a claim which was, or which could have been, decided in a previous state postconviction proceeding that was filed by the same convicted person, see, e.g., *Whitton v. State*, 161 So. 3d 314 (Fla. 2014) (capital murder defendant failed to demonstrate that he was entitled on the basis of cumulative error to postconviction relief, where all his claims of error were either procedurally barred or without merit); *Smith v. State*, 126 So. 3d 1038 (Fla. 2013) (habeas petitioner's claims that the state's capital sentencing scheme was unconstitutional as applied, that it was unconstitutionally arbitrary and capricious, that trial counsel did not effectively raise the issue, and that cumulative errors resulted in an unfair trial were not properly presented in a habeas petition, as petitioner had raised those claims in motion for postconviction relief); *Mann v. State*, 112 So. 3d 1158 (Fla. 2013) (petition for writ of habeas corpus in capital post-conviction proceedings, alleging that state death penalty scheme allowing sentence of death based on simple majority jury recommendation did not conform to society's evolving standards of decency, was procedurally barred, where such claim was restatement of arguments raised in petitioner's fifth motion for post-conviction relief and on appeal); *McDonald v. State*, 952 So. 2d 484 (Fla. 2006) (death sentence case; habeas corpus petitions cannot be used as a means to seek a second appeal or to litigate issues that could have been or were raised in a postconviction appeal); *Baker v. State*, 878 So. 2d 1236 (Fla. 2004) (habeas corpus petitions filed by noncapital defendants which seek the kind of collateral postconviction relief available through a Rule 3.850 motion filed in the sentencing court will be dismissed as unauthorized, if such petitions: (1) would be untimely if considered as motions for postconviction relief pursuant to the rule of criminal procedure governing motions to vacate, set aside, or correct sentence, (2) raise claims that could have been raised at trial or, if properly preserved, on direct appeal of the judgment and sentence, or (3) would be considered second or successive motions under the applicable rule of criminal procedure that either fail to allege new or different grounds for relief, or allege new or different grounds for relief that were known or should have been known at the time the first motion was filed); *Patton v. State*, 878 So. 2d 368 (Fla. 2004)

(death sentence case; habeas corpus petitions are not to be used for additional appeals on questions which could have been raised in a Rule 3.850 motion); *Barnard v. State*, 949 So. 2d 250 (Fla. 3d DCA 2007) (habeas corpus may not be used to file successive motions for postconviction relief or to raise issues which would be untimely if considered as a Rule 3.850 motion for postconviction relief); *Allen v. State*, 917 So. 2d 906 (Fla. 3d DCA 2005) (successive habeas corpus petitions seeking the same relief are not permitted nor can new claims be raised in a second petition when the circumstances upon which they are based were known or should have been known at the time the prior petition was filed).

§ 12:66 Motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a)

The motion to correct illegal sentence, authorized by Rule 3.800(a), Fla. R. Crim. Proc., and filed in the sentencing court, is another postconviction remedy in Florida. Rule 3.800(a) was most recently amended on Feb. 8, 2007; see *In re Amendments To Florida Rule Of Criminal Procedure-Rule 3.800*, 949 So. 2d 196 (Fla. 2007).

This remedy is modeled after the motion to correct illegal sentence remedy authorized by the pre-1987 version of Rule 35(a), Fed. R. Crim. Proc.; unlike the former federal rule, however, Rule 3.800(a), also authorizes correction of an incorrect calculation made by the sentencing court in a sentencing guidelines scoresheet, and correction of a sentence that does not grant proper credit for time served when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief.

For purposes of Rule 3.800(a), an illegal sentence is a sentence which exceeds the maximum prescribed by law, which patently fails to comport with statutory or constitutional limitations, or which imposes a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances.

Correction of sentence may, depending on the circumstances, take the form of resentencing, reduction of sentence, or the vacatur or modification of a provision or portion of the sentence. If necessary and proper to correct the illegal sentence, correction of sentence may take the form of increasing the sentence.

Rule 3.800(a) is limited to issues that can be resolved as a matter of law without an evidentiary hearing; in order for Rule 3.800(a) relief to be granted, that is, the error to be corrected must be apparent on the face of the record or be resolvable from the contents of the court file.

A Rule 3.800(a) motion may be made at any time except that it may not be filed during the time allowed for the filing of a preappeal motion to correct sentencing error or during the pendency of a direct appeal. (Motions to correct sentencing error, which are authorized by Rule 3.800(b), Fla. R. Crim. Proc. are examined below in this chapter.)

A final order granting or denying a Rule 3.800(a) motion to correct illegal sentence is an appealable final judgment. Rule 9.140(b)(1)(D), (c)(1)(M), Fla. R. App. Proc. See also Rule 9.141(b)(2), Fla. R. App. Proc. (governing appeals in cases where a Rule 3.800(a) motion was granted or denied without an evidentiary hearing); Rule 9.141(b)(3), Fla. R. App. Proc. (governing appeals in cases where a Rule 3.800(a) motion was granted or denied after an evidentiary hearing). The notice of appeal must be filed in the convicting court within 30 days of entry of the final order on the Rule 3.800(a) motion.

Appeals from orders granting or denying a Rule 3.800(a) motion without an evidentiary hearing are governed by Rule 9.141(b)(2), Fla. R. App. Proc. Appeals from orders granting or denying a Rule 3.800(a) motion after an evidentiary hearing are governed by Rule 9.141(b)(3), Fla. R. App. Proc.

A Rule 3.800(a) movant may seek a belated appeal from the denial of a Rule 3.800(a) motion if the movant timely requested his counsel to appeal the order denying relief and counsel, through neglect, failed to do so. The proper procedure for applying for such a belated appeal is to file an original habeas corpus petition directly in the appropriate district court of appeal, pursuant to Rule 9.141, Fla. R. App. Proc.

§ 12:67 Motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a)—Text

Rule 3.800(a), Fla. R. Crim. Proc., provides:

Rule 3.800. Correction, Reduction, and Modification of Sentences

(a) **Correction.**(1) Generally. A court may at any time correct an illegal sentence imposed by it, or an incorrect calculation made by it in a sentencing scoresheet, when it is affirmatively alleged that the court records demonstrate on their face an entitlement to that relief, provided that a party may not file a motion to correct an illegal sentence under this subdivision during the time allowed for the filing of a motion under subdivision (b)(1) or during the pendency of a direct appeal.

(2) Successive Motions. A court may dismiss a second or

successive motion if the court finds that the motion fails to allege new or different grounds for relief and the prior determination was on the merits. When a motion is dismissed under this subdivision, a copy of that portion of the files and records necessary to support the court's ruling must accompany the order dismissing the motion.

(3) Sexual Predator Designation. A defendant may seek correction of an allegedly erroneous sexual predator designation under this subdivision, but only when it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator.

(4) Appeals. All orders denying or dismissing motions under subdivision (a) must include a statement that the defendant has the right to appeal within 30 days of rendition of the order.

§ 12:68 Motion to correct illegal sentence under Florida Rule of Criminal Procedure 3.800(a)—Case law

For case law on the Rule 3.800(a), Fla. R. Crim. Proc. remedy, see, e.g., *Plott v. State*, 148 So. 3d 90 (Fla. 2014) (Rule 3.800 allows defendants to petition the courts to correct sentencing errors that may be identified on the face of the record; intent of rule is to balance the need for finality of convictions and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements of law; "illegal sentence" is one that imposes a punishment or penalty that no judge under the entire body of sentencing statutes and laws could impose under any set of factual circumstances); *Jordan v. State*, 143 So. 3d 335 (Fla. 2014) (defendant has a right to be present and to be represented by counsel at any resentencing proceeding from a motion for correction, reduction, and modification of sentence; resentencing of defendant following grant of his motion to correct impermissible habitual violent felony offender (HVFO) life sentence with 15-year mandatory minimum for second-degree felony was not ministerial, but allowed trial court discretion to sentence defendant to anywhere from ten to 30 years' imprisonment, such that defendant was constitutionally entitled to be present at resentencing; error in resentencing defendant in his absence was harmless where defendant was serving a concurrent HVFO life sentence with 15-year mandatory minimum on another count and that sentence remained intact); *In re Amendments to Florida Rules of Criminal Procedure*, 104 So. 3d 304 (Fla. 2012) (rule 3.800(a) is amended to clarify that a defendant may seek correction of an allegedly erroneous sexual predator designation under the rule, but only when it is apparent from the

face of the record that the defendant did not meet the criteria for designation as a sexual predator); *Sutton v. Florida Parole Com'n*, 975 So. 2d 1256 (Fla. 4th DCA 2008) (inmate's remedy for challenging only the manner in which his prison term is being counted or administered not a motion to correct illegal sentence); *Renaud v. State*, 926 So. 2d 1241 (Fla. 2006) (Rule 3.800(a), Fla. R. Crim. Proc., motion to correct an illegal sentence on the face of the record does not contemplate the necessity of an evidentiary hearing; when the alleged illegality of the sentence is not apparent on the face of the record, a Rule 3.850, Fla. R. Crim. Proc., motion for postconviction relief to vacate, set aside, or correct sentence is the only available remedy); *Galarza v. State*, 955 So. 2d 69 (Fla. 3d DCA 2007) (movant's Rule 3.800(a) claim that upon re-sentencing on violation of probation he was entitled to 406 days of credit for time served is not conclusively refuted by the record); *Morency v. State*, 955 So. 2d 67 (Fla. 3d DCA 2007) (Morency presented a facially valid Rule 3.800(a) claim that he is entitled to 364 days of credit for time spent in Miami-Dade county jail prior to his sentencing in the current cases; the trial court summarily denied the motion but failed to attach any record substantiating its decision; Morency also claims that his twenty year sentence upon violation of probation is illegal; once again, the order summarily denying relief was not accompanied by any record conclusively showing that the appellant is not entitled to any relief; on appeal from a summary denial of a motion under Rule 3.800(a), this court must reverse unless the postconviction record shows conclusively that the appellant is entitled to no relief); *Butler v. State*, 951 So. 2d 38 (Fla. 2d DCA 2007) (Rule 3.800(a) movant may collaterally attack restitution orders, on the basis that trial court lacked jurisdiction to enter restitution orders while his direct appeal was pending, in a motion to correct sentence); *Dixon v. State*, 949 So. 2d 1209 (Fla. 2d DCA 2007) (Dixon's Rule 3.800(a) motion is facially insufficient because it did not affirmatively allege that the court records demonstrate on their face an entitlement to relief); *Bean v. State*, 949 So. 2d 1207 (Fla. 4th DCA 2007) (movant's claim, raised in motion to correct illegal sentence, that he could not be sentenced as a habitual felony offender for offense of burglary of a dwelling with assault or battery while armed was legally sufficient to entitle movant to relief; in denying a legally sufficient motion to correct illegal sentence, the trial court's failure to attach portions of the record refuting the movant's claim is reversible error; the state suggests that the doctrine of laches should apply, noting that movant filed the instant motion approximately fourteen years after he was sentenced; laches is sustainable in a criminal case where there has been both a lack of due diligence on the defendant's part in

bringing forth the claim and prejudice to the state; while movant offers no explanation for his delay in bringing the claim, there is no apparent prejudice to the state; furthermore, a claim of illegal sentence is one that can be raised at any time); *Adams v. State*, 949 So. 2d 1125 (Fla. 3d DCA 2007) (trial court's denial of defendant's motion to correct illegal sentence, on reconsideration after having orally granted the motion, did not violate defendant's double jeopardy rights, where trial court did not resentence defendant or vacate his sentence after granting the motion, but rather defendant was still serving his original sentence at time motion was denied); *Rivera v. State*, 949 So. 2d 1090 (Fla. 3d DCA 2007) (claim that trial court prepared a sentencing guideline scoresheet but then failed to apply a guideline sentence to him was facially sufficient to entitle defendant to relief); *Hines v. State*, 949 So. 2d 1086 (Fla. 4th DCA 2007) (doctrine of law of the case barred defendant from raising, in fourth motion to correct illegal sentence, claim that was raised in defendant's first and second motions, where trial court denied such first and second motions, and such denials were subsequently affirmed by the District Court of Appeal; doctrine of collateral estoppel barred defendant from raising, in fourth motion to correct illegal sentence, claims that were raised in third such motion, which was summarily denied and not appealed); *Lauramore v. State*, 949 So. 2d 307 (Fla. 1st DCA 2007) (a claim challenging consecutive habitual offender sentences for multiple crimes arising from a single criminal episode is cognizable in a motion to correct sentence if the motion is facially sufficient and the issue can be resolved from the face of the record); *Livingston v. State*, 944 So. 2d 1254 (Fla. 2d DCA 2006) (Livingston's Rule 3.800(a) motion is facially insufficient because it did not affirmatively allege that the court records demonstrate on their face an entitlement to relief); *Britt v. State*, 931 So. 2d 209 (Fla. 5th DCA 2006) (we affirm the denial of movant's Rule 3.800(a) motion; movant's pro se filings have become frivolous, an abuse of process, and a waste of the taxpayers' money; the clerk of this court is directed not to accept any further pro se filings concerning this case from movant; the clerk is further directed to forward a certified copy of this opinion to the appropriate institution for consideration of disciplinary procedures pursuant to Fla. Stat. Ann. § 944.279(1)); *Pettis v. State*, 931 So. 2d 204 (Fla. 5th DCA 2006) (we affirm the summary denial of movant's Rule 3.800(a) motion, and write only to recommend that the Department of Corrections institute disciplinary proceedings against Pettis pursuant to Fla. Stat. Ann. § 944.279(1) for his pursuit of this clearly frivolous claim on appeal); *Jiminez v. State*, 929 So. 2d 56 (Fla. 5th DCA 2006) (Robert Jiminez appeals the denial of his fourth Rule 3.800(a)

