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Robert Rivas*

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Abstract

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I. Introduction

Consider an inmate serving a prison sentence. He was tried, convicted and sentenced; he appealed, and the appellate court affirmed the conviction and sentence. Since then, he has discovered that his sentence was based on an incorrect application of the sentencing guidelines. Inexplicably, there are two separate rules of procedure under which the inmate may petition the trial court to correct his sentence.[1]

One is Florida Rule of Criminal Procedure 3.800(a),[2] which, in its entirety, states: "A trial court may at any time correct an illegal sentence imposed by it or an incorrect calculation made by it in a sentencing guidelines scoresheet." The other is Florida Rule of Criminal Procedure 3.850,[3] which, in relevant part, says: "A motion to vacate a sentence which exceeds the limits provided by law may be filed at any time."

In these rules, Florida's court system has set up overlapping provisions for sentences to be corrected.[4] This article explores the development of the rules to explain how they came to work the way they do, and it gives illustrative examples of how the rules cause confusion in trial and appellate courts. Finally, it proposes that rule 3.800(a) be repealed, and it argues that every purpose fulfilled by rule 3.800(a) could be better fulfilled by rule 3.850, particularly if a few minor changes

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1. In many circumstances, a sentencing guidelines error could be the basis of a post-conviction motion even if it were not preserved by a contemporaneous objection at the sentencing and raised on appeal. For a complete exploration of when a guidelines error must be preserved by a contemporaneous objection in the trial court, *see* Raiden, *Preservation of Issues Under the Sentencing Guidelines*, 13 NOVA L. REV. 271 (1988).

2. The entire text of FLA. R. CRIM. P. 3.800 is reprinted in Appendix I.

3. The entire text of FLA. R. CRIM. P. 3.850 is reprinted in Appendix III.

4. *E.g.*, Yates v. State, 556 So. 2d 501, 502 (Fla. 1st Dist. Ct. App. 1990) ("In challenging the legality of a sentence, motions filed pursuant to either Rule 3.800(a) or 3.850 are equally valid.").

were made in the wording of 3.850. The proposal is not intended to alter any substantive rights, but seeks only to streamline and rationalize the rules.

II. The History

A. Rule 3.800

What has come to be rule 3.800(a) first appeared in 1961 as Florida Statutes section 921.24 (1961).[5] Its passage was apparently uncontroversial.[6] Modeled after Federal Rule of Criminal Procedure 35(a),[7] the Florida law originally said: "A court may at any time correct an illegal sentence imposed by it in a criminal case."[8] Federal rule 35, promulgated by the United States Supreme Court in 1945, also had been uncontroversial because it merely codified procedures existing pursuant to case law.[9]

The Florida law remained unchanged until it was deleted from the statutes[10] effective January 1, 1971,[11] when a number of purely procedural matters under the rulemaking authority of the Florida Supreme Court were stricken from the law books.[12] Meanwhile, the same lan-

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5. Act effective July 1, 1961, 1961 FLA. LAWS 61-39, §§ 1, 2. Note that § 1 was codified as FLA. STAT. § 921.24, and § 2 was codified as FLA. STAT. § 921.25. The latter provided for the trial court to reduce a *legal* sentence on a purely discretionary basis. The history of § 921.24, which became FLA. R. CRIM. P. 3.800(a), and § 921.25, which became FLA. R. CRIM. P. 3.800(b), are precisely parallel. However, § 921.25 and its successor, FLA. R. CRIM. P. 3.800(b), have no bearing on the issue raised by this article.

6. *See* S.B. 68, 38th Reg. Sess., JOURNAL OF THE SENATE 27, 261, 337, 910, 920, 1019, 1183; JOURNAL OF THE HOUSE 889, 1164, 1427, 1432, 1603, 1773 (1961) (the bill unanimously passed both judiciary committees and both chambers; the only change made after its filing was in the effective date; the governor allowed the bill to become law without his signature).

7. Federal rule 35 had a subsection (b) analogous to FLA. R. CRIM. P. 3.800(b), but it, like 3.800(b), has no bearing on the issue raised by this article. *See supra* note 5.

8. Act effective July 1, 1961, 1961 FLA. LAWS 61-39, § 1 (codified at FLA. STAT. § 921.24).

9. For a history of the promulgation of Federal Rule 35, *see* 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 35 (1967).

10. Act effective January 1, 1971, 1969 FLA. LAWS 70-339, § 180.

11. *See* FLORIDA LEGISLATIVE SERVICE BUREAU, 1970 SUMMARY OF GENERAL LEGISLATION 7 (1970).

12. *Id.*

guage had already been written into Florida Rule of Criminal Procedure 3.800(a), which superceded the law.[13] The key words of the statute remain intact today in rule 3.800(a).

