Florida Law Review

Volume 20 | Issue 3 Article 5

January 1968

Collateral Post Conviction Remedies in Florida

Gene D. Brown

COLLATERAL POST CONVICTION REMEDIES IN FLORIDA

GENE D. BROWN*

March 18, 1963, was a significant date in the development of criminal due process. On that date the United States Supreme Court delivered a set of judicial quintuplets that piloted a new era in the application of constitutional guarantees of individual rights.[1] All of these decisions were important, but the case of *Gideon v. Wainwright*[2] was destined to overshadow the others. Clarence Earl Gideon had been convicted in Bay County, Florida, of breaking and entering with intent to commit a misdemeanor. Gideon's request for appointed counsel was refused and he was sentenced to five years in the state penitentiary at Raiford. The Florida Supreme Court denied Gideon's petition for a writ of habeas corpus, relying on controlling precedent from the United States Supreme Court.[3] But when the United States Supreme Court accepted Gideon's pro se petition for a writ of certiorari and set the case for argument,[4] thoughtful leaders of the Florida bench and bar quickly realized that this "precedent" was condemned to early interment.

The Florida Attorney General's Office took immediate steps to marshal assistance from other states, realizing that Abe Fortas would present a strong case as Gideon's appointed counsel. This call for help backfired, however, when twenty-two states refused to aid Florida and joined instead in an amicus curiae brief filed in Gideon's behalf. Only Alabama and South Carolina submitted briefs supporting Florida's position.

The Florida Supreme Court and the Florida Judicial Council began preparation for the *Gideon* decision well before it was actually handed down. At a meeting of the council in the Supreme Court Building on September 15, 1962, several members of the court emphasized the potential impact on Florida should the *Gideon* case be overruled. In this event, over half of Florida's prisoners would then have an immediate right to apply for post-conviction relief.[5]

The only post-conviction remedies available, however, were habeas corpus and *coram nobis,* both of which were circumscribed by procedural restrictions. Venue in habeas corpus could be laid only in the jurisdiction of incarceration. Thus, thousands of prisoners in Raiford could be expected to seek relief in the Florida Supreme Court, the First District Court of Appeal, and the Circuit Court of the Eighth Circuit. This would have constituted an almost

*B.S. 1963, Florida State University; J.D. 1966, University of Florida; Member Tallahassee, Florida, Bar, The Florida Bar, and The American Bar Association.

1. Lane v. Brown, 372 U.S. 477 (1963); Draper v. Washington, 372 U.S. 487 (1963); Fay v. Noia, 372 U.S. 391 (1963); Douglas v. California, 372 U.S. 353 (1963); Gideon v. Wainwright, 372 U.S. 335 (1963).

2. 372 U.S. 335 (1963).

3. Betts v. Brady, 316 U.S. 455 (1942).

4. Gideon v. Cochran, 370 U.S. 908 (1962).

5. As of June, 1962, 4,065 of the 8,000 prisoners then in custody in Florida had pleaded guilty without the assistance of counsel, and 477 others had pleaded not guilty without counsel. Figures taken from files of Florida State Division of Corrections.

unbearable judicial responsibility, to the detriment of other litigants in those three courts. It would have required the supreme court and the First District Court of Appeal to appoint a commissioner in each case requiring factual determinations, and the circuit judges of the Eighth Circuit would have been overburdened with habeas corpus hearings. *Coram nobis* was even more cumbersome, being hamstrung by numerous restrictions, including a trial by jury.[6]

Those present at the meeting of September 15, 1962, understood the urgency of the situation. On October 27, 1962, the judicial council strongly recommended to the supreme court the early adoption of an expeditious procedure for handling post-conviction claims.[7] In addition, the council began preparing legislation to establish a statewide public defender system for submission to the 1963 legislature. At that time only three circuits had public defenders.

There were at least two alternatives for an effective post-conviction procedure. The court could wait for the legislature to enact a statutory remedy, or, as the council had recommended, it could adopt a court rule under the authority of article V, section III, of the Florida Constitution. The court chose the latter approach for two basic reasons. First, a court rule would provide the needed flexibility; it could be revised at any time by court order, while a statutory procedure could be changed only at one of the biennial legislative sessions and then only after a tedious process. Second, time was of the essence and the legislature was not yet in session.