motion to correct illegal sentence; Jiminez is abusing the judicial process by his successive attacks upon his conviction and habitual felony offender sentence; in order to conserve judicial resources, we prohibit Jimenez from filing with this court any further pro se pleadings concerning the criminal proceeding leading to his Volusia county conviction and sentence for child abuse; the clerk of this court is directed to forward a certified copy of this opinion to the appropriate institution for consideration of disciplinary procedures, pursuant to Fla. Stat. Ann. § 944.279(1), under which prison inmates who bring a frivolous or malicious collateral criminal proceeding, which is filed after Sept. 30, 2004, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections); *Wilson v. State*, 928 So. 2d 522 (Fla. 2d DCA 2006) (to establish a facially sufficient claim that the trial court illegally imposed consecutive sentences where the offenses were committed in a single criminal episode, not only must a Rule 3.800(a) sentence correction movant allege that the claim is determinable from the face of the record, he must identify with particularity the nonhearsay record documents upon which he relies); *Guerra v. State*, 927 So. 2d 248 (Fla. 2d DCA 2006) (claim that written sentencing order does not reflect the amount of jail credit that the trial court awarded in its oral pronouncement of sentence is cognizable under Rule 3.800(a)); *Nickerson v. State*, 927 So. 2d 114 (Fla. 2d DCA 2006) (once a trial court determines that a defendant's sentence is illegal and the defendant is entitled to re-sentencing, the full panoply of due process considerations attaches; generally speaking, a defendant need not be present or represented by counsel when the purpose of a resentencing is the performance of a ministerial-type function or the correction of a clerical error); *Arthur v. State*, 927 So. 2d 86 (Fla. 1st DCA 2006) (use of a single sentencing scoresheet to score separate offenses is erroneous where the crimes took place under differing versions of the sentencing guidelines); *Finan v. State*, 927 So. 2d 72 (Fla. 2d DCA 2006) (jail credit issues involving disputed issues of fact are not appropriate for resolution on a motion filed pursuant to Rule 3.800(a) and are matters that can only be resolved pursuant to Rule 3.850); *Lewis v. State*, 926 So. 2d 437 (Fla. 1st DCA 2006) (where an appellant makes a fact-based challenge to the lawfulness of his conviction, the appellant's claim is not cognizable in a Rule 3.800(a) motion for correction of sentence); *Shade v. State*, 925 So. 2d 453 (Fla. 1st DCA 2006) (where a defendant commits his crimes after the effective date of the statute repealing the statute authorizing a sentence of hard labor, a hard labor condition constitutes an illegal sentence; relief granted, and the condition of hard labor is stricken from movant's sentence); *Smith v. State*, 921 So. 2d 794 (Fla. 5th DCA 2006) (claim regarding jail

time credit is cognizable in a Rule 3.800(a) motion to correct sentence so long as the motion alleges that the court records demonstrate on their face that the defendant was entitled to receive additional credit for time served); *Hollinger v. State*, 920 So. 2d 1213 (Fla. 1st DCA 2006) (Rule 3.800(a) provides that such a Rule 3.800(a) motion may not be filed during the time allowed for filing of a motion under Rule 3.800(b)(1), which permits a motion to be filed before the filing of the notice of appeal); *Spears v. State*, 920 So. 2d 187 (Fla. 2d DCA 2006) (when denying relief, the burden is on the postconviction court to attach portions of the record refuting the Rule 3.800(a) claim); *Carter v. State*, 920 So. 2d 129 (Fla. 4th DCA 2006) (when a defendant enters a negotiated plea for a term of imprisonment on the basis of an incorrectly calculated scoresheet, the sentence is not illegal if it does not exceed the statutory maximum); *Espinosa v. State*, 916 So. 2d 47 (Fla. 3d DCA 2005) (movant motion to correct illegal sentence seeking additional credit for jail time served); *Thomas v. State*, 916 So. 2d 24 (Fla. 2d DCA 2005) (claim that the imposition of consecutive minimum mandatory sentences was illegal was, without more, facially insufficient); *Robbins v. State*, 915 So. 2d 232 (Fla. 3d DCA 2005) (habeas petitioner Robbins claims that his habitual offender sentence is illegal as it is based on nonsequentially sentenced prior offenses; a habeas petition is not the correct remedy; the claim should first have been brought before the trial court as a Rule 3.800 postconviction motion to correct an illegal sentence pursuant, as Robbins raises a challenge to his sentence rather than to his conviction; a petition for writ of habeas corpus cannot be used as a substitute for an appropriate postconviction motion); *Simpkins v. State*, 909 So. 2d 427 (Fla. 5th DCA 2005) (Simpkins appeals the denial of his Rule 3.800(a) motion which was correctly denied as improperly successive and without merit; this appeal is frivolous; this is Simpkins' twelfth appearance before this court; we issued a show cause order to Simpkins to explain why he is not abusing the legal process; we prohibit Simpkins from filing with this court any further pro se pleadings or papers concerning his Volusia county conviction and sentence; the clerk of this court is directed to forward a certified copy of this opinion to the appropriate institution for consideration of disciplinary procedures, pursuant to Fla. Stat. Ann. § 944.279(1), under which prison inmates who bring a frivolous or malicious collateral criminal proceeding, which is filed after Sept. 30, 2004, is subject to disciplinary procedures pursuant to the rules of the Department of Corrections); *Johnson v. State*, 902 So. 2d 276 (Fla. 1st DCA 2005) (defendant's sentence is illegal because under *Whitehead v. State*, 498 So. 2d 863 (Fla. 1986), defendant's classification as a habitual felony offender is not a

valid reason for departure from the sentencing guidelines; the sentence is also illegal because defendant was sentenced under illegal sentencing guidelines; despite procedural bars, defendant is entitled to relief because application of the procedural bar in this case would result in a manifest injustice); *Brunache v. State*, 901 So. 2d 412 (Fla. 3d DCA 2005) (movant's claim that he should have been personally present at his resentencing was not cognizable by Rule 3.800(a) motion, but rather was required to be brought by way of Rule 3.850 motion).

§ 12:69 Motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)

The motion to correct sentencing error, authorized by Rule 3.800(b), Fla. R. Crim. Proc., is another Florida postconviction remedy. This remedy first came into existence on June 27, 1996, effective July 1, 1996, when the Florida Supreme Court created it as an entirely new postconviction remedy. See *Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374, 1375 (Fla. 1996).

Since 1996, Rule 3.800(b) has been amended four times.

The motion to correct sentencing error is available only in noncapital cases; the remedy does not extend to death sentence cases. Rule 3.800(b), Fla. R. Crim. Proc. The motion to correct sentencing error may be used to correct any type of sentencing error, regardless of whether sentence be called illegal, unlawful, or erroneous. Thus, sentences which are illegal for purposes of Rule 3.800(a), Fla. R. Crim. Proc., are within the purview of Rule 3.800(b).

A motion to correct sentencing error is filed in the convicting court. Under Rule 9.140(e), Fla. R. App. Proc., 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 a Rule 3.800(b) motion to correct sentencing error. The motion to correct sentencing error may be filed before or after the direct appeal. If the motion is filed before the direct appeal, it must be filed during the time allowed for filing a notice of appeal of the sentence, i.e., within 30 days of sentencing. Rule 3.800(b)(1), Fla. R. Crim. Proc. If the convicting court does not decide the motion within 60 days of the filing of the motion, then the motion shall be considered denied. Rule 3.800(b)(1), Fla. R. Crim. Proc. Motions to correct sentencing error filed in the convicting court while the direct appeal is pending are governed by Rule 3.800(b)(2), Fla. R. Crim. Proc.; see also Rule 9.140(b)(4), Fla. R. App. Proc. (defendant may cross appeal by serving a notice within 10 days of service of the state's notice or service of an

order on a motion pursuant to Rule 3.800(b)(2), Fla. R. Crim. Proc.); Rule 9.140(d)(2), Fla. R. App. Proc. (orders allowing withdrawal of counsel are conditional and counsel shall remain of record for the limited purpose of representing the defendant in the lower tribunal regarding any sentencing error the lower tribunal is authorized to address during the pendency of the direct appeal pursuant to Rule 3.800(b)(2); Rule 9.140(f)(6) (supplemental appellate record for Rule 3.800(b)(2) motion to correct sentencing error); Rule 9.600(d), Fla. R. App. Proc. (lower tribunal shall retain jurisdiction to consider Rule 3.800(b)(2) motions).

§ 12:70 Motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)—Text

Rule 3.800(b), Fla. R. Crim. Proc., provides:

Rule 3.800. Correction, Reduction, and Modification of Sentences

(b) **Motion to Correct Sentencing Error.** A motion to correct any sentencing error, including an illegal sentence, may be filed as allowed by this subdivision. This subdivision shall not be applicable to those cases in which the death sentence has been imposed and direct appeal jurisdiction is in the Supreme Court under article V, section 3(b)(1) of the Florida Constitution. The motion must identify the error with specificity and provide a proposed correction. A response to the motion may be filed within 15 days, either admitting or contesting the alleged error. Motions may be filed by the state under this subdivision only if the correction of the sentencing error would benefit the defendant or to correct a scrivener's error.

(1) Motion Before Appeal. During the time allowed for the filing of a notice of appeal of a sentence, a defendant or the state may file a motion to correct a sentencing error.

(A) This motion shall stay rendition under Florida Rule of Appellate Procedure 9.020(i).

(B) Unless the trial court determines that the motion can be resolved as a matter of law without a hearing, it shall hold a calendar call no later than 20 days from the filing of the motion, with notice to all parties, for the express purpose of either ruling on the motion or determining the need for an evidentiary hearing. If an evidentiary hearing is needed, it shall be set no more than 20 days from the date of the calendar call. Within 60 days from the filing of the motion, the trial court shall file an order ruling on the motion. A party may file a motion for rehearing

of any signed, written order entered under subdivisions (a) and (b) of this rule within 15 days of the date of service of the order or within 15 days of the expiration of the time period for filing an order if no order is filed. A response may be filed within 10 days of service of the motion. The trial court's order disposing of the motion for rehearing shall be filed within 15 days of the response but not later than 40 days from the date of the order of which rehearing is sought. A timely filed motion for rehearing shall toll rendition of the order subject to appellate review and the order shall be deemed rendered upon the filing of a signed, written order denying the motion for rehearing.

(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. 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).

(A) The motion shall be served on the trial court and on all trial and appellate counsel of record. Unless the motion expressly states that appellate counsel will represent the movant in the trial court, trial counsel will represent the movant on the motion under Florida Rule of Appellate Procedure 9.140(d). If the state is the movant, trial counsel will represent the defendant unless appellate counsel for the defendant notifies trial counsel and the trial court that he or she will represent the defendant on the state's motion.

(B) The trial court shall resolve this motion in accordance with the procedures in subdivision (b)(1)(B).

(C) In accordance with Florida Rule of Appellate Procedure 9.140(f)(6), the clerk of circuit court shall supplement the appellate record with the motion, the order, any amended sentence, and, if designated, a transcript of any additional portion of the proceedings.

§ 12:71 Motion to correct sentencing error under Florida Rule of Criminal Procedure 3.800(b)—Case law

For case law on the motion to correct sentencing error, which was created in 1996 and since then has been authorized by Rule 3.800(b), Fla. R. Crim. Proc., see, e.g., *Mapp v. State*, 71 So. 3d

776 (Fla. 2011) (assertion that trial court had improperly sentenced defendant as a habitual felony offender following guilty plea was properly reviewable on a motion to correct an illegal sentence; rule governing such motions was not limited to correcting illegal sentences or errors to which the defendant had no opportunity to object, rather, the rule could be used to correct and preserve for appeal any error in an order entered as a result of the sentencing process, that is, orders related to the sanctions imposed); *Tasker v. State*, 48 So. 3d 798 (Fla. 2010) (claim of scoresheet error pertaining to victim injury points that were included on the scoresheet filed in the initial sentencing proceeding in which the defendant was placed on probation could be raised for the first time in a motion to correct sentencing error during the appeal from revocation of probation; rule allowing motion to correct sentencing error permitted sentencing scoresheet error to be raised at any time); *Sanders v. State*, 35 So. 3d 864 (Fla. 2010) (when a scoresheet error is challenged on direct appeal, via a motion under Florida Rule of Criminal Procedure 3.800(b), the error is harmless if the record conclusively shows that the trial court would have imposed the same sentence using a correct scoresheet); *Macias v. State*, 3 So. 3d 1190 (Fla. 2009) (a rule 3.800(a) motion to correct an illegal sentence may be used to challenge a sexual predator designation, but limit our holding to cases where it is apparent from the face of the record that the defendant did not meet the criteria for designation as a sexual predator); *State v. Rabedeau*, 2 So. 3d 191 (Fla. 2009) (when a criminal defendant is sentenced after being convicted of a crime and serves some portion of that sentence, he or she is entitled to receive credit for the actual service of that sentence, or any portion thereof, in a resentencing for the same crime; likewise, if multiple convictions result in concurrent sentences, credit must be awarded for time served on each sentence in any resentencing for the multiple convictions; the word "concurrently" simply means "at the same time," and by imposing sentences to be served concurrently, a trial court is permitting a defendant to serve multiple sentences at the same time); *Davis v. State*, 887 So. 2d 1286 (Fla. 2004) (trial court may authorize extension of 60-day time period in which to resolve motion to correct sentencing error while appeal is pending as long as trial court acts within 60-day time period to extend such time period and good cause is shown); *Brannon v. State*, 850 So. 2d 452 (Fla. 2003) (essential issue in this case is the status of fundamental sentencing error following our adoption of Rule 3.800(b)(2), which authorizes a party in a criminal appeal to raise a sentencing error in the trial court in a motion filed before the party's first brief in the appeal; the impetus for the adoption of both Rule 3.800(b)(1), which autho-