B. Rule 3.850

Rule 3.850's creation, two years after the passage of section 921.25, was much more remarkable. The rule was promulgated when the United States Supreme Court's historic ruling in *Gideon v. Wainwright*[14] shook the legal establishment. In *Gideon*, a criminal defendant's conviction was reversed because he was not represented by legal counsel at trial. Members of the Florida Supreme Court and the Florida Judicial Council foresaw the United States Supreme Court's holding in 1962, well before the decision was handed down.[15]

Of the 8,000 inmates in Florida prisons at the time of the *Gideon* decision, more than half had been convicted without the benefit of a lawyer.[16] Any number of them could be expected to seek post-conviction relief[17] by filing a petition for a writ of *habeas corpus*.[18] Under the habeas corpus procedures, an inmate could file a petition in any court with jurisdiction over the place of his imprisonment.[19] Therefore, thousands of petitions were expected to flood the Florida Supreme Court, the First District Court of Appeal, and the Circuit Court for the Eighth Judicial Circuit, headquartered in Gainesville, the region where most Florida inmates were housed at the time.[20] To alleviate this burden, the Florida Supreme Court promulgated Criminal Procedure Rule

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13. The rule was first enacted on March 1, 1967, effective January 1, 1968, as FLA. R. CRIM. P. 1.800, and superceded §§ 921.24-25. *In re* Florida Rules of Criminal Procedure, 196 So. 2d 124, 171 (Fla. 1967). Effective December 13, 1971, all the rules beginning with "1" were renumbered to start with a "3." Thus, rule 1.800 became rule 3.800. *In re* Rules of Criminal Procedure, 253 So. 2d 421 (Fla. 1971).

14. 372 U.S. 335 (1963).

15. *See* Brown, *Collateral Post Conviction Remedies in Florida*, 20 U. FLA. L. REV. 306, 306 (1968).

16. *See* Roy v. Wainwright, 151 So. 2d 825, 827 (Fla. 1963).

17. *Id.*

18. *Id.*

19. Brown, *supra* note 15, at 306. For a complete explanation of the remedies that were available to an inmate prior to the enactment of rule 3.850, *see* Clark, *Curable Ills of the Criminal Law in Florida*, 16 U. FLA. L. REV. 258, 295 (1963).

20. Brown, *supra* note 15, at 306. As it turned out, 6,403 motions under rule 3.850 were filed between April 1, 1963, and April 1, 1966. *Id.* at 308.

No. 1,[21] effective April 1, 1963. Under the rule, inmates who claimed they were convicted in violation of a constitutional right would be forbidden from filing a common law petition for a writ of *habeas corpus*, and instead would have to file a motion for post-conviction relief under rule 3.850 in the trial courts where they were convicted.[22]

The rule was copied almost verbatim from Title 28 United States Code section 2255,[23] one of a number of sections in Title 28, Chapter 153, the federal laws governing *habeas corpus*.[24] The federal law was written in 1948[25] as part of a massive revision of the judiciary and judicial procedure laws. It was designed to serve the purposes of spreading the workload of petitions for writs of *habeas corpus* from federal prisoners evenly to federal trial courts throughout the nation, and of requiring the prisoners to seek relief in the court with the most knowledge of the case and the easiest access to the records.[26] To glean how to apply the rule, federal trial and appellate courts turned to the enormous body of historic case law on *habeas corpus*.[27] Thus, section 2255 served as a procedural device to carry out the common law of *habeas corpus* as it applied to federal prisoners.[28] A similar rule in Florida would serve the same purposes: Instead of petitions for writs of *habeas corpus* being funneled through the state courts near Raiford, petitions for relief under the new rule would be spread to trial courts throughout the state.[29]

In this manner, section 2255 came to be Florida's Rule 1, which was recodified without alteration in 1971 as rule 3.850.[30] The new rule provided relief from a sentence "in excess of the maximum authorized by law,"[31] while the statute, later to become rule 3.800(a), provided

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21. *In re* Criminal Procedure, Rule No. 1, 151 So. 2d 634 (Fla. 1963).
22. *Id.*
23. *Roy*, 151 So. 2d at 828.
24. *See* 28 U.S.C. § 2255 (1948).
25. The complete legislative history is republished as an appendix to Title 28 U.S.C.A. (West 1976).
26. *See* Kaufman v. United States, 394 U.S. 217, 221 & n.5 (1969).
27. Sanders v. United States, 373 U.S. 1, 11 (1963).
28. *Id.*
29. *See* Brown, *supra* note 15, at 307; Haddad and Wolbe, *Florida's Revised Rule 3.850: New Limitations on Post Conviction Collateral Attack*, 59 FLA. B.J. 27 (July/Aug. 1985).
30. In 1968, rule 1 had been renumbered as rule 1.850. *In re* Rules of Criminal Procedure, 196 So. 2d 124, 177 (Fla. 1967). In 1972, it was renumbered, again unchanged, as rule 3.850. *In re* Rules of Criminal Procedure, 253 So. 2d 421 (Fla. 1971).
31. *In re* Criminal Procedure, Rule No. 1, 151 So. 2d at 634.

relief from an "illegal sentence." In each instance the inmate was required to petition the trial court where he was convicted.

Nothing in the recorded history suggests that Florida judicial officials—or commentators, even in law review surveys of criminal procedure—noticed the overlap between Rule 1 and what was then Florida Statute 921.24, or purposefully intended for the rules to overlap.[32] Rule 3.800(a)'s promulgation was a routine codification of a common law procedure, and rule 3.850 was copied from a federal law and made a Florida rule under emergency circumstances, with little time for careful study.

C. At first, there was no problem

Throughout most of the 1970s an inmate claiming his sentence was illegal could move for relief under either rule. Obviously the rules overlapped. However, both rules were interpreted only to apply to *illegal* sentences.[33] Since a sentence within the broad statutory minimum and maximum was not illegal, it was neither appealable[34] nor cognizable in a post-trial motion on the basis of illegality. With sentences generally deemed to be not reviewable, the fact that the rules overlapped did not cause a problem. Motions for relief were rare.