rizes motions to correct sentencing error before an appeal, and Rule 3.800(b)(2), which authorizes such motions during an appeal, was the enactment of the Criminal Appeals Reform Act of 1996; the goal of that statute was to ensure that all claims of error were raised and resolved at the first opportunity; in adopting Rule 3.800(b)(2) our expectation was that it would provide an effective, and hopefully more failsafe, procedural mechanism through which defendants may present their sentencing errors to the trial court and thereby preserve them for appellate review; the most important change in the new rule is that it significantly expands the period in which a motion to correct a sentencing error can be filed in the trial court; as with the current rule, Rule 3.800(b)(1) will allow a motion to correct a sentencing error to be filed in the trial court during the time allowed for the filing of a notice of appeal; however, under the new Rule 3.800(b)(2), if a notice of appeal has been filed, a motion to correct a sentencing error can also be filed in the trial court at any time until the first appellate brief is filed; the deadline for filing the first appellate brief is then extended until 10 days after the clerk of the circuit court transmits the supplemental record from the proceedings held on the motion to correct the sentencing error, which includes the motion, the order, any amended sentence, and the transcript if designated; thus, an advantage of this amendment is that it will give appellate counsel, with expertise in detecting sentencing errors, the opportunity to identify any sentencing errors and a method to correct these errors and preserve them for appeal; unless the motion to correct the sentencing error states that appellate counsel will represent the movant in the trial court, trial counsel will represent the defendant; if the state files the motion, trial counsel will represent the defendant; another advantage of the rule is that it requires the movant to specifically identify the alleged sentencing error and propose how the trial court should correct the error; the rule further requires a response within 15 days either admitting or denying the sentencing error; in many cases, we anticipate that clear errors will be corrected by agreement of the parties, thus eliminating the necessity for resolution by the appellate court and minimizing the involvement of the trial court; in appeals involving only the issue of a sentencing error, this resolution would allow for dismissal of the appeal after the error has been corrected; for those sentencing errors that cannot be resolved by the good faith cooperation of the parties, Rule 3.800(b)(1)(B) provides the time limits for the trial court to dispose of the motion so as to minimize any delays in the appellate process; unless the trial court determines that the motion can be resolved as a matter of law, the trial court must hold a calendar call within 20 days after the motion is filed to either

rule on the motion or determine the need for an evidentiary hearing; if an evidentiary hearing is needed, it shall be set within 20 days of the calendar call; however, the trial court must rule on the motion within 60 days of filing or it is deemed denied; the comments to the proposed rule state that "trial courts and counsel are strongly encouraged to cooperate to resolve these motions as expeditiously as possible because they delay the appellate process;" trial courts thus have the opportunity to address and correct sentencing errors, which might eliminate the need for an appeal in many cases and also reduce the number of postconviction motions related to sentencing and appeals therefrom; any delay to the appellate process caused by Rule 3.800(b) will be more than offset by the fact that the parties will now be given a workable procedure to correct these sentencing errors in the trial court before the appeal and to preserve these errors for appellate review; this early correction of these sentencing errors will further the goal of judicial efficiency as well as ensure the integrity of the judicial process; in this case, Brannon did not avail himself of the opportunity under Rule 3.800(b)(2) to raise the unpreserved sentencing errors in the trial court before presenting them in his direct appeal; we hold that for defendants whose initial briefs were filed after the effective date of Rule 3.800(b)(2), the failure to preserve a fundamental sentencing error by motion under Rule 3.800(b) or by objection during the sentencing hearing forecloses them from raising the error on direct appeal; a Rule 3.800(b) motion can be used to correct any type of sentencing error, whether we had formerly called that error erroneous, unlawful, or illegal); after 60 days and an order filed more than 60 days after the motion was filed is a nullity); *Balkaran v. State*, 950 So. 2d 478 (Fla. 4th DCA 2007) (an issue regarding a sentence that exceeds the terms of a plea agreement is not a sentencing error subject to relief under Rule 3.800(b)); *Mills v. State*, 949 So. 2d 1186 (Fla. 1st DCA 2007) (upon appellant's motion to correct sentencing error, the trial court resentenced appellant; however, because the order was issued more than 60 days after appellant's Rule 3.800(b)(2) motion was filed, in violation of Rule 3.800(b)(1)(B), the motion is deemed denied as a matter of law and is considered a nullity); *Echeverria v. State*, 949 So. 2d 331 (Fla. 1st DCA 2007) (respecting appellant's Rule 3.800(b)(2) motion, it must be stated that such a motion is not the correct procedural vehicle for attacking the merits of an underlying criminal conviction); *Lopez v. State*, 925 So. 2d 1105 (Fla. 2d DCA 2006) (prior to briefing in this appeal Lopez filed a Rule 3.800(b)(2) motion challenging the legality of his new sentence on the burglary tools conviction; the circuit court did not rule on Lopez's motion, hence it is deemed denied); *Hollinger v. State*, 920 So. 2d 1213 (Fla. 1st DCA 2006)

(Rule 3.800(a) provides that such a Rule 3.800(a) motion may not be filed during the time allowed for filing of a motion under Rule 3.800(b)(1), which permits a motion to be filed before the filing of the notice of appeal); *Kenny v. State*, 916 So. 2d 38 (Fla. 4th DCA 2005) (here, the trial court erroneously changed Kenny's sentences in two cases not implicated in his motion to correct sentencing error); *Sessions v. State*, 907 So. 2d 572 (Fla. 1st DCA 2005) (a Rule 3.800(b)(2) motion is deemed denied, and the trial court's jurisdiction ends, once 60 days elapse without rendition of an order ruling on the motion, and any order rendered more than 60 days after a Rule 3.800(b)(2) motion is filed is a nullity); *Barber v. State*, 901 So. 2d 364 (Fla. 5th DCA 2005) (a sentence that exceeds the terms of a plea agreement is not a sentencing error subject to relief under Rule 3.800(b)); *Rodriguez v. State*, 881 So. 2d 671 (Fla. 5th DCA 2004) (Rule 3.800(b)(2) authorizes the filing of a motion to correct a sentencing error while an appeal is pending; however, any such motion must be filed before the party's first brief is served); *Jones v. State*, 876 So. 2d 642 (Fla. 1st DCA 2004) (defendant also argues that the trial court erred by classifying the defendant as both a habitual violent felony offender and a violent career criminal; we decline to reach this issue because it was not raised in the trial court at sentencing or by a Rule 3.800(b) motion to correct sentence); *Henry v. State*, 834 So. 2d 406 (Fla. 2d DCA 2003) (relief granted); *Phillips v. State*, 834 So. 2d 272 (Fla. 5th DCA 2002) (Rule 3.800(b)(2) permits a motion to correct sentence to be filed in the trial court pending appeal if the motion is filed and served by a party before the party's first appellate brief is filed); *Edmond v. State*, 832 So. 2d 782 (Fla. 4th DCA 2002) (after appellant filed an appeal from his resentencing, he filed a Rule 3.800(b) motion to correct his sentence in the trial court, which failed to rule on the motion within 60 days; pursuant to Rule 3.800(b), this means the motion is deemed denied; a trial court cannot extend the time to resolve a Rule 3.800(b) motion after the motion has already been automatically denied by the expiration of the 60 day time period); *Williams v. State*, 821 So. 2d 1267 (Fla. 2d DCA 2002) (prior version of Rule 3.800(b), relating to motions to correct sentencing errors, allowed 30 days for a defendant to raise unpreserved sentencing errors in the trial court and thereby preserve the errors for direct appeal; however, recognizing that the 30-day period was insufficient to allow appellate attorneys to identify and preserve potential sentencing errors, the state supreme court amended the rule to allow appellate counsel to file a motion to correct sentencing errors up until the time of filing the initial brief).

§ 12:72 Correction of jail credit—Florida Rule of Criminal Procedure 3.801

Effective July 1, 2013, new rule 3.801 governs the correction of a sentence that fails to allow county jail time credit as provided in section 921.161, Florida Statutes (2012). The rule is intended to prevent stale claims by requiring that jail credit issues be brought within one year of the sentence becoming final. Successive motions for jail credit are not allowed. The rule also identifies the contents that must be included in a motion seeking such relief and specifies that certain subdivisions of rule 3.850 are applicable to motions under this rule. *In re Amendments To Florida Rules of Criminal Procedure and Florida Rules of Appellate Procedure*, 112 So. 3d 1234 (Fla. 2013), opinion withdrawn and superseded, 132 So. 3d 734 (Fla. 2013). All jail credit issues must be handled pursuant to this rule. The rule is intended to require that jail credit issues be dealt with promptly, within 1 year of the sentence becoming final. No successive motions for jail credit will be allowed. Fla. R. Crim. P. 3.801 comment.

§ 12:73 Correction of jail credit—Florida Rule of Criminal Procedure 3.801—Text

RULE 3.801. CORRECTION OF JAIL CREDIT

(a) Correction of Jail Credit. A court may correct a sentence that fails to allow a defendant credit for all of the time he or she spent in the county jail before sentencing as provided in section 921.161, Florida Statutes.

(b) Time Limitations. No motion shall be filed or considered pursuant to this rule if filed more than 1 year after the sentence becomes final.

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

(1) a brief statement of the facts relied on in support of the motion;

(2) the dates, location of incarceration and total time for credit already provided;

(3) the dates, location of incarceration and total time for credit the defendant contends was not properly awarded;

(4) whether any other criminal charges were pending at the time of the incarceration noted in subdivision (c)(3), and if so, the location, case number and resolution of the charges; and

(5) whether the defendant waived any county jail credit at the time of sentencing, and if so, the number of days waived.

(d) Successive Motions. No successive motions for jail credit will be considered.

(e) Incorporation of Portions of Florida Rule of Criminal Procedure 3.850. The following subdivisions of Florida Rule of Criminal Procedure 3.850 apply to proceedings under this rule: 3.850(e), (f), (j), (k), and (n).

§ 12:74 Motion to reduce or modify sentence under Florida Rule of Criminal Procedure 3.800(c)

Another postconviction remedy in Florida is the motion to reduce or modify sentence, filed in the convicting court, and authorized by Rule 3.800(c), Fla. R. Crim. Proc. The Rule 3.800(c), Fla. R. Crim. Proc., remedy is modeled after the motion to reduce remedy authorized by the pre-1987 version of Rule 35(b), Fed. R. Crim. Proc.

The Rule 3.800(c) remedy allows the convicting court, on motion of the defendant or on the court's own motion, and in the exercise of its discretion, to reduce a sentence within 60 days of sentencing if there was no appeal or, if there was an appeal, within 60 days of the appellate court's final decision. However, Rule 3.800(c) does not authorize reduction of sentence in death sentence cases or cases where the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion. Rule 3.800(c) authorizes only reduction of sentences; it does not authorize a court to increase a sentence.

Generally, a final order denying a Rule 3.800(c) motion to reduce or modify sentence is not an appealable judgment. Under limited circumstances, however, a denial of a Rule 3.800(c) may be reviewed by an appellate court via a writ of certiorari.

§ 12:75 Motion to reduce or modify sentence under Florida Rule of Criminal Procedure 3.800(c)—Case law on unappealability of denials of Rule 3.800(c) motions

For case law on the unappealability of denials of Rule 3.800(c) motions to reduce or modify sentence, see, e.g., *Griffin v. State*, 979 So. 2d 1253 (Fla. 4th DCA 2008) (Rule 3.800(c) giving trial court jurisdiction to reduce or modify a legal sentence imposed by it within 60 days after the imposition applied to trial court's correction of defendant's illegal sentence on remand from the reversal of trial court's denial of her motion to correct illegal sentence); *Kuehl v. Bradshaw*, 954 So. 2d 653 (Fla. 4th DCA 2007) (the denial of a Rule 3.800(c) motion to mitigate is not appealable; however, there is a narrow exception that provides for

certiorari review where the motion is denied as untimely; outside of the timeliness issue, certiorari is not the proper procedural vehicle for reviewing the denial of a Rule 3.800(c) motion); *Terry v. State*, 940 So. 2d 1288 (Fla. 5th DCA 2006) (an order entered on a Rule 3.800(c) motion to reduce or modify a sentence is not appealable; however, it is subject to review in an extraordinary case under this court's certiorari jurisdiction); *Diaz v. State*, 931 So. 2d 1002 (Fla. 3d DCA 2006) (an order denying a Rule 3.800(c) motion to reduce or mitigate a sentence is not appealable; an appeal, however, may be treated as a petition for writ of certiorari to permit the trial court to properly consider a motion to mitigate where the trial court has mistakenly found the motion to be untimely); *Byrd v. State*, 920 So. 2d 825 (Fla. 2d DCA 2006) (although an order entered on a Rule 3.800(c) motion to reduce or modify a sentence is not appealable, it is subject to review in an extraordinary case under this court's certiorari jurisdiction; such review extends to orders of dismissal entered upon an erroneous determination that the motion was untimely filed as in the present case); *Howard v. State*, 914 So. 2d 455 (Fla. 4th DCA 2005).

§ 12:76 Motion to reduce or modify sentence under Florida Rule of Criminal Procedure 3.800(c)—History

Prior to 1996, what is now Rule 3.800(c), Fla. R. Crim. Proc., was designated Rule 3.800(b), Fla. R. Crim. Proc. On June 27, 1996, Rule 3.800(b), Fla. R. Crim. Proc., which authorized motions to reduce or modify sentence, was renumbered as Rule 3.800(c), Fla. R. Crim. Proc., effective July 1, 1996. At the same time, an entirely new Rule 3.800(b) was adopted, thereby creating a brand new postconviction remedy, the motion to correct sentencing error. Amendments to *Amendments to Florida Rule of Appellate Procedure 9.020(g) and Florida Rule of Criminal Procedure 3.800*, 675 So. 2d 1374 (Fla. 1996). Thus, since July 1, 1996, Rule 3.800(b) has authorized motions to correct sentencing error, rather than motions to reduce or modify sentence. And whereas the motion to reduce or modify sentence was authorized by Rule 3.800(b) prior to July 1, 1996, since then the remedy has been authorized by Rule 3.800(c).

§ 12:77 Motion to reduce or modify sentence under Florida Rule of Criminal Procedure 3.800(c)—Text

Rule 3.800(c), Fla. R. Crim. Proc., which authorizes the reduction of sentence remedy, and which prior to 1996 was designated Rule 3.800(b), Fla. R. Crim. Proc., provides:

Rule 3.800. Correction, Reduction, and Modification of Sentences

. . .

(c) Reduction and Modification. A court may reduce or modify to include any of the provisions of chapter 948, Florida Statutes, a legal sentence imposed by it, sua sponte, or upon motion filed, within 60 days after the imposition, or within 60 days after receipt by the court of a mandate issued by the appellate court on affirmance of the judgment and/or sentence on an original appeal, or within 60 days after receipt by the court of a certified copy of an order of the appellate court dismissing an original appeal from the judgment and/or sentence, or, if further appellate review is sought in a higher court or in successively higher courts, within 60 days after the highest state or federal court to which a timely appeal has been taken under authority of law, or in which a petition for certiorari has been timely filed under authority of law, has entered an order of affirmance or an order dismissing the appeal and/or denying certiorari. If review is upon motion, the trial court shall have 90 days from the date the motion is filed or such time as agreed by the parties or as extended by the trial court to enter an order ruling on the motion. This subdivision shall not be applicable to those cases in which the death sentence is imposed or those cases in which the trial judge has imposed the minimum mandatory sentence or has no sentencing discretion.

§ 12:78 Motion to reduce or modify sentence under Florida Rule of Criminal Procedure 3.800(c)—Case law

For case law on motions to reduce or modify sentence filed under Rule 3.800(c), Fla. R. Crim. Proc. (formerly Rule 3.800(b), Fla. R. Crim. Proc.), see, e.g., *Noel v. State*, 191 So. 3d 370 (Fla. 2016) (sentencing judge's use of an incentive to encourage the payment of restitution by defendant convicted of conspiracy to racketeer and first-degree grand theft, with the incentive being that if he were to make a restitution payment of $20,000 within 60 days, then his prison term would be mitigated from ten years to eight years, violated defendant's due process rights, because, since defendant failed to make the restitution payment, he received a harsher prison sentence solely because of his lack of financial resources); *Schlabach v. State*, 37 So. 3d 230 (Fla. 2010) (trial court does not lose jurisdiction on a motion to reduce or modify sentence solely because no hearing was scheduled and no order was entered by the trial court within the sixty-day time period provided for by rule; trial court retains jurisdiction when the

motion is filed within the sixty-day time period, as long as the trial court rules on the motion within a reasonable time; the responsibility for ruling on the motion is placed on the trial judge; there is no requirement for a defendant to file a motion to extend time in anticipation of the trial court not ruling in a timely manner; motion to reduce or modify sentence permits a trial judge to reconsider matters that were not addressed during sentencing and to ensure that the sentence is appropriate and fair in light of all of the relevant circumstances; Trial courts can rule on motions to reduce or modify sentence without a hearing); *Powell v. State*, 12 So. 3d 1270 (Fla. 2d DCA 2009) (a defendant may file a rule 3.800(c) motion within sixty days from the imposition of the legal sentence or within sixty days from the receipt by the circuit court of a mandate affirming the sentence or an order dismissing the appeal; Powell's rule 3.800(c) motion was received by the postconviction court within sixty days of the issuance of the mandate affirming her direct appeal, Powell's motion was timely); *Kuehl v. Bradshaw*, 954 So. 2d 653 (Fla. 4th DCA 2007) (the denial of a Rule 3.800(c) motion to mitigate is not appealable; however, there is a narrow exception that provides for certiorari review where the motion is denied as untimely; outside of the timeliness issue, certiorari is not the proper procedural vehicle for reviewing the denial of a Rule 3.800(c) motion); *Cunniff v. State*, 950 So. 2d 1255 (Fla. 2d DCA 2007) (Ronald Cunniff petitions for certiorari review of an order dismissing as untimely his motion for mitigation of sentence filed pursuant to Rule 3.800(c), Fla. R. Crim. Proc.; here, under the prison mailbox rule, Cunniff is deemed to have filed his motion nine days prior to the expiration of the sixty-day period under Rule 3.800(c), and the trial court received the motion six days prior to the expiration of the sixty-day period; under these circumstances, the trial court did not lose jurisdiction hours after actual receipt of the motion, and the trial court should have either considered the motion on its merits or extended the time for considering the motion; accordingly, we grant the petition, quash the order dismissing the motion as untimely, and remand for the trial court to consider the motion on its merits); *Terry v. State*, 940 So. 2d 1288 (Fla. 5th DCA 2006) (an order entered on a Rule 3.800(c) motion to reduce or modify a sentence is not appealable; however, it is subject to review in an extraordinary case under this court's certiorari jurisdiction); *Diaz v. State*, 931 So. 2d 1002 (Fla. 3d DCA 2006) (an order denying a Rule 3.800(c) motion to reduce or mitigate a sentence is not appealable; an appeal, however, may be treated as a petition for writ of certiorari to permit the trial court to properly consider a motion to mitigate where the trial court has mistakenly found the motion to be untimely); *Byrd v. State*, 920

So. 2d 825 (Fla. 2d DCA 2006) (Kimberly Byrd seeks certiorari review of an order dismissing as untimely a motion to correct, reduce, and modify sentence which Byrd had filed pursuant to Florida Rule 3.800(c); the state candidly concedes that this case warrants certiorari relief; we agree and grant Byrd's petition; although an order entered on a Rule 3.800(c) motion to reduce or modify a sentence is not appealable, it is subject to review in an extraordinary case under this court's certiorari jurisdiction; such review extends to orders of dismissal entered upon an erroneous determination that the motion was untimely filed as in the present case); *Howard v. State*, 914 So. 2d 455 (Fla. 4th DCA 2005) (convicting court lacked jurisdiction over motion to mitigate sentence that was filed more than 60 days after District Court of Appeal issued mandate on appeal); *Seward v. State*, 912 So. 2d 389 (Fla. 2d DCA 2005) (orders denying relief under Rule 3.800(c) are not reviewable by appeal, but we may review them under our certiorari jurisdiction; defendant's motion to mitigate sentence imposed following revocation of probation was timely, even though motion was filed more than 60 days after imposition of sentence, where motion was filed within 60 days after trial court's receipt of mandate following affirmance of probation revocation and sentence; we quash the order that dismissed Seward's motion as untimely and remand for the circuit court to consider the Rule 3.800(c) motion on the merits); *Arango v. State*, 891 So. 2d 1195 (Fla. 3d DCA 2005) (plea bargain contained a specific agreement on the specific sentence that would be imposed on the defendant, namely, ten years' incarceration followed by seven years of probation; since the plea bargain here did not give the trial court any discretion over the length of the sentence, it follows that the trial court would be without the discretion to reduce the agreed sentence); *State v. Brooks*, 890 So. 2d 503 (Fla. 2d DCA 2005) (this court has jurisdiction to review on the merits the state's appeal of order granting defendant's Rule 3.800(c) motion to reduce or modify her sentences for conviction by guilty plea to lewd or lascivious battery and unlawful sexual activity with a minor, since trial court resentenced defendant to mitigated sentences of sex offender probation, which constituted a downward departure from minimum permissible sentence; movant's purported progress and conduct while in prison on conviction by guilty plea to lewd or lascivious battery and unlawful sexual activity with a minor did not provide basis for trial court to grant defendant's motion to reduce or modify her negotiated sentences and resentence defendant to mitigated sex offender probation in lieu of prison, where sentence was part of a quid pro quo pursuant to plea agreement).

§ 12:79 Writ of mandamus

The writ of mandamus, applied for in a circuit court, is a postconviction remedy in Florida. Generally, before seeking mandamus relief, the convicted person must first exhaust all available administrative remedies.

The writ of mandamus may be invoked as a postconviction remedy in the following circumstances. In the first place, certain final orders of the Florida Parole Commission may be reviewed by the writ of mandamus in the circuit court pursuant to Rule 1.630, Fla. R. Civ. Proc. Under Fla. Stat. Ann. § 47.011, the petition for mandamus relief should be filed in the circuit court where the defendant resides, or where the cause of action accrued. See, e.g., *Florida Parole Com'n v. Spaziano*, 48 So. 3d 714 (Fla. 2010) (mandamus is the proper remedy for review of an order of the Parole Commission determining a presumptive parole release date); *Bujno v. Department of Corrections*, 1 So. 3d 1138 (Fla. 1st DCA 2009) (circuit court considering inmate's petition for writ of mandamus challenging prison disciplinary team's finding that he was guilty of the offense of introduction of contraband was required to solicit a response from Department of Corrections regarding inmate's claim that the evidence was insufficient to establish constructive possession; responses to inmate's administrative grievances did not directly address inmate's claim, and without benefit of an adequate record, the circuit court could not properly discharge its duty to determine whether there was some factual support for the finding of guilt); *Currie v. State*, 955 So. 2d 1200 (Fla. 1st DCA 2007) (the proper vehicle for inmate's challenge to Parole Commission's determination of his presumptive parole release date was a writ of mandamus filed in Leon County, where the Commission was headquartered); *Sullivan v. Florida Parole Com'n*, 920 So. 2d 106 (Fla. 2d DCA 2006) (inmate sought review of Parole Commission's decision to suspend his presumptive parole release date; proper vehicle for petitioner's action is a petition for a writ of mandamus, and the proper venue for petitioner's mandamus petition is the county in which Commission is headquartered); *Gibson v. Florida Parole Com'n*, 895 So. 2d 1291 (Fla. 5th DCA 2005) (inmate's habeas corpus petition challenged an order issued by the Florida Parole Commission which extended inmate's presumptive parole release date by sixty months and refused to set an effective parole release date; the commission correctly argues that the proper method of obtaining review of its decision is by means of a petition for writ of mandamus filed in the circuit court in and for Leon County, Florida; the trial court should have treated the habeas petition as a petition for writ of mandamus and transferred the case to Leon County); *Roth v. Crosby*, 884 So. 2d 407 (Fla. 2d DCA 2004)

(inmate who sought review of Parole and Probation Commission's establishment of a presumptive parole release date that was significantly later than date recommended by hearing examiner was required to file petition for writ of mandamus directed against Commission in county where Commission was headquartered, rather than writ of habeas corpus in county of incarceration).

§ 12:80 Writ of mandamus—Case law regarding mandamus review by circuit courts of Florida parole commission orders

For case law on mandamus review by the circuit courts of Florida Parole Commission orders, see, e.g., *Currie v. State*, 955 So. 2d 1200 (Fla. 1st DCA 2007) (the proper vehicle for inmate's challenge to Parole Commission's determination of his presumptive parole release date was a writ of mandamus filed in Leon County, where the Commission was headquartered); *Roberts v. Florida Parole Com'n*, 951 So. 2d 75 (Fla. 1st DCA 2007) (inmate filed petition for writ of mandamus, challenging the Parole Commission's establishment of his presumptive parole release date (PPRD); the circuit court denied the petition as untimely without issuing an order to show cause, and inmate appealed; unlike the 30 day limit imposed by Rule 9.100(c)(4), Fla. R. App. Proc., to file a petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings, the Florida Supreme Court has not by rule adopted a similar time limit to challenge orders of the parole commission in parole revocation or PPRD proceedings; therefore, the question of timeliness must be raised by the affirmative defense of laches; we grant the inmate's petition for writ of certiorari, quash the order of the circuit court, and remand for further proceedings); *Frederick v. David*, 926 So. 2d 409 (Fla. 1st DCA 2006) (petition for a writ of certiorari to reverse circuit court's denial of petition for mandamus seeking to compel recalculation of inmate's presumptive parole release date; review of a circuit court's denial of a petition for writ of mandamus, when sitting in its appellate capacity, is limited to whether the circuit court afforded due process and observed the essential requirements of law); *Richardson v. Florida Parole Com'n*, 924 So. 2d 908 (Fla. 1st DCA 2006) (although the Florida Parole Commission is an administrative agency, a special provision of the Administrative Procedure Act exempts inmate orders from review by appeal; in lieu of a statutory right to an appeal, review of the parole commission's orders remains available to inmates by petitions for habeas corpus or mandamus filed in the circuit court); *Sullivan v. Florida Parole Com'n*, 920 So. 2d 106 (Fla. 2d DCA 2006) (proper vehicle for petitioner's action seeking

review of parole commission's decision to suspend his presumptive parole release date was a petition for a writ of mandamus directed against commission, rather than a petition for writ of habeas corpus; the proper venue for petitioner's petition for a writ of mandamus, seeking review of parole commission's decision to suspend his presumptive parole release date, was county in which commission was headquartered, unless home venue privilege was waived by commission); *Roth v. Crosby*, 884 So. 2d 407 (Fla. 2d DCA 2004) (appropriate vehicle for challenging a presumptive parole release date is a petition for a writ of mandamus directed against the Parole and Probation Commission; inmate who sought review of Parole and Probation Commission's establishment of a presumptive parole release date that was significantly later than date recommended by hearing examiner was required to file petition for writ of mandamus directed against Commission in county where Commission was headquartered, rather than writ of habeas corpus in county of incarceration; our record is unclear as to whether Roth exhausted his administrative remedies pursuant to Fla. Stat. Ann. § 947.173, which he was required to do before seeking review of the Commission's action in the circuit court); *Walker v. David*, 876 So. 2d 729 (Fla. 4th DCA 2004) (jurisdiction of the district courts of appeal to entertain direct appeals by parolees and prisoners from final orders of the Florida Parole Commission was eliminated in 1983, and the proper remedy is by petition for an extraordinary writ filed in the circuit court; while there is no 30-day time limit for challenging orders by the Parole Commission in extraordinary writ petitions, the question of timeliness may be raised by the affirmative defense of laches).