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32. *See In re* Florida Rules of Criminal Procedure, 196 So. 2d at 124; *In re* Rules of Criminal Procedure, Rule No. 1, 151 So. 2d at 634; Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963); Brown, *supra* note 15, at 306; Clark, *supra* note 19, at 258; Note, *Judgment and Sentence in a Florida Criminal Case*, 16 U. FLA. L. REV. 312 (1963) (authored by Donald L. Gattis, Jr.); Wills, *Survey, Criminal Law and Procedure*, 22 U. MIAMI L. REV. 240 (1967); Wills & Wisotsky, *Survey, Criminal Law and Procedure*, 24 U. MIAMI L. REV. 215 (1970).

33. State v. Evans, 225 So. 2d 548, 549 (Fla. 3d Dist. Ct. App.), *cert. denied*, 229 So. 2d 261 (Fla. 1969), *cert. denied*, 397 U.S. 1053 (1970); Brumit v. Wainwright, 290 So. 2d 39, 41 (Fla. 1973); Ware v. State, 231 So. 2d 872, 873 (Fla. 3d Dist. Ct. App. 1970).

34. *See* Davis v. State, 123 So. 2d 703 (Fla. 1960); Note, *Appellate Review of Sentences in Florida: A Proposal*, 23 U. FLA. L. REV. 736, 737 (1971) (authored by Darryl M. Bloodworth) (objecting to the lack of review of sentences and urging a change); A. SUNDBERG, CHIEF JUSTICE, SUPREME COURT OF FLORIDA, A REPORT TO THE LEGISLATURE: STATEWIDE SENTENCING GUIDELINES IMPLEMENTATION AND REVIEW 21 (1982).

D. Later, attacks on sentences became more frequent

The problem evolved from the creation,[35] in 1982, of the Sentencing Commission.[36] The Sentencing Commission drafted uniform sentencing guidelines that took effect on October 1, 1983.[37] In addition to establishing the guidelines, the law gave a prisoner the right to a direct appeal of any sentence allegedly outside the guidelines.[38] The guidelines were complicated, and provided many potential grounds for arguments over their correct application.[39] Thus, the sentencing guidelines created a huge new category of appeals.

Three years later it became clear that the sentencing guidelines created, in addition, a huge new category of post-conviction attacks on sentences that could be filed in trial courts. The Florida Supreme Court, in *Whitfield v. State*,[40] ruled that a sentence based on an erroneous calculation of the guidelines was an "illegal" sentence reviewable by a trial court at any time under rule 3.800(a). The court spontaneously amended rule 3.800(a) to state: "A court may at any time correct

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35. Act approved on April 7, 1982, 1982 FLA. LAWS 82-145.

36. For a complete history of the enactment of the guidelines, the philosophy behind them and the legal issues they raise, *see* Note, *An Examination of Issues in the Florida Sentencing Guidelines*, 8 NOVA L.J. 687 (1984) (authored by Rebecca Jean Spitzmiller).

37. Act approved on June 8, 1983, 1983 FLA. LAWS 83-87, § 2 (codified as amended at FLA. STAT. § 921.001).

38. Under the law, a sentence "outside the guidelines" is one that does not conform to the law either by being within the presumptive guidelines range, or by the judge's entry of an order specifying lawful reasons to depart from the guidelines. FLA. STAT. § 921.001(5)-(6) (1987). The question of appealability is found in FLA. STAT. §§ 921.001(5), 924.06(e) (1987).

39. For a vivid description of the many complications involved in sentencing guidelines, *see* UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINE MANUAL 1-9 (1987). *See also* Memorandum from Leonard Holton, Director of the Florida Sentencing Guidelines Commission, to court personnel throughout the state (Jan. 10, 1989) (available from court libraries or the Office of the State Courts Administrator). Holton's memorandum took forty seven pages of small print, in chart form, to list the appellate court rulings only on valid and invalid reasons to depart from the guidelines. The validity of a reason for a "departure sentence" is but one of many types of appealable disputes over the correct application of the guidelines. In 1984, barely a year after the guidelines took effect, Judge Gavin K. Letts of the Fourth District Court of Appeal, writing in *Mischler v. State*, 458 So. 2d 37 (Fla. 4th Dist. Ct. App. 1984), published a footnote containing ninety-two citations to appellate cases attempting to answer twenty-five categories of questions about the guidelines. *Id.* at note 14.