§ 12:81 Writ of mandamus—Use to obtain judicial review of prison disciplinary proceedings

In the second place, the writ of mandamus may be used by Florida inmates to obtain judicial review of prison disciplinary proceedings.

A Florida prisoner who seeks judicial relief from a prison disciplinary proceeding decision may, after exhausting his administrative remedies, file a petition for extraordinary relief, i.e., a petition for a writ of mandamus, in the appropriate Florida circuit court pursuant to Rule 1.630, Fla. R. Civ. Proc. The appropriate circuit court is the circuit court for Leon county, where the headquarters of the Department of Corrections is located. See *Stovall v. Cooper*, 860 So. 2d 5 (Fla. 2d DCA 2003).

The mandamus petition must be filed in the circuit court within the time provided by law. Rule 1.630(c), Fla. R. Civ. Proc. See

also Fla. Stat. Ann. § 95.11(8) (any court action challenging prison disciplinary proceedings shall be commenced within 30 days after final disposition of the proceedings through any administrative grievance process; any action challenging prisoner disciplinary proceedings shall be barred by the court unless it is commenced within the time period provided by this section); Rule 9.100(c)(4), Fla. R. App. Proc. (petition challenging an order of the Department of Corrections entered in prisoner disciplinary proceedings shall be filed within 30 days of rendition of the order to be reviewed).

If the circuit court's final order denies mandamus relief, the convicted person may seek discretionary appellate review of that order by filing a petition for a writ of certiorari in the appropriate district court of appeal pursuant to Rules 9.030(b)(2)(B), and 9.100, Fla. R. App. Proc. The petition for a writ of writ of certiorari must be filed within 30 days of rendition of the circuit court's order. Rule 9.100(c)(1), Fla. R. App. Proc.

§ 12:82 Writ of mandamus—Use to obtain judicial review of prison disciplinary proceedings—Case law

For case law on mandamus relief from prison disciplinary proceedings in Florida, see, e.g., *McNeil v. Cox*, 997 So. 2d 343 (Fla. 2008) (prison gain time claims are not subject to the prepayment and lien requirements of the prisoner indigency statute, applicable to all game time claims that, if successful, will directly affect the length of time the inmate will actually spend in prison); *Savery v. State*, 884 So. 2d 439 (Fla. 5th DCA 2004) (Savery seeks certiorari review of a circuit court order dismissing his petition seeking a writ of mandamus arising out of a prison disciplinary proceeding; pursuant to Rule 9.100(c)(4), Fla. R. App. Proc., a petition challenging a Department of Corrections order entered in a prisoner disciplinary proceeding must be filed within thirty days of rendition of that order; here, Savery's petition for writ of mandamus, filed in the circuit court on Apr. 27, 2004, was timely, and we quash the circuit court's order dismissing Savery's petition for writ of mandamus and remand for further proceedings); *Davidson v. Crosby*, 883 So. 2d 866 (Fla. 1st DCA 2004) (David Davidson petitioned the Circuit Court for Leon County for a writ of mandamus, challenging a disciplinary action taken against him by the Florida Department of Corrections).

§ 12:83 Writ of mandamus—Use to obtain judicial review of decisions of Florida department of corrections

Mandamus may also be used to obtain judicial review of certain other final decisions of the Florida Department of Corrections,

e.g., those relating to gain time earned by the inmate or to calculation of the time to be served under the sentence.

Such judicial review, pursuant to Rule 1.630, Fla. R. Civ. Proc., is available if the inmate files his petition for mandamus relief in the circuit court within the time provided by law. Rule 1.630(c), Fla. R. Civ. Proc. The circuit court for Leon county, where the Department of Corrections is headquartered, is the appropriate circuit court in which to file the mandamus petition. See, e.g., *Bush v. State*, 945 So. 2d 1207 (Fla. 2006); *Smiley v. State*, 948 So. 2d 964 (Fla. 5th DCA 2007) (mandamus is the accepted remedy for circuit court review of Department of Corrections disciplinary actions; however, the circuit court in Leon County is the proper venue for such cases if the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release; although this case should have been transferred to the circuit court in Leon County, venue was waived below).

§ 12:84 Writ of mandamus—Use to obtain judicial review of decisions of Florida department of corrections—Case law

For case law concerning use of mandamus to review various final decisions of the Florida Department of Corrections, see, e.g., *Morrison v. Florida Dept. of Corrections*, 153 So. 3d 981 (Fla. 1st DCA 2015) (appellant William T. Morrison, an inmate in the custody of the Florida Department of Corrections (FDOC), seeks review of an order of the Leon County Circuit Court which dismissed his petition for writ of mandamus as moot; we agree that the order of dismissal was premature, and we therefore reverse that order and remand this matter to the circuit court for further proceedings; Morrison filed four sets of inmate grievances which complained that the FDOC was not processing his inmate mail appropriately); *Bush v. State*, 945 So. 2d 1207 (Fla. 2006) (the proper remedy for a prisoner to pursue in challenging a sentence-reducing credit determination by the Department of Corrections, where the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release, is a petition for writ of mandamus; the Department of Corrections itself is the proper respondent in a mandamus proceeding challenging a sentence-reducing credit determination rendered by the Department; proper venue for a prisoner's mandamus challenge to a sentence-reducing credit determination by the Department of Corrections, where the prisoner has exhausted administrative remedies and is not alleging entitlement to immediate release, is the circuit court in Leon County, where the Department is located; transfer to proper venue, rather than dismissal, was the preferred remedy, where improper venue was sought in manda-

mus case involving prisoner's mandamus challenge to a sentence-reducing credit determination by the Department of Corrections); *Turner v. McDonough*, 949 So. 2d 1106 (Fla. 1st DCA 2007) (Dennis W. Turner seeks review of the circuit court's denial of his petition for writ of mandamus and of the denial of his motion to vacate the lien placed on his inmate trust account; the mandamus petition challenged respondent's gain-time forfeiture after Mr. Turner's probation was revoked; we deny his petition for writ of certiorari, insofar as it challenges the denial of the petition for writ of mandamus filed in circuit court; the petition for writ of certiorari is granted insofar as it seeks relief from the unauthorized lien); *Smiley v. State*, 948 So. 2d 964 (Fla. 5th DCA 2007) (Earic Smiley appeals the denial of a petition for writ of mandamus in which he challenged the loss of gain time pursuant to a disciplinary action by the Department of Corrections (DOC); district court of appeal review of a prisoner disciplinary matter is properly by certiorari where the circuit court has already afforded the petitioner a review of the agency's administrative decision on the merits; on the second level of review in the district court of appeal the issue is limited to a determination whether the circuit court afforded due process and whether the court observed the essential requirements of law; we treat Smiley's notice of appeal as a petition for writ of certiorari; mandamus is the accepted remedy for circuit court review of DOC disciplinary actions); *Marquez v. McDonough*, 945 So. 2d 652 (Fla. 1st DCA 2007) (Kevin J. Marquez seeks review of the circuit court's order denying his petition for a writ of mandamus, and refusing to remove a lien on his inmate trust account imposed to recover circuit court costs and fees; the mandamus petition challenged the gain-time forfeiture in a prison disciplinary proceeding; we deny his petition for writ of certiorari, insofar as it challenges denial of the petition for writ of mandamus filed in circuit court); *Florida Dept. of Corrections v. Hanson*, 903 So. 2d 282 (Fla. 1st DCA 2005) (Samuel Hanson, a prisoner in the Department of Corrections' custody, filed a petition for writ of mandamus alleging that he was entitled to restoration of thirty days of emergency gain-time); *Salazar v. State*, 892 So. 2d 545 (Fla. 3d DCA 2005) (if an inmate believes that the Department of Corrections has not granted correct credit in accordance with the Fla. Stat. Ann. § 921.161 jail certificate, then the inmate must seek relief through the inmate grievance procedure; after exhausting available remedies through the inmate grievance procedure, if the inmate believes that the Departments ruling was incorrect, the inmate may then file a petition for writ of mandamus directed to the Department of Corrections; venue for such a proceeding is in the circuit court for the second judicial circuit, in Tallahassee,

Leon county, Florida); *Lewis v. Crosby*, 878 So. 2d 444 (Fla. 1st DCA 2004) (by petition for writ of certiorari, prison inmate Dino Lewis seeks review of an order of the circuit court which denied his petition for writ of mandamus which sought recalculation of his release date; because Lewis is entitled to relief, we grant the petition); *Drymon v. State*, 878 So. 2d 438 (Fla. 1st DCA 2004) (petitioner, a prison inmate, filed a petition for writ of mandamus in the circuit court; he argued that the Department of Corrections' recalculation of his release date effectively forfeited all his gain time credits awarded from Dec. 11, 1995 to Nov. 20, 1997; petitioner seeks a writ of certiorari to review an order from the circuit court which denied his petition for writ of mandamus; we grant the petition for writ of certiorari and direct the circuit court to issue the writ of mandamus; the circuit court is directed to enter an order compelling respondent to credit petitioner with 412 days of gain time earned between Dec. 11, 1995 and Nov. 20, 1997); *Leiffer v. State*, 867 So. 2d 538 (Fla. 5th DCA 2004) (inmate seeks an additional 69 days credit for time purportedly served; for issues involving postsentencing credit, a defendant must first exhaust his administrative remedies and then seek mandamus relief in the circuit court in Leon county, where the Department of Corrections maintains its headquarters).

§ 12:85 Writ of habeas corpus—History

Prior to the adoption of Criminal Procedure Rule 1 in 1963, the writ of habeas corpus was the principal postconviction remedy in Florida and could be used to challenge convictions and sentences on grounds of jurisdictional error, on grounds of violation of the right to counsel or of other constitutional rights, and on various other grounds. *Richardson v. State*, 918 So. 2d 999 (Fla. 5th DCA 2006) (historically, habeas corpus proceedings were the means available to a defendant to challenge the validity of his or her conviction and sentence; prior to adoption of Rule 3.850, Fla. R. Crim. Proc., or its predecessors, habeas corpus was the primary procedural device to challenge the validity of a sentence or judgment of conviction; adoption of the Rule superseded habeas corpus as the method to collaterally attack a sentence or judgment of conviction); *Collins v. State*, 859 So. 2d 1244 (Fla. 5th DCA 2003) (prior to adoption of Rule 3.850, habeas corpus was the primary procedural device to challenge the validity of a sentence or judgment of conviction in Florida).

§ 12:86 Writ of error coram nobis

Although the common law writ of error coram nobis had been an established postconviction remedy in Florida for three

quarters of a century, it was effectively abolished there in 1999. In *Wood v. State*, 750 So. 2d 592 (Fla. 1999), the Florida Supreme Court abrogated the custody requirement in Rule 3.850 proceedings so that noncustodial convicted persons in need of postconviction relief who in the past would have had to resort to coram nobis rather than Rule 3.850 may now use the Rule 3.850 remedy instead. See *Wood v. State*, 750 So. 2d 592 (Fla. 1999) (examining contours of common law writ of error coram nobis; newly discovered evidence is grounds for both Rule 3.850 and coram nobis relief; the writ of error coram nobis and the Rule 3.850 remedy are intended to serve the same purpose; the time limits on applying for Rule 3.850 relief apply equally to petitions for coram nobis; we hereby amend Rule 3.850 by deleting the "in custody" requirement so that both custodial and noncustodial movants may be rely on and be governed by Rule 3.850, thereby eliminating the need for coram nobis; we do not narrow in any way the relief heretofore available to defendants under coram nobis, and all claims cognizable under the writ of error coram nobis are now available to noncustodial movants under Rule 3.850).

§ 12:87 Postconviction DNA testing statute under Florida Statutes §§ 925.11 and 943.3251

Florida has a postconviction DNA testing statute, enacted in 2001 by the Act of May 31, 2001, ch. 2001-97, §§ 1, 2, 2001 Fla. Laws 813, and, as amended by the Act of June 23, 2006, ch. 2006-292, 2006 West's Fla. Sess. Law Serv. 2204, codified at Fla. Stat. Ann. §§ 925.11, 925.12, and 943.2351.

Florida's postconviction DNA testing statute is supplemented and procedurally implemented by Rule 3.853, Fla.R.Crim.Proc. Since its original adoption in 2001, *Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853*, 807 So. 2d 633 (Fla. 2001), Rule 3.853 has been amended four times.

See also Rule 9.140(b)(1)(D), Fla. R. App. Proc. (a defendant may appeal orders denying Rule 3.853 relief); Rule 9.140(c)(1)(J), Fla. R. App. Proc. (the state may appeal an order granting Rule 3.853 relief); Rule 9.141(b)(2), Fla. R. App. Proc. (governing appeals in cases where a Rule 3.853 motion was granted or denied without an evidentiary hearing); Rule 9.141(b)(3), Fla. R. App. Proc. (governing appeals in cases where a Rule 3.853 motion was granted or denied after an evidentiary hearing).

§ 12:88 Postconviction DNA testing statute under Florida Statutes §§ 925.11 and 943.3251—Text of §§ 925.11 and 925.12

Florida's postconviction DNA testing statute, codified in part at Fla. Stat. Ann. §§ 925.11 and 925.12, provides:

925.11. Postsentencing DNA testing

(1) Petition for examination.—

(a) 1. A person who has been tried and found guilty of committing a felony and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate that person or mitigate the sentence that person received.

2. A person who has entered a plea of guilty or nolo contendere to a felony prior to July 1, 2006, and has been sentenced by a court established by the laws of this state may petition that court to order the examination of physical evidence collected at the time of the investigation of the crime for which he or she has been sentenced that may contain DNA (deoxyribonucleic acid) and that would exonerate that person.

(b) A petition for postsentencing DNA testing under paragraph (a) may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(2) Method for seeking postsentencing DNA testing.—

(a) The petition for postsentencing DNA testing must be made under oath by the sentenced defendant and must include the following:

1. A statement of the facts relied on in support of the petition, including a description of the physical evidence containing DNA to be tested and, if known, the present location or the last known location of the evidence and how it was originally obtained;

2. A statement that the evidence was not previously tested for DNA or a statement that the results of any previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques would likely produce a definitive result establishing that the petitioner is not the person who committed the crime;

3. A statement that the sentenced defendant is innocent and how the DNA testing requested by the petition will

exonerate the defendant of the crime for which the defendant was sentenced or will mitigate the sentence received by the defendant for that crime;

4. A statement that identification of the defendant is a genuinely disputed issue in the case, and why it is an issue;

5. Any other facts relevant to the petition; and

6. A certificate that a copy of the petition has been served on the prosecuting authority.

(b) Upon receiving the petition, the clerk of the court shall file it and deliver the court file to the assigned judge.

(c) The court shall review the petition and deny it if it is insufficient. If the petition is sufficient, the prosecuting authority shall be ordered to respond to the petition within 30 days.

(d) Upon receiving the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the petition or set the petition for hearing.

(e) Counsel may be appointed to assist the sentenced defendant if the petition proceeds to a hearing and if the court determines that the assistance of counsel is necessary and makes the requisite finding of indigency.

(f) The court shall make the following findings when ruling on the petition:

1. Whether the sentenced defendant has shown that the physical evidence that may contain DNA still exists;

2. Whether the results of DNA testing of that physical evidence would be admissible at trial and whether there exists reliable proof to establish that the evidence has not been materially altered and would be admissible at a future hearing; and

3. Whether there is a reasonable probability that the sentenced defendant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(g) If the court orders DNA testing of the physical evidence, the cost of such testing may be assessed against the sentenced defendant unless he or she is indigent. If the sentenced defendant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(h) Any DNA testing ordered by the court shall be carried out by the Department of Law Enforcement or its designee, as provided in s. 943.3251.

(i) The results of the DNA testing ordered by the court shall be provided to the court, the sentenced defendant, and the prosecuting authority.

(3) Right to appeal; rehearing.—

(a) An appeal from the court's order on the petition for postsentencing DNA testing may be taken by any adversely affected party.

(b) An order denying relief shall include a statement that the sentenced defendant has the right to appeal within 30 days after the order denying relief is entered.

(c) The sentenced defendant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(d) The clerk of the court shall serve on all parties a copy of any order rendered with a certificate of service, including the date of service.

(4) Preservation of evidence.—

(a) Governmental entities that may be in possession of any physical evidence in the case, including, but not limited to, any investigating law enforcement agency, the clerk of the court, the prosecuting authority, or the Department of Law Enforcement shall maintain any physical evidence collected at the time of the crime for which a postsentencing testing of DNA may be requested.

(b) In a case in which the death penalty is imposed, the evidence shall be maintained for 60 days after execution of the sentence. In all other cases, a governmental entity may dispose of the physical evidence if the term of the sentence imposed in the case has expired and no other provision of law or rule requires that the physical evidence be preserved or retained.

§ 925.12. DNA testing; defendants entering pleas

(1) For defendants who have entered a plea of guilty or nolo contendere to a felony on or after July 1, 2006, a defendant may petition for postsentencing DNA testing under s. 925.11 under the following circumstances:

(a) The facts on which the petition is predicated were unknown to the petitioner or the petitioner's attorney at the time the plea was entered and could not have been ascertained by the exercise of due diligence; or

(b) The physical evidence for which DNA testing is sought

was not disclosed to the defense by the state prior to the entry of the plea by the petitioner.

(2) For defendants seeking to enter a plea of guilty or nolo contendere to a felony on or after July 1, 2006, the court shall inquire of the defendant and of counsel for the defendant and the state as to physical evidence containing DNA known to exist that could exonerate the defendant prior to accepting a plea of guilty or nolo contendere. If no physical evidence containing DNA that could exonerate the defendant is known to exist, the court may proceed with consideration of accepting the plea. If physical evidence containing DNA that could exonerate the defendant is known to exist, the court may postpone the proceeding on the defendant's behalf and order DNA testing upon motion of counsel specifying the physical evidence to be tested.

(3) It is the intent of the Legislature that the Supreme Court adopt rules of procedure consistent with this section for a court, prior to the acceptance of a plea, to make an inquiry into the following matters:

(a) Whether counsel for the defense has reviewed the discovery disclosed by the state and whether such discovery included a listing or description of physical items of evidence.

(b) Whether the nature of the evidence against the defendant disclosed through discovery has been reviewed with the defendant.

(c) Whether the defendant or counsel for the defendant is aware of any physical evidence disclosed by the state for which DNA testing may exonerate the defendant.

(d) Whether the state is aware of any physical evidence for which DNA testing may exonerate the defendant.

(4) It is the intent of the Legislature that the postponement of the proceedings by the court on the defendant's behalf under subsection (2) constitute an extension attributable to the defendant for purposes of the defendant's right to a speedy trial.

§ 12:89 Postconviction DNA testing statute under Florida Statutes §§ 925.11 and 943.3251—Text of § 943.3251

Florida's postconviction DNA testing statute, codified in part at Fla. Stat. Ann., § 943.3251 and provides:

943.3251. Postsentencing DNA testing

(1) When a court orders postsentencing DNA testing of physical evidence, pursuant to s. 925.11, the Florida Department of Law Enforcement or its designee shall carry out the testing.

(2) The cost of such testing may be assessed against the sentenced defendant, pursuant to s. 925.11, unless he or she is indigent.

(3) The results of postsentencing DNA testing shall be provided to the court, the sentenced defendant, and the prosecuting authority.

§ 12:90 Postconviction DNA testing statute under Florida Statutes §§ 925.11 and 943.3251—Text of Florida Rule of Criminal Procedure 3.853

Currently, Rule 3.853, Fla. R. Crim. Proc., which supplements and procedurally implements Florida's postconviction DNA testing statute, provides:

Rule 3.853. Motion for Postconviction DNA Testing

(a) Purpose. This rule provides procedures for obtaining DNA (deoxyribonucleic acid) testing under sections 925.11 and 925.12, Florida Statutes.

(b) Contents of Motion. The motion for postconviction DNA testing must be under oath and must include the following:

(1) a statement of the facts relied upon in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;

(2) a statement that the evidence was not previously tested for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result establishing that the movant is not the person who committed the crime;

(3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;

(4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;

(5) a statement of any other facts relevant to the motion; and

(6) a certificate that a copy of the motion has been served on the prosecuting authority.

(c) Procedure.

(1) Upon receipt of the motion, the clerk of the court shall file it and deliver the court file to the assigned judge.

(2) The court shall review the motion and deny it if it is facially insufficient. If the motion is facially sufficient, the prosecuting authority shall be ordered to respond to the motion within 30 days or such other time as may be ordered by the court.

(3) Upon receipt of the response of the prosecuting authority, the court shall review the response and enter an order on the merits of the motion or set the motion for hearing.

(4) In the event that the motion shall proceed to a hearing, the court may appoint counsel to assist the movant if the court determines that assistance of counsel is necessary and upon a determination of indigency pursuant to section 27.52, Florida Statutes.

(5) The court shall make the following findings when ruling on the motion:

(A) Whether it has been shown that physical evidence that may contain DNA still exists.

(B) Whether the results of DNA testing of that physical evidence likely would be admissible at trial and whether there exists reliable proof to establish that the evidence containing the tested DNA is authentic and would be admissible at a future hearing.

(C) Whether there is a reasonable probability that the movant would have been acquitted or would have received a lesser sentence if the DNA evidence had been admitted at trial.

(6) If the court orders DNA testing of the physical evidence, the cost of the testing may be assessed against the movant, unless the movant is indigent. If the movant is indigent, the state shall bear the cost of the DNA testing ordered by the court.

(7) The court-ordered DNA testing shall be ordered to be conducted by the Department of Law Enforcement or its designee, as provided by statute. However, the court, upon a showing of good cause, may order testing by another laboratory or agency certified by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) or Forensic Quality Services, Inc. (FQS) if requested by a movant who can bear the cost of such testing.

(8) The results of the DNA testing ordered by the court shall be provided in writing to the court, the movant, and the prosecuting authority.

(d) Time Limitations. The motion for postconviction DNA testing may be filed or considered at any time following the date that the judgment and sentence in the case becomes final.

(e) Rehearing. The movant may file a motion for rehearing of any order denying relief within 15 days after service of the order denying relief. The time for filing an appeal shall be tolled until an order on the motion for rehearing has been entered.

(f) Appeal.

An appeal may be taken by any adversely affected party within 30 days from the date the order on the motion is rendered. All orders denying relief must include a statement that the movant has the right to appeal within 30 days after the order denying relief is rendered.

§ 12:91 Postconviction DNA testing statute under Florida Statutes §§ 925.11 and 943.3251—Text of Florida Rule of Criminal Procedure 3.853—Case law

For case law on Florida's postconviction DNA testing statute or Rule 3.853, Fla. R. Crim. Proc., see, e.g., *Harris v. State*, 183 So. 3d 1065 (Fla. 2d DCA 2015) (the postconviction court examined the record and denied Harris's Rule 3.853 motion on its merits; but if a postconviction court finds that a Rule 3.853 motion is facially sufficient, it must order a response from the State; a response is required even when an examination of the record conclusively shows that the defendant is not entitled to relief; only after the response is received and reviewed is the court to enter an order on the merits of the motion or set the motion for hearing); *Gresham v. State*, 181 So. 3d 1207 (Fla. 1st DCA 2015), review granted, 2016 WL 3031721 (Fla. 2016) (in order to allege a facially sufficient claim for DNA testing, a defendant must allege that identification was a genuinely disputed issue at trial and explain how the DNA testing will exonerate him); because Appellant failed to sufficiently allege that identity was a disputed issue and explain how DNA testing would exonerate him, his motion was facially insufficient; as such, the trial court did not err in denying the motion without first receiving a response from the State; additionally, we note that even if the motion had been facially sufficient, triggering the requirement for the trial court to receive a response from the State prior to ruling on it, we would still affirm under the doctrine of harmless error; we disagree with the holding in *Harris v. State*, 183 So. 3d 1065 (Fla. 2d DCA 2015); because it is apparent from the face of the record that Appellant's claims are meritless, it would be futile to reverse and remand for the trial court to order a response from the State when it is clear that the failure to do so was harmless error);

Mitchell v. State, 179 So. 3d 407 (Fla. 4th DCA 2015) (Mitchell appeals an order summarily denying his Rule 3.853 motion for postconviction DNA testing; in responding to the motion, the State argued that even if Mitchell's DNA was not found, that would not exonerate him; because there were several attackers, it would not be unexpected to find DNA from other individuals; the summary record for this appeal does not contain any trial testimony, but it includes the probable cause affidavit, in which the victim reported that "all three subjects raped her;" an appellate court should affirm the summary denial of a Rule 3.853 motion only if the record shows conclusively that the appellant is entitled to no relief; the record we have been provided does not conclusively show that Mitchell is entitled to no relief; accordingly, we reverse); *Zeigler v. State*, 116 So. 3d 255 (Fla. 2013), cert. denied, 134 S. Ct. 825, 187 L. Ed. 2d 694 (2013) (capital murder defendant's motion for postconviction DNA testing was not barred because it was successive, as such motions, pursuant to rule 3.853(b)(2), (d), could be filed or considered at any time following the date that the judgment and sentence in the case becomes final; defendant's successive postconviction motion seeking additional DNA testing of defendant's shirts and victims' clothing, as well as other items, which he argued would support his claim that he was not the perpetrator, was barred by collateral estoppel, as Supreme Court had previously addressed defendant's claims and held that the DNA testing that defendant sought would not establish that defendant was not the perpetrator; it is the burden of defendant seeking postconviction DNA testing to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence); *Alvarez v. Attorney General for Fla.*, 679 F.3d 1257 (11th Cir. 2012) (examining Florida's postconviction DNA testing statute, as well as Rule 3.853, Fla. R. Crim. Proc., which procedurally implements the statute); *Gore v. State*, 32 So. 3d 614 (Fla. 2010) (it is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence; burden is on the movant to 'demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case; supreme court has rejected claims where the defendant was merely speculating and has repeatedly cautioned that rule 3.853 is not intended to be a fishing expedition); *Powell v. State*, 12 So. 3d 1270 (Fla. 2d DCA 2009) (postconviction court, in summarily denying motion for postconviction DNA testing as facially insufficient, could not also deny the motion on its merits by at-

taching record excerpts to refute defendant's assertion that identification was a genuinely disputed issue in his case; court may not summarily deny a motion for postconviction DNA testing even when the record conclusively shows that the defendant is not entitled to relief; if motion for postconviction DNA testing is facially sufficient, the court must order a response; once the response is received, the court may enter an order on the merits of the motion or set the motion for hearing); *Bates v. State*, 3 So. 3d 1091 (Fla. 2009) (in order to be entitled to postconviction DNA testing, a defendant's motion must include a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained; the motion must also allege that the evidence was not previously tested or that the results of such testing were inconclusive; additionally, a defendant's motion must explain how the DNA testing requested will exonerate the defendant or mitigate the defendant's sentence; defendant's motion is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial; the clear requirement of the provisions of rule 3.853 is that a movant must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence; further, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case); *Consalvo v. State*, 3 So. 3d 1014 (Fla. 2009) (the burden is on the movant to demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case; rule 3.853 is not intended to be a fishing expedition); *Brown v. Secretary for Dept. of Corrections*, 530 F.3d 1335 (11th Cir. 2008) (DNA testing motion under rule 3.853 was not an application for postconviction or other collateral review with respect to the pertinent judgment for purposes of Antiterrorism and Effective Death Penalty Act tolling statute); *Overton v. State*, 976 So. 2d 536 (Fla. 2007) (death sentence case; murder defendant was not entitled to postconviction DNA testing of hairs attached to tape used to bind victim; presence of hair belonging to someone other than victim or defendant would not exculpate defendant, as there was no way to determine when, why, where, or how the hairs attached to tape); *Willacy v. State*, 967 So. 2d 131 (Fla. 2007) (postconviction DNA testing would not eliminate significant and substantial evidence directly linking capital defendant to victim's murder); *Cole v. State*, 895 So. 2d 398 (Fla. 2004) (death sentence case; movant filed Rule 3.853 motion in convicting court; in 2001, this court adopted Rule 3.853,