40. 487 So. 2d 1045 (Fla. 1986).

an illegal sentence imposed by it *or an incorrect calculation made by it in a sentencing guidelines scoresheet.*"[41]

E. How the federal government avoided the problem

Meanwhile, the federal government also enacted sentencing guidelines in the Comprehensive Crime Control Act of 1984.[42] As part of the law, Congress deleted all of rule 35(a),[43] the one allowing a trial court to correct an illegal sentence at any time, and replaced it with a provision allowing a trial court *only* to correct a sentence found by an appellate court, in a direct appeal from the conviction, to be illegal or a violation of the guidelines.[44] The avenue for a direct appeal from an illegal sentence or one imposed wrongly under the guidelines was created in 18 U.S.C. section 3742.[45] By these changes, Congress established that an attack on a sentence outside the guidelines could only be made on direct appeal or under 28 U.S.C. section 2255, the federal version of rule 3.850.[46]

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41. *Id.* at 1047 (emphasis added).
42. PUB. L. NO. 98-473, 98 STAT. 1837.
43. PUB. L. NO. 98-473, 98 STAT. 2015.
44. The new rule 35(a), as enacted at 98 STAT. 2015, states:

> The court shall correct a sentence that is determined on appeal under 18 U.S.C. § 3742 to have been imposed in violation of law, to have been imposed as a result of an incorrect application of the sentencing guidelines, or to be unreasonable, upon remand of the case to the court (1) for imposition of a sentence in accord with the findings of the court of appeals; or (2) for further sentencing proceedings if, after such proceedings, the court determines that the original sentence was incorrect.

It is unclear why such a rule would be necessary. Obviously, a trial court must follow the appellate court's instructions on remand.

45. PUB. L. NO. 98-473, 98 STAT. 2011:

"(A) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence

"(1) was imposed in violation of the law;

"(2) was imposed as a result of an incorrect application of the sentencing guidelines . . . ."

The rest of the law's provisions are beyond the scope of this article.

46. This interpretation is clear from the face of the rules and statutes. Although the question has not been addressed in any opinion of an appellate court, trial courts have reached the same conclusion in unpublished decisions. In Cunningham v. United States, No. 89-CIV.-1761-(MBM) (S.D.N.Y. June 1, 1989) (Westlaw, ALLFEDS library, No. 59619), the trial court's order said the defendant petitioned, "allegedly" pursuant to FED. R. CRIM. P. 35, to correct a sentence that was illegal by an incorrect calculation of the guidelines. The court's order stated: "Rule 35, which applies only to

The federal sentencing guidelines law thus eliminated the federal version of rule 3.800(a) as a means of attacking a sentence on grounds that it exceeded the guidelines. Florida's sentencing guidelines law, in contrast, left rule 3.800(a) intact. As long as Florida courts held that a sentence in excess of the guidelines was an "illegal" sentence, *either one* of rules 3.800(a) or 3.850 provided for an unlimited number of collateral attacks on a sentence to be filed in the trial court on the basis that the guidelines were violated.[47]

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correction of sentence following appeal or[, under 35(b),] as a result of changed circumstances, is inapplicable on its face. Accordingly this will be treated as a petition pursuant to 28 U.S.C. § 2255." In United States v. Doner, No. CR-88-97E (W.D.N.Y. Feb. 9, 1989) (Westlaw, ALLFEDS library, No. 10940), the defendant sought similar relief. The trial court's order stated:

> Rule 35 governs generally the correction of sentences. Although prior versions of the rule permitted direct challenges by defendants to the correctness of their sentences, the rule in its present form is conspicuously silent with regard to their right to move thereunder. Thus, the evolution of Rule 35 indicates that Congress intended to withdraw the capacity of defendants to employ the rule as a mechanism to challenge sentences . . . . Accordingly, the amended Rule 35 controls and precludes sub silentio the defendant's motion to correct his sentence thereunder . . . . [T]his court construes the instant motion as having been made under section 2255

Id. [citations omitted].

47. Courts sometimes treat collateral attacks on sentencing guidelines errors as cognizable under rule 3.850, often disregarding the fact that the same argument could have been channeled through rule 3.800(a). *See, e.g.*, McCuiston v. State, 534 So. 2d 1144 (Fla. 1988) (accepting, without discussion, the legitimacy of the appellant's bringing a motion to correct guidelines error under rule 3.850); Holland v. State, 508 So. 2d 5 (Fla. 1987) (in case where appellant utilized rule 3.850, court said, "[c]learly, an erroneous guidelines calculation can be raised by a motion for post-conviction relief . . . "); Brown v. State, 507 So. 2d 764 (Fla. 1st Dist. Ct. App. 1987) (alleging guidelines error, prisoner moved under 3.850; appellate opinion did not question propriety of the motion as filed); Chaplin v. State, 473 So. 2d 842 (Fla. 1st Dist. Ct. App. 1985) ("Although this type of sentencing error may be raised by way of direct appeal, the courts have nevertheless allowed it to be remedied in post-conviction proceedings under Rule 3.850 . . . "). *But see* State v. Chaplin, 490 So. 2d 52 (Fla. 1986) (on appeal from *Chaplin*, 473 So. 2d 842, supreme court affirmed, but did so by treating motion as brought under 3.800(a)); Brown v. State, 508 So. 2d 522 (Fla. 2d Dist. Ct. App. 1987) (citing guidelines error, prisoner moved under rule 3.850; appellate court treated as a motion under 3.800(a), without necessarily saying whether 3.850 was a legitimate alternative). In contrast, prior to Whitfield v. State, 487 So. 2d 1045 (Fla. 1986), the Second District Court of Appeal, in Wahl v. State, 460 So. 2d 579 (Fla. 2d Dist. Ct. App. 1984), had held that rule 3.850's provision for review of sentences "in excess of the maximum allowed by law" referred only to sentences outside the legislative maximum for the crime, not to sentences in excess of the guidelines for the defendant.

F. Florida's problem almost did not happen

Ironically, a committee headed by then Chief Justice Alan C. Sundberg had foreseen the fact that the number of appeals from "illegal" sentences would skyrocket.[48] The committee's report, which was submitted to the legislature as the basis for the sentencing guidelines law, recommended that all challenges to the legality of a sentence be funneled through a specially appointed review panel, which would develop a "common law of sentencing."[49] The review panel would alleviate the anticipated burden on district courts of appeal of hearing the many appeals from disagreements over the application of the guidelines.[50] This recommendation was not adopted by the legislature as part of the sentencing guidelines law.[51]

III. Rule 3.800(a) Is Not Up To Its Task, and the Two Rules Cause Needless Confusion

Florida trial and appellate courts are extremely familiar with rule 3.850.[52] In 1988 alone, Florida trial courts heard 1,922 motions for

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48. A. SUNDBERG, A REPORT TO THE LEGISLATURE: STATEWIDE SENTENCING GUIDELINES IMPLEMENTATION AND REVIEW 34 (1982).

49. *Id.*

50. *Id.* at 35.

51. This begs the question: Why not resuscitate the Sundberg proposal? Although the idea is beyond the scope of this article, it would be a worthy avenue for someone, perhaps a member of the legislature, to pursue.

52. Anyone who has researched a problem under rule 3.850 can confirm that there are dozens of appellate cases reported, going back for decades, on virtually any question a movant could raise. Litigation under rule 3.850 is so extensive particularly because the rule is a vehicle for those condemned to death to seek collateral review of their convictions and sentences. These attacks under 3.850 on death sentences help to create an enormous body of case law applicable just as well to cases in which the defendant has received a brief prison sentence. In addition, the citable appellate authority is often the best authority possible, since all capital appeals go straight to the Florida Supreme Court, bypassing the district courts of appeal. *See, e.g.*, Gorham v. State, 521 So. 2d 1067 (Fla. 1988) (evidentiary hearing under 3.850 should have been granted on movant's claim of prosecutorial misconduct); Maxwell v. Wainwright, 490 So. 2d 927 (Fla. 1986) (trial court properly denied evidentiary hearing under the rule when movant, at trial, waived challenge to the impartiality of a juror); Magill v. State, 457 So. 2d 1367 (Fla. 1984) (ineffective assistance of counsel); Aldridge v. State, 425 So. 2d 1132 (Fla. 1983) (ineffective assistance of counsel); Knight v. State, 394 So. 2d 997 (Fla. 1981) (outlining standards for ineffective assistance of counsel claims); Witt v. State, 387 So. 2d 922 (Fla. 1980) (changes in the law to be applied retroactively only if they involve fundamental rights, not mere refinements of legal principles); Gra-

post-conviction relief under the rule.[53] The rule is lengthy[54] and contains a variety of procedural mandates to prevent abuse and facilitate the trial and appellate courts in disposing of rule 3.850 motions.[55] In addition, a form is provided in Florida Rule of Criminal Procedure 3.987. The form effectuates the policies set forth in the rule by giving the movant step-by-step blanks to fill in to ensure that he has provided the trial court with all the required information.

Since a motion under the rule often involves allegations of fact, the rule requires that the motion be sworn. The form in rule 3.987 provides the exact wording of the oath. The oath requires the movant to swear that all the facts are "true and correct," and not based merely on the movant's information and belief. A deviation from the exact language of the oath is grounds for the trial court to summarily deny the motion as facially insufficient.[56]

The rule also provides that the motion must include a list of specified pieces of information about prior related litigation—case numbers and dates of disposition of the underlying case and its direct appeal, plus other collateral attacks—to enable the trial court to gain quick access to the necessary files.[57]

The motion might be insufficient on its face, either for a failure to comply with the rule, or for failure to state a basis for relief even if the alleged facts were true. To help the trial court reach a determination about whether the motion is sufficient, the rule provides for the court to

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ham v. State, 372 So. 2d 1363 (Fla. 1979) (outlining trial court's discretion to decide whether to appoint counsel for movant in 3.850 proceeding).

53. Computer data printout, Florida Supreme Court Summary Reporting System, Circuit and County Courts Summary Report, January 1988 through December 1988 (available from the Office of the State Courts Administrator, Tallahassee).

54. Indeed, based on the author's scrutiny of the criminal rules, rule 3.850 is one of the lengthiest of them all, and it is certainly the only lengthy rule not subdivided into numbered and lettered paragraphs for easy reference. This is presumably an accident of the fact that the rule was Florida's first, and only subsequently did the authors of the rules begin utilizing the technique of organizing rules into brief, numbered sections. Therefore, in the author's proposed revision of the rule, found at Appendix IV, the rule is broken down into numbered subsections.

55. Also because of the lack of subsection numbering in the rule, the author is unable to give pinpoint citations to particular parts of the rule throughout this discussion of the rule's procedural mandates.

56. Scott v. State, 464 So. 2d 1171 (Fla. 1985).

57. A failure to comply with this part, too, can result in the trial court's summary denial of the motion. *See* Catlett v. State, 367 So. 2d 735 (Fla. 4th Dist. Ct. App. 1979).

order the state attorney to respond to the motion.