which tracks the provisions of Fla. Stat. Ann. § 925.11; pursuant to Rule 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence; the clear requirement is that a movant, in pleading the requirements of Rule 3.853, must lay out with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence; in order for the trial court to make the required findings, the movant must demonstrate the nexus between the potential results of DNA testing on each piece of evidence and the issues in the case); *Robinson v. State*, 865 So. 2d 1259 (Fla. 2004) (death sentence case; pursuant to Rule 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence; it is the defendant's burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence); *Hitchcock v. State*, 866 So. 2d 23 (Fla. 2004) (death sentence case; it was Hitchcock's burden to explain, with reference to specific facts about the crime and the items he wished to have tested, how the DNA testing requested by the motion will exonerate the movant of the crime for which Hitchcock was sentenced, or will mitigate the sentence received by Hitchcock for that crime); *Walker v. State*, 956 So. 2d 1249 (Fla. 2d DCA 2007) (state's unsworn response to postconviction motion for DNA testing that evidence sought to be tested no longer existed did not conclusively establish that no evidence existed for testing, and thus, defendant was entitled to evidentiary hearing on motion; even an affidavit from the state that refutes the movant's allegations serves only to create a factual dispute that must be resolved by an evidentiary hearing); *Glenn v. State*, 954 So. 2d 732 (Fla. 1st DCA 2007) (the language of Fla. Stat. Ann. § 925.11(1)(a) 2. is clear and extends the right to file a motion for postconviction DNA testing not only to those who entered a guilty or nolo contendere plea after the change in the law, but also includes those who entered a plea to a felony before July 1, 2006; therefore, the fact that defendant pled guilty to first-degree murder and robbery did not preclude him from filing a motion for postconviction DNA testing, under amendment to postconviction DNA testing statute which extended the right to file such a motion to persons who entered a plea of guilty or nolo contendere to a felony prior to July 1, 2006; defendant who sought postconviction DNA testing seven years after his conviction for first-degree murder and robbery was not required to explain and justify why DNA testing was not sought before postconviction stage of the

proceedings or to justify his delay in seeking DNA testing); *Jordan v. State*, 950 So. 2d 442 (Fla. 3d DCA 2007) (an assertion made by the state that evidence is no longer in its possession and cannot be found may not be summarily resolved upon motion for postconviction DNA testing, but rather requires an evidentiary hearing); *Reddick v. State*, 929 So. 2d 34 (Fla. 4th DCA 2006) (defendant's undisputed claims that identity of perpetrator of rape and murder was disputed issue at trial given questionable eyewitness identification, and that DNA evidence would exonerate him or lessen sentence, together with State's concession that there was physical evidence that might contain DNA, including swabs from victim's vagina, rectum, mouth, fingernails, and clothing, stated facially sufficient claim for postconviction DNA testing); *Knighten v. State*, 927 So. 2d 239 (Fla. 2d DCA 2006) (under the postconviction DNA testing statute and Rule 3.853, a claim is facially sufficient with regard to the exoneration issue if the alleged facts demonstrate that there is a reasonable probability that the defendant would have been acquitted if the DNA evidence had been admitted at trial; although Rule 3.853 and Fla. Stat. Ann. § 925.11 do not delineate which form of DNA testing should be performed, this does not mean that the postconviction court is only limited to STR DNA testing, particularly when there are other means of DNA testing that have been judicially accepted); *Hampton v. State*, 924 So. 2d 34 (Fla. 3d DCA 2006) (in the present case, the trial court summarily denied the motion for DNA testing, that is, denied the motion without conducting an evidentiary hearing; where there is a summary denial of a Rule 3.853 motion, this court must reverse unless the postconviction record shows conclusively that the appellant is entitled to no relief; here, the record does not conclusively refute the claim of defendant, and the order summarily denying the motion is reversed); *Thompson v. State*, 922 So. 2d 383 (Fla. 2d DCA 2006) (decision by the postconviction court that DNA evidence does or does not exist for testing is a factual finding and requires an evidentiary hearing); *Peterson v. State*, 919 So. 2d 573 (Fla. 3d DCA 2006) (Rule 3.353 does not require defendant to allege that results of DNA testing of physical evidence would be admissible at trial; in requesting postconviction DNA testing, a defendant is not required to plead existence of DNA material or its location; rather, rule governing such requests required only statement of facts describing physical evidence containing DNA to be tested, and present or last location of evidence, if known; a defendant is not entitled to postconviction DNA testing, absent statement as to how DNA testing might exonerate him); *Carter v. State*, 913 So. 2d 701 (Fla. 3d DCA 2005) (where a defendant who files a petition for postconviction DNA testing claims that DNA evidence

exists, but the state denies the claim, a factual dispute results and an evidentiary hearing is required); *Clayton v. State*, 912 So. 2d 355 (Fla. 3d DCA 2005) (defendant's failure to allege how DNA testing would exonerate him rendered legally insufficient his motion for postconviction DNA testing); *Moore v. State*, 903 So. 2d 238 (Fla. 2d DCA 2005) (defendant's claim that state destroyed rape kit in bad faith prior to trial for capital sexual battery was beyond scope of evidentiary hearing on postconviction motion for DNA testing to determine whether physical evidence still existed for testing; Rule 3.853 provides procedures for a convicted person to obtain DNA testing if certain requirements are met, including the requirement that DNA evidence must still exist; a Rule 3.853 proceeding ends in one of two ways: either the court denies the request for DNA testing or the court orders DNA testing; if the court orders DNA testing and the results are favorable to the convicted person, he or she may file a motion to vacate pursuant to Rule 3.850 (or Rule 3.851 in death penalty cases); if the Rule 3.850 motion is based solely on the results of the DNA testing, the motion is treated as a claim of newly discovered evidence); *Williams v. State*, 891 So. 2d 621 (Fla. 3d DCA 2005) (defendant who sought postconviction DNA testing of physical evidence failed to establish that state acted in bad faith by destroying the evidence 30 years earlier pursuant to a valid court order); *Block v. State*, 885 So. 2d 993 (Fla. 4th DCA 2004) (in order for Block to be entitled to relief under Rule 3.853, he must show how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentence; such motions have the purpose of challenging convictions where there is a credible concern that an injustice may have occurred and DNA testing may resolve the issue; here, DNA testing could reveal whether the victim's blood was present on the knife, thus shedding light on defense theory that the victim's injury was caused by her contact with broken glass and that nobody stabbed the victim; since Block has stated a legally sufficient claim for relief as it relates to DNA testing of the knife blade, Block is entitled to relief); *Warren v. State*, 884 So. 2d 1074 (Fla. 2d DCA 2004) (this court previously held that Warren's Rule 3.853 motion was facially sufficient and instructed the trial court to order the state to respond; after obtaining the state's response, the trial court accepted the state's conclusion that the evidence for which Warren requested DNA testing no longer exists' the trial court then summarily denied Warren's Rule 3.853 motion; the documents provided by the state to show that the evidence listed in Warren's motion for postconviction DNA testing no longer exists create a factual dispute as to whether the evidence still exists for testing; these documents cannot be relied on to support the sum-

mary denial of a facially sufficient Rule 3.853 motion for postconviction relief); *Jakeway v. State*, 884 So. 2d 290 (Fla. 2d DCA 2004) (in his Rule 3.853 motion, Jakeway sought DNA testing of several items of evidence collected during the investigation of the burglary and kidnapping for which he was convicted; the trial court denied the motion based on an affidavit from the St. Petersburg Police Department Supervisor of Evidentiary Services stating that the evidence was no longer in the custody of the Department because it had either been destroyed in 1996 or given to the case detective; the trial court erred in denying the motion on this ground because the affidavit from the St. Petersburg Police Department creates a factual issue as to whether the evidence exists, and an evidentiary hearing is required to resolve the issue); *Spaziano v. State*, 879 So. 2d 51 (Fla. 5th DCA 2004) (although no reported cases have been found discussing discovery during postconviction proceedings dealing with DNA and Rule 3.853, cases discussing discovery during a Rule 3.850 postconviction proceeding may lend some guidance; discovery during a Rule 3.850 postconviction proceeding is not automatically allowed; the lower court may allow discovery into matters which are relevant and material, and where the discovery is permitted the court may place limitations on the sources and scope; we vacate the order denying an evidentiary hearing and remand for the imposition of limitations on discovery leading to an evidentiary hearing); *Gaffney v. State*, 878 So. 2d 470 (Fla. 5th DCA 2004) (Gaffney admits that identity is not an issue in his case, and it is clear that he has absolutely no grounds for relief under Rule 3.853); *Merson v. State*, 876 So. 2d 641 (Fla. 5th DCA 2004)) (Scotty Merson appeals the summary denial of his Rule 3.853 motion for DNA testing; the trial court found that any physical evidence that may have contained DNA evidence had been destroyed and denied the motion on that ground; the record does not support the trial court's finding).

§ 12:92 Erroneous Convictions Act

Florida's 'Victims of Wrongful Incarceration Compensation Act' it provides a limited method by which a person may seek the status of a wrongfully incarcerated person who is eligible and entitled to compensation under the act. The act requires a sworn petition by the claimant, the showing of verifiable and substantial evidence of actual innocence, a response by the original prosecuting authority to the petition, and a determination on the pleadings whether the claimant is ineligible for compensation based on past criminal history. The text of the Act follows:

Chapter 961. Victims of Wrongful Incarceration Compensation

961.01. Short title

Sections 961.01-961.07 may be cited as the "Victims of Wrongful Incarceration Compensation Act."

961.02. Definitions

As used in ss. 961.01-961.07, the term:

(1) "Act" means the Victims of Wrongful Incarceration Compensation Act.

(2) "Department" means the Department of Legal Affairs.

(3) "Division" means the Division of Administrative Hearings.

(4) "Wrongfully incarcerated person" means a person whose felony conviction and sentence have been vacated by a court of competent jurisdiction and, with respect to whom pursuant to the requirements of s. 961.03, the original sentencing court has issued its order finding that the person neither committed the act nor the offense that served as the basis for the conviction and incarceration and that the person did not aid, abet, or act as an accomplice or accessory to a person who committed the act or offense.

(5) "Eligible for compensation" means a person meets the definition of "wrongfully incarcerated person" and is not disqualified from seeking compensation under the criteria prescribed in s. 961.04.

(6) "Entitled to compensation" means a person meets the definition of "eligible for compensation" and satisfies the application requirements prescribed in s. 961.05, and may receive compensation pursuant to s. 961.06.

961.03. Determination of status as a wrongfully incarcerated person; determination of eligibility for compensation

(1) (a) In order to meet the definition of a "wrongfully incarcerated person" and "eligible for compensation," upon entry of an order, based upon exonerating evidence, vacating a conviction and sentence, a person must set forth the claim of wrongful incarceration under oath and with particularity by filing a petition with the original sentencing court, with a copy of the petition and proper notice to the prosecuting authority in the underlying felony for which the person was incarcerated. At a minimum, the petition must:

1. State that verifiable and substantial evidence of actual innocence exists and state with particularity the nature and significance of the verifiable and substantial evidence of actual innocence; and

2. State that the person is not disqualified, under the provisions of s. 961.04, from seeking compensation under this act.

(b) The person must file the petition with the court:

1. Within 90 days after the order vacating a conviction and sentence becomes final if the person's conviction and sentence is vacated on or after July 1, 2008.

2. By July 1, 2010, if the person's conviction and sentence was vacated by an order that became final prior to July 1, 2008.

(2) The prosecuting authority must respond to the petition within 30 days. The prosecuting authority may respond:

(a) By certifying to the court that, based upon the petition and verifiable and substantial evidence of actual innocence, no further criminal proceedings in the case at bar can or will be initiated by the prosecuting authority, that no questions of fact remain as to the petitioner's wrongful incarceration, and that the petitioner is not ineligible from seeking compensation under the provisions of s. 961.04; or

(b) By contesting the nature, significance, or effect of the evidence of actual innocence, the facts related to the petitioner's alleged wrongful incarceration, or whether the petitioner is ineligible from seeking compensation under the provisions of s. 961.04.

(3) If the prosecuting authority responds as set forth in paragraph (2)(a), the original sentencing court, based upon the evidence of actual innocence, the prosecuting authority's certification, and upon the court's finding that the petitioner has presented clear and convincing evidence that the petitioner committed neither the act nor the offense that served as the basis for the conviction and incarceration, and that the petitioner did not aid, abet, or act as an accomplice to a person who committed the act or offense, shall certify to the department that the petitioner is a wrongfully incarcerated person as defined by this act. Based upon the prosecuting authority's certification, the court shall also certify to the department that the petitioner is eligible for compensation under the provisions of s. 961.04.

(4) (a) If the prosecuting authority responds as set forth in paragraph (2)(b), the original sentencing court shall make a determination from the pleadings and supporting documentation whether, by a preponderance of the evidence, the petitioner is ineligible for compensation under the provisions of s. 961.04, regardless of his or her claim of wrongful incarceration. If the court finds the petitioner ineligible under the provisions of s. 961.04, it shall dismiss the petition.