Finally, if the motion appears viable on its face, the trial court must take one of two steps. In one alternative, the court could find that the files and records in the case conclusively show that the movant is entitled to no relief. If so, the trial court must attach to its order denying relief those portions of the record necessary to show conclusively that the movant is entitled to no relief. This procedure facilitates appellate review.[58] The second alternative is to hold an evidentiary hearing. Indeed, an evidentiary hearing is required if the motion is facially sufficient and the files and records in the case do not conclusively show whether the movant is entitled to relief.[59]

In contrast, rule 3.800(a) provides for none of these procedures. One theory of the rule is that whether a sentence was illegal is a matter of law to be determined by the trial court in a review of the file: the order of conviction, the sentencing guidelines scoresheet, and the order specifying reasons for a departure, if there was one, from the presumptive guidelines range.[60] Those documents will show whether an error of law was made, and the trial court may dispose of the motion without the encumbrances of rule 3.850.[61] Indeed, if the alleged error is one of fact—a fact that could require an evidentiary hearing—it must be the subject of a contemporaneous objection in the trial court and raised on appeal.[62] An error of fact might occur, for instance, where a defendant was scored points for a prior crime and he claims not to have been convicted of the prior crime. If such fact-based claims are not cognizable under rule 3.800(a), there would never be a need for an evidentiary hearing.

On the other hand, the procedural encumbrances of rule 3.850 are not considerable. Rule 3.850 merely requires the moving party to swear

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58. *See* Roth v. State, 479 So. 2d 848 (Fla. 3d Dist. Ct. App. 1983); Penoyer v. State, 485 So. 2d 7 (Fla. 2d Dist. Ct. App. 1986); Smith v. State, 481 So. 2d 988 (Fla. 5th Dist. Ct. App. 1986); Simmons v. State, 485 So. 2d 476 (Fla. 2d Dist. Ct. App. 1986). These are but a few of scores of reported cases in which the appellate court reversed the trial court, not necessarily on the substance of the movant's claim, but merely because the trial court failed to either (a) attach those portions of the record necessary to enable the appellate court to see conclusively that the movant was entitled to no relief, or (b) hold an evidentiary hearing.

59. *See* the cases collected *supra* at note 58.

60. *See* Dailey v. State, 488 So. 2d 532, 533 (Fla. 1986); Senior v. State, 502 So. 2d 1360, 1362 (Fla. 5th Dist. Ct. App. 1987).

61. *Dailey*, 488 So. 2d at 533; *Senior*, 502 So. 2d at 1362.

62. *Dailey*, 488 So. 2d at 533; *Senior*, 502 So. 2d at 1362.

to his motion and provide various historical details on its face. If he has raised the exact same illegal sentence argument on direct appeal, for instance, he is required to say so in his new motion. The requirement of an evidentiary hearing called for under 3.850 would obviously never have to be invoked if indeed a challenge to an illegal sentence turns purely on a matter of law apparent from the record. Likewise, the trial court need not invoke the rule's provision allowing the court to order the state to respond. Yet if the movant raises an arguable point of law, the rule allows it.

In addition, rule 3.850 spells out the trial court's obligation to attach those portions of the record necessary to show conclusively that the movant was entitled to no relief. Rule 3.800 contains no such provision to expedite appeals. Here, the strict procedural dictates of rule 3.850 cannot harm, and they might help.[63]

The mere existence of two rules under which a prisoner can move to reduce his sentence causes confusion. For instance, in *Hobbs v. State*,[64] a prisoner moved under rule 3.800(a) for the court to reduce an allegedly illegal sentence.[65] The trial court entered an order,[66] as rule 3.850—but not rule 3.800(a), under which Hobbs moved—provides for it to do, directing the state to respond to the "Defendant's Motion for Post Conviction Relief Pursuant to Fla. R. Crim. P. 3.850." The state then responded by arguing that, because the motion was not sworn, as required by rule 3.850, relief should be summarily denied because of the movant's failure to comply with the rule.[67]

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63. In Caban v. State, 551 So. 2d 613 (Fla. 4th Dist. Ct. App. 1989), the court considered a rule 3.850 motion that included a sentencing challenge. The district court remanded the sentencing challenge to the trial court "to either attach those portions of the record to establish that appellant's sentencing challenge is without merit or to resentence appellant in accordance with the sentencing guidelines." While this language is standard in 3.850 appeals, what if the appellant had filed his motion under 3.800? Then the trial court would not be required by the rule to attach to its order those portions of the record necessary to show conclusively that the movant was entitled to no relief.

64. 547 So. 2d 1290 (Fla. 4th Dist. Ct. App. 1989).

65. Motion to Correct Sentence at 1, Hobbs v. State, 547 So. 2d 1290 (Fla. 4th Dist. Ct. App. 1989) (No. 88-1640) (the motion also can be located in State v. Hobbs, six cases consolidated under No. 84-11233-CF (Broward County Circuit Court)).

66. Order Requiring Response to Defendant's Motion for Post Conviction Relief Pursuant to FLA. R. CRIM. P. 3.850 at 1 (Sept. 29, 1987), *Hobbs*, 547 So. 2d at 1290; *see supra* note 65.

67. Response to Defendant's Motion to Correct Sentence at 1 (Dec. 31, 1987), *Hobbs*, 547 So. 2d at 1290; *see supra* note 65.

The state cited cases interpreting rule 3.850 in support of its argument.[68]

On January 20, 1988, for "the reasons stated in the response to the defendant's motion,"[69] the trial court summarily denied the motion. From the start, the inmate moved under rule 3.800, yet the state and the trial court treated the motion as one under rule 3.850. As far as the record shows, the trial court might have wrongly denied the motion because it was not sworn,[70] although, since Hobbs moved under rule 3.800, the motion was not required to be sworn.

Could Hobbs appeal the denial? While there is an appellate rule specifically providing for appeal from a denial of a rule 3.850 motion,[71] there is no rule providing for an appeal from a motion under rule 3.800(a), even though, since *Whitfield*, a trial court's denial of a motion to correct a sentence under rule 3.800(a) is appealable. Furthermore, while Florida Statutes section 924.06(1) provides for an appeal from a "sentence imposed outside the guideline range," the statute is silent on whether, in addition to the direct appeal obviously provided for from the sentence, the statute means to provide for an appeal from a denial of a 3.800(a) motion. The complete lack of any guidance in

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68. The state cited Scott v. State, 464 So. 2d 1171 (Fla. 1985), and Catlett v. State, 367 So. 2d 735 (Fla. 4th Dist. Ct. App. 1979).

69. Order Denying Motion to Correct Sentence at 1 (Jan. 20, 1988), *Hobbs*, 547 So. 2d at 1290; *see supra* note 65.

70. This is not to say the trial court necessarily erred. The state's response cited several potential reasons to deny relief. One was that since the sentences were not "illegal," in the sense that they were within the broad statutory minimum and maximum for the crimes (disregarding the sentencing guidelines), they were not reviewable under rule 3.800(a), an argument refuted by the supreme court's decision in Whitfield v. State, 487 So. 2d 1045 (Fla. 1986). Another reason was that a claim that a prisoner was sentenced under the wrong presumptive guidelines range had to be raised in the trial court and on direct appeal and could not be raised in a motion for post-conviction relief. Another was that, even if the sentence deviated from the guidelines, a deviation was legal because the prisoner agreed to his sentence in a plea bargain. The Fourth District Court of Appeal apparently affirmed the trial court on the basis of the latter argument, since the court's one-sentence ruling, *Hobbs*, 547 So. 2d at 1290, merely referred to three cases, Quarterman v. State, 527 So. 2d 1380 (Fla. 1988), Holland v. State, 508 So. 2d 5 (Fla. 1987), and Rowe v. State, 523 So. 2d 620 (Fla. 2d Dist. Ct. App. 1988), all of which held that a sentence agreed upon in plea bargaining was lawful, notwithstanding that it differed from what the sentence would have been under the guidelines. Therefore, the state's erroneous assertion that the prisoner's motion had to be dismissed for failure to be sworn did not necessarily have any bearing on the final result.

71. FLA. R. APP. P. 9.140(g).

the statutes and rules is further evidence that rule 3.800(a) has become anachronistic in the wake of the creation of sentencing guidelines and the concurrent expansion of post-conviction collateral attacks on "illegal" sentences.

The Fourth District Court of Appeal was so concerned about whether a motion under rule 3.800(a) was appealable that it decided the answer *en banc* in *Johnson v State*.[72] The court was worried[73] that confusion might be caused by its earlier ruling in *Adams v. State*,[74] where the court said: "We dismiss the appeal since an order denying a motion to correct, reduce or modify a sentence is not appealable."[75] On its face, the unqualified language of the *Adams* ruling seemed to say that there is no appeal from any motion under rule 3.800. However, in *Johnson*, the court said:

> In *Adams*, we held that an order denying a motion to correct, reduce or modify a sentence under rule 3.800 is not appealable. The *Adams* decision was intended to prevent appeals from orders on requests to mitigate or modify a sentence made under rule 3.800(b). However, *Adams* was not intended to bar review on appeal of challenges to the legality of a sentence specifically authorized by the Florida Supreme Court to be raised in a rule 3.800(a) motion. *See State v. Whitfield*, 487 So. 2d 1045 (Fla. 1986), holding that computational errors in sentencing guidelines can be raised on direct appeal, even when no contemporaneous objection was made at trial, and amending rule 3.800(a) to facilitate correction of such errors at the trial court level.
>
> This distinction is best understood by considering that rule 3.800 addresses two different types of motions for correction or modification of sentence. A different standard of appealability applies to each section, but because many of the presentencing guidelines cases do not refer to which section of the rule was under consideration, the distinction has been occasionally blurred in case law.[76]

Indeed, a year earlier the fourth district had blurred the distinction in *Knight v. State*,[77] where the court said it "must dismiss this

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72. 543 So. 2d 1289 (Fla. 4th Dist. Ct. App. 1989).
73. *Id.*
74. 487 So. 2d 1209 (Fla. 4th Dist. Ct. App. 1986).
75. *Id.* at 1209.
76. *Johnson*, 543 So. 2d at 1290.
77. 522 So. 2d 1076 (Fla. 4th Dist. Ct. App. 1988).

appeal for lack of jurisdiction pursuant to *Adams*," even though the appellant had attacked the computation of his sentencing guidelines score. Likewise, in an unpublished ruling, *Harkissoon v. State*,[78] the court dismissed for lack of jurisdiction under *Adams*, although the appellant had argued that he was the victim of a guidelines error.[79] One member of the three-judge panel, Judge Harry Lee Anstead, disagreed with the majority and, on the form where the judges cast their vote,[80] wrote: "I would treat [this appeal] as an appeal from a 3.850 [and] not dismiss."