(b) If the prosecuting authority responds as set forth in paragraph (2)(b), and the court determines that the petitioner is eligible under the provisions of s. 961.04, but the prosecuting authority contests the nature, significance or effect of the evidence of actual innocence, or the facts related to the petitioner's alleged wrongful incarceration, the court shall set forth its findings and transfer the petition by electronic means through the division's website to the division for findings of fact and a recommended determination of whether the petitioner has established that he or she is a wrongfully incarcerated person who is eligible for compensation under this act.

(5) Any questions of fact, the nature, significance or effect of the evidence of actual innocence, and the petitioner's eligibility for compensation under this act must be established by clear and convincing evidence by the petitioner before an administrative law judge.

(6) (a) Pursuant to division rules and any additional rules set forth by the administrative law judge, a hearing shall be conducted no later than 120 days after the transfer of the petition.

(b) The prosecuting authority shall appear for the purpose of contesting, as necessary, the facts, the nature, and significance or effect of the evidence of actual innocence as presented by the petitioner.

(c) No later than 45 days after the adjournment of the hearing, the administrative law judge shall issue an order setting forth his or her findings and recommendation and shall file the order with the original sentencing court.

(d) The original sentencing court shall review the findings and recommendation contained in the order of the administrative law judge and, within 60 days, shall issue its own order adopting or declining to adopt the findings and recommendation of the administrative law judge.

(7) If the court concludes that the petitioner is a wrongfully incarcerated person as defined by this act and is eligible for compensation as defined in this act, the court shall include in its order a certification to the department that:

(a) 1. The order of the administrative law judge finds that the petitioner has met his or her burden of establishing by clear and convincing evidence that the petitioner committed neither the act nor the offense that served as the basis for the conviction and incarceration and that the petitioner did not aid, abet, or act as an accomplice to a person who committed the act or offense; or

2. That the court has declined to adopt the findings and recommendations of the administrative law judge and finds that the petitioner has met his or her burden of establishing by clear and convincing evidence that the petitioner committed neither the act nor the offense that served as the basis for the conviction and incarceration and that the petitioner did not aid, abet, or act as an accomplice to a person who committed the act or offense; and

(b) The original sentencing court determines the findings and recommendations on which its order is based are supported by competent, substantial evidence.

(8) The establishment of the method by which a person may seek the status of a wrongfully incarcerated person and a finding as to eligibility for compensation under this act in no way creates any rights of due process beyond those set forth herein, nor is there created any right to further petition or appeal beyond the scope of the method set forth herein.

961.04. Eligibility for compensation for wrongful incarceration

A wrongfully incarcerated person is not eligible for compensation under the act if:

(1) Before the person's wrongful conviction and incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, any felony offense, or a crime committed in another jurisdiction the elements of which would constitute a felony in this state, or a crime committed against the United States which is designated a felony, excluding any delinquency disposition;

(2) During the person's wrongful incarceration, the person was convicted of, or pled guilty or nolo contendere to, regardless of adjudication, any felony offense; or

(3) During the person's wrongful incarceration, the person was also serving a concurrent sentence for another felony for which the person was not wrongfully convicted.

961.05. Application for compensation for wrongful incarceration; administrative expunction; determination of entitlement to compensation

(1) A wrongfully incarcerated person who is eligible for compensation as defined in this act must initiate his or her application for compensation as required in this section no more than two years after the original sentencing court enters its order finding that the person meets the definition of wrongfully incarcerated person and is eligible for compensation as defined in this act.

(2) A wrongfully incarcerated person who is eligible for

compensation under the act must apply to the Department of Legal Affairs. No estate of, or personal representative for, a decedent is entitled to apply on behalf of the decedent for compensation for wrongful incarceration.

(3) The application must include:

(a) A certified copy of the order vacating the conviction and sentence;

(b) A certified copy of the original sentencing court's order finding the claimant to be a wrongfully incarcerated person who is eligible for compensation under this act;

(c) Certified copies of the original judgment and sentence;

(d) Documentation demonstrating the length of the sentence served, including documentation from the Department of Corrections regarding the person's admission into and release from the custody of the Department of Corrections;

(e) Positive proof of identification, including two full sets of fingerprints administered by a law enforcement agency and a current form of photo identification, demonstrating that the person seeking compensation is the same individual who was wrongfully incarcerated;

(f) All supporting documentation of any fine, penalty, or court costs imposed and paid by the wrongfully incarcerated person as described in s. 961.06(1)(c);

(g) All supporting documentation of any reasonable attorney's fees and expenses as described in s. 961.06(1)(d).

(4) The department shall forward one full set of fingerprints of the applicant to the Department of Law Enforcement for statewide criminal records checks. The Department of Law Enforcement shall forward the second set of fingerprints to the Federal Bureau of Investigation for national criminal records checks. The results of the state and national records checks shall be submitted to the department.

(5) Upon receipt of an application, the department shall examine the application and notify the claimant within 30 calendar days of any errors or omissions, and request any additional information relevant to the review of the application. The claimant shall have 15 days after proper notification of any existing errors or omissions to supplement the application. The department may not deny an application for failure of the claimant to correct an error or omission or supply additional information unless the department timely notified the claimant of such errors or omissions or requested the additional information within the 30-day period specified in this subsection. The department shall process and review each completed ap-

plication within 90 calendar days. Once the department determines whether a claim for compensation meets the requirements of this act, the department shall notify the claimant within five business days of that determination.

(6) If the department determines that a claimant meets the requirements of this act, the wrongfully incarcerated person who is the subject of the claim becomes entitled to compensation, subject to the provisions in s. 961.06.

961.055. Application for compensation for a wrongfully incarcerated person; exemption from application by nolle prosequi

(1) A person alleged to be a wrongfully incarcerated person who was convicted and sentenced to death on or before December 31, 1979, is exempt from the application provisions of ss. 961.03, 961.04, and 961.05 in the determination of wrongful incarceration and eligibility to receive compensation pursuant to s. 961.06 if:

(a) The Governor issues an executive order appointing a special prosecutor to review the defendant's conviction; and

(b) The special prosecutor thereafter enters a nolle prosequi for the charges for which the defendant was convicted and sentenced to death.

(2) The nolle prosequi constitutes conclusive proof that the defendant is innocent of the offenses charged and is eligible to receive compensation under this chapter.

(3) This section is repealed July 1, 2018.

961.056. Alternative application for compensation for a wrongfully incarcerated person

(1) A person who has been determined to be a wrongfully incarcerated person pursuant to s. 961.055 is eligible to apply to the department to receive compensation for such wrongful incarceration.

(a) Only the wrongfully incarcerated person may apply for compensation. The estate of, or personal representative for, a decedent may not apply on behalf of the decedent for compensation for wrongful incarceration.

(b) In order to receive compensation, the wrongfully incarcerated person shall, by July 1, 2016, submit to the Department of Legal Affairs an application for compensation irrespective of whether the person has previously sought compensation under this chapter. The application must include:

1. A certified copy of the nolle prosequi or nolle prosequi memorandum;

2. Certified copies of the original judgment and sentence;

3. Documentation demonstrating the length of the sentence served, including documentation from the Department of Corrections regarding the person's admission into and release from the custody of the Department of Corrections;

4. Positive proof of identification, as evidenced by two full sets of fingerprints prepared by a law enforcement agency of this state and a current form of photo identification;

5. Supporting documentation of any fine, penalty, or court costs imposed on and paid by the wrongfully incarcerated person as described in s. 961.06(1);

6. Supporting documentation of any reasonable attorney fees and expenses as described in s. 961.06(1); and

7. Any other documentation, evidence, or information required by rules adopted by the department.

(2) The law enforcement agency that prepared the applicant's set of fingerprints shall forward both full sets to the Department of Law Enforcement. The Department of Law Enforcement shall retain one set for statewide criminal records checks and forward the second set of fingerprints to the Federal Bureau of Investigation for national criminal records checks. The results of the state and national records checks shall be submitted to the department.

(3) Upon receipt of an application, the department shall examine the application and, within 30 days after receipt of the application, shall notify the claimant of any error or omission and request any additional information relevant to the review of the application.

(a) The claimant has 15 days after proper notification by the department to correct any identified error or omission in the application and to supply any additional information relevant to the application.

(b) The department may not deny an application for failure of the claimant to correct an error or omission or to supply additional information unless the department has notified the claimant of such error or omission and requested the additional information within the 30-day period specified in this subsection.

(c) The department shall process and review each complete application within 90 calendar days.

(d) Once the department determines whether a claim for compensation meets the requirements of this chapter, the

department shall notify the claimant within 5 business days after that determination.

(4) If the department determines that a claimant making application under this section meets the requirements of this chapter, the wrongfully incarcerated person is entitled to compensation under s. 961.06.

(5) (a) No portion of the compensation paid to a claimant making application under this section may be used for attorney fees, lobbyist fees, or costs relating to assisting the claimant in receiving such compensation.

(b) A person who accepts any portion of the compensation paid to a claimant making application under this section as payment for attorney fees, lobbyist fees, or costs relating to assisting the claimant in receiving such compensation commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(6) This section is repealed July 1, 2018.

961.06. Compensation for wrongful incarceration

(1) Except as otherwise provided in this act and subject to the limitations and procedures prescribed in this section, a person who is found to be entitled to compensation under the provisions of this act is entitled to:

(a) Monetary compensation for wrongful incarceration, which shall be calculated at a rate of $50,000 for each year of wrongful incarceration, prorated as necessary to account for a portion of a year. For persons found to be wrongfully incarcerated after December 31, 2008, the Chief Financial Officer may adjust the annual rate of compensation for inflation using the change in the December-to-December "Consumer Price Index for All Urban Consumers" of the Bureau of Labor Statistics of the Department of Labor;

(b) A waiver of tuition and fees for up to 120 hours of instruction at any career center established under s. 1001.44, any Florida College System Institution as defined in s. 1000.21(3), or any state university as defined in s. 1000.21(6), if the wrongfully incarcerated person meets and maintains the regular admission requirements of such career center, Florida College System Institution, or state university; remains registered at such educational institution; and makes satisfactory academic progress as defined by the educational institution in which the claimant is enrolled;

(c) The amount of any fine, penalty, or court costs imposed and paid by the wrongfully incarcerated person;

(d) The amount of any reasonable attorney's fees and ex-

penses incurred and paid by the wrongfully incarcerated person in connection with all criminal proceedings and appeals regarding the wrongful conviction, to be calculated by the department based upon the supporting documentation submitted as specified in s. 961.05; and

(e) Notwithstanding any provision to the contrary in s. 943.0583 or s. 943.0585, immediate administrative expunction of the person's criminal record resulting from his or her wrongful arrest, wrongful conviction, and wrongful incarceration. The Department of Legal Affairs and the Department of Law Enforcement shall, upon a determination that a claimant is entitled to compensation, immediately take all action necessary to administratively expunge the claimant's criminal record arising from his or her wrongful arrest, wrongful conviction, and wrongful incarceration. All fees for this process shall be waived.

The total compensation awarded under paragraphs (a), (c), and (d) may not exceed $2 million. No further award for attorney's fees, lobbying fees, costs, or other similar expenses shall be made by the state.

(2) In calculating monetary compensation under paragraph (1)(a), a wrongfully incarcerated person who is placed on parole or community supervision while serving the sentence resulting from the wrongful conviction and who commits anything less than a felony law violation that results in revocation of the parole or community supervision is eligible for compensation for the total number of years incarcerated. A wrongfully incarcerated person who commits a felony law violation that results in revocation of the parole or community supervision is ineligible for any compensation under subsection (1).

(3) Within 15 calendar days after issuing notice to the claimant that his or her claim satisfies all of the requirements under this act, the department shall notify the Chief Financial Officer to draw a warrant from the General Revenue Fund or another source designated by the Legislature in law for the purchase of an annuity for the claimant based on the total amount determined by the department under this act.

(4) The Chief Financial Officer shall purchase an annuity on behalf of the claimant for a term of not less than 10 years. The terms of the annuity shall:

(a) Provide that the annuity may not be sold, discounted, or used as security for a loan or mortgage by the applicant.

(b) Contain beneficiary provisions for the continued disbursement of the annuity in the event of the death of the applicant.

(5) Before the Chief Financial Officer draws the warrant for the purchase of the annuity, the claimant must sign a release and waiver on behalf of the claimant and his or her heirs, successors, and assigns, forever releasing the state or any agency, instrumentality, or any political subdivision thereof, or any other entity subject to the provisions of s. 768. 28, from all present or future claims that the claimant or his or her heirs, successors, or assigns may have against such entities arising out of the facts in connection with the wrongful conviction for which compensation is being sought under the act. The release and waiver must be provided to the department prior to the issuance of the warrant by the Chief Financial Officer.

(6) (a) A wrongfully incarcerated person may not submit an application for compensation under this act if the person has a lawsuit pending against the state or any agency, instrumentality, or any political subdivision thereof, or any other entity subject to the provisions of s. 768.28, in state or federal court requesting compensation arising out of the facts in connection with the claimant's conviction and incarceration.

(b) A wrongfully incarcerated person may not submit an application for compensation under this act if the person is the subject of a claim bill pending for claims arising out of the facts in connection with the claimant's conviction and incarceration.

(c) Once an application is filed under this act, a wrongfully incarcerated person may not pursue recovery under a claim bill until the final disposition of the application.

(d) Any amount awarded under this act is intended to provide the sole compensation for any and all present and future claims arising out of the facts in connection with the claimant's conviction and incarceration. Upon notification by the department that an application meets the requirements of this act, a wrongfully incarcerated person may not recover under a claim bill.

(e) Any compensation awarded under a claim bill shall be the sole redress for claims arising out of the facts in connection with the claimant's conviction and incarceration and, upon any award of compensation to a wrongfully incarcerated person under a claim bill, the person may not receive compensation under this act.

(7) Any payment made under this act does not constitute a waiver of any defense of sovereign immunity or an increase in the limits of liability on behalf of the state or any person subject to the provisions of s. 768.28 or other law.