Prior to its ruling in *Johnson*, the Fourth District Court of Appeal sought guidance on whether a motion under rule 3.800 was appealable by directing the state to brief the question of appealability in at least two cases, besides *Johnson*, of appeals from denials of 3.800 motions.[81] Although *Johnson* found a denial of a 3.800(a) motion to be appealable, it did not specifically name a statute or rule creating any right to appeal from a motion under 3.800(a). There simply is none.

IV. The Solution: Rewrite the Rules

There is no need for rule 3.800(a). Florida Statutes section 924.06 provides for a direct appeal from a sentence in excess of the guidelines. Rule 3.850 provides a basis for a collateral attack on a sentence in excess of the guidelines, and the rule provides procedures to effectuate the process of collateral attack and safeguard against abuse. Trial courts are extremely familiar with rule 3.850, and a direct appeal from a trial court ruling on a 3.850 motion is clearly provided for in the rules. Florida's rules should simply be rewritten so that rule 3.800(a) is eliminated, and it is clear that rule 3.850 is the mechanism for a post-

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78. Order of the Court at 1, Harkissoon v. State, No. 88-1012 (Fla. 4th Dist. Ct. App. May 4, 1988).

79. Motion to Correct an Illegal Sentence at 1, Harkissoon v. State, No. 88-1012 (Fla. 4th Dist. Ct. App.) (also available in State v. Harkissoon, No. 85-10651CF (Broward County Circuit Court)). Harkissoon argued that some of the crimes scored against him should have been scored as "additional offenses at conviction," instead of "prior record," which would have caused fewer points to accrue. His argument was another example of the many types of disputes over application of the guidelines.

80. This is a separate copy of the order cited *supra*, note 78, on which the judges cast their votes by initialing the proposed order before it is dated and made official by republication on a separate form, without the initials. The voting form also becomes part of the public record in the file, No. 88-1012.

81. Order of the Court (Aug. 2, 1988), Hamilton v. State, No. 88-2038 (Fla. 4th Dist. Ct. App.); *see supra* note 65 (Order of the Court dated June 24, 1988).

conviction collateral attack on an illegal sentence or a sentence outside the guidelines.

Arguably, rule 3.850 already provides a mechanism for any challenge to a sentence, and therefore the rule need not be revised. However, a few words of clarification would simply eliminate any doubt about whether 3.850 is intended to be the vehicle for relief when an inmate claims an error in the application of the guidelines. In *Whitfield*, the supreme court, confronted with rule 3.800(a)'s provision for a trial court to change "an illegal sentence," opted to add a clarifying phrase, "or an incorrect calculation made by it in a sentencing guidelines scoresheet."[82] Likewise, the proposed revision incorporates a parallel change in rule 3.850 to qualify its provision for relief from an illegal sentence.

These changes would conform Florida's rules to the federal model in effect since the passage of the Comprehensive Crime Control Act of 1984.[83] The exact language of changes in the rules that would accomplish the ends this article proposes is published in Appendices II and IV. In addition to repealing rule 3.800(a), the proposed rules changes make other refinements.

For one thing, the proposal seeks to modernize and clarify archaic or confusing language in rule 3.850. For instance, the first sentence of the current rule contains a ninety-seven-word clause between the subject, a "prisoner," and its verb, "may move." The proposed revision brings the subject and verb together and thus makes the sentence easier to read without changing its substance. The proposed revision also consistently refers to the trial court as the trial court, whereas the current rule, for no apparent reason, alternately refers to the trial court and the trial judge. Also, the proposed revision recasts a few phrases to avoid referring to the movant by the masculine pronoun, "he."

In addition, the proposal repeals the third paragraph of rule 3.850, which no longer has any application. The paragraph established a window from January 1, 1985, through January 1, 1987, for prisoners to file for relief from allegedly illegal convictions without running afoul of a two-year statute of limitations placed in the rule in 1985.

Finally, the proposal provides a subsection numbering system for

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82. Whitfield v. State, 487 So. 2d 1045, 1047 (Fla. 1986).

83. One difference is that, instead of repealing the federal version of rule 3.800(a), the Congress chose to insert a new rule allowing a trial court to correct a sentence upon remand from an appellate court from a direct appeal. *See supra*, note 44.

rule 3.850. The existing rule is the longest Florida rule without subdivisions for easy reference.

V. Conclusion

Rule 3.850 was designed to accommodate all post-conviction attacks on judgments of conviction and sentences. It should be so utilized. Rule 3.800(a) duplicates the function of rule 3.850 in one narrow category of collateral attacks, those dealing with questionably legal sentences. It is needless and confusing. Its repeal would channel all post-conviction attacks on sentences allegedly in violation of the sentencing guidelines through the time-tested and effective procedures outlined by 3.850.[84]

Robert Rivas

84. In 1989 the author sent a draft of this article to William Pierce White III, an assistant public defender in the Fourth Judicial Circuit and vice chairman of the Supreme Court Committee on Criminal Procedure Rules. Mr. White sent copies of the article to the members of the committee in advance of a meeting held in Orlando on December 1, 1989. At the meeting, the committee chairman, Anthony C. Musto, of Miami, directed a subcommittee chaired by Mr. White to consider the proposal. The subcommittee has postponed consideration of the proposal until 1990.