The search for a model after which Florida's post-conviction rule could be patterned led the court to section 2255, title 28, United States Code. This statute had served the federal courts well for fourteen years. It had accumulated an extensive body of case law, including several federal decisions upholding the constitutionality of the statute.[8]

Using section 2255 as a model, the Florida Supreme Court drafted and promulgated Florida Criminal Procedure Rule Number 1.[9] This rule was made effective April 1, 1963, just two weeks after *Gideon* was announced and before the Supreme Court mandate was actually received.[10] The rule was designed to spread the base of jurisdiction by allowing a prisoner to attack his allegedly invalid sentence in the sentencing court, which would have the necessary files and records. From there, the prisoner could seek review of an adverse ruling through an orderly and established appellate process, which would help solve the federal-state exhaustion problem.[11]

---

6. *See* Russ v. State, 110 So. 2d 11 (Fla. 1959).

7. Florida Judicial Council, Eighth Annual Report 6-7 (June 30, 1963).

8. *E.g.*, United States v. Anselmi, 207 F.2d 312 (3d Cir. 1953), *cert. denied*, 347 U.S. 902 (1954); Martin v. Hiatt, 174 F.2d 350 (5th Cir. 1949).

9. *See* Appendix I. As of January 1, 1968, "Rule One" became Rule 1.850 of the new Florida Rules of Criminal Procedure. For purposes of this article, however, the rule will be referred to as "Rule One" because this is its title in practically all the cases to be discussed and because, to thousands of Florida prisoners, it undoubtedly will remain "Rule One," both in name and in importance.

10. *In re* Criminal Procedure Rule No. 1, 151 So. 2d 634 (Fla. 1963).

11. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963).

The Florida Supreme Court never questioned the retroactive effect of *Gideon*. This was the only logical conclusion because the Gideon petition was itself a collateral attack upon a judgment long since laid to rest under established precedent. The basic contention of the petition was that *Betts v. Brady*[12] should be overruled and a new rule of law applied to Gideon's conviction. When the United States Supreme Court accepted this contention by reversing his conviction it had to be assumed that other Florida prisoners were entitled to the same constitutional protection.

The period following *Gideon* emphasized the reality of this retroactivity and the necessity of some type of post-conviction remedy. During the two weeks following the announcement of *Gideon*, 118 habeas corpus petitions were filed in the Florida Supreme Court, while only 300 were filed during all of 1962.[13] Between April 1, 1963, and April 1, 1966, 6,403 Florida prisoners filed post-conviction motions. Of these, 2,506 received new trials, 1,311 were released with no further charges, and 111 committed new crimes in Florida and were resentenced to prison.[14] The Division of Corrections stopped publishing records of this type in April 1966, but Rule One and other post-conviction remedies continue to be widely used.

By adopting Rule One, Florida accepted a position of leadership among the states in the area of post-conviction remedies. The purpose of this article is to discuss Florida's collateral, as contrasted with direct or appellate, procedures for attacking a judgment of conviction. Rule One will be discussed in detail because, to a great extent, it has replaced the more conventional remedies of habeas corpus and *coram nobis*. These latter remedies will also be considered, but only as they relate to Rule One.

Pleading Requirements Under Rule One

A Rule One motion must be directed to the court in which the conviction occurred. It cannot be filed initially in an appellate court.[15] The motion should at least be legible, preferably printed or typed, but the rule does not prescribe any particular form. If a similar motion has been filed, the Rule One motion should state where the first motion was filed and its disposition.[16] All motions should be under oath,[17] but this is a prerequisite to relief, not to a hearing.[18] It would be unreasonable to deny a motion for failure to have it verified, since many prisoners detained by the State of Florida do not have access to an officer before whom an oath can be administered. Rather than summarily denying an otherwise adequate motion, the trial judge should proceed with the hearing and have the prisoner verify his motion at the first opportunity.[19]

12. 316 U.S. 455 (1942).
13. Figures taken from files in Clerk's Office, Florida Supreme Court.
14. Figures taken from files of Florida Division of Corrections.
15. Beauchamp v. State, 201 So. 2d 582 (1st D.C.A. Fla. 1967).
16. Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963).
17. *Id.*
18. Sampson v. State, 158 So. 2d 771 (2d D.C.A. Fla. 1963).
19. Ashley v. State, 158 So. 2d 530 (2d D.C.A. Fla. 1963).

It is not necessary to obtain leave from an appellate court to file a Rule One motion attacking a conviction affirmed by that court, although such permission is a prerequisite to application for a writ of error *coram nobis*.[20] The trial court should dismiss all successive motions by a prisoner if these motions make claims that are substantially the same as those made in the original motion filed by the same prisoner.[21] But a successive motion by the same prisoner should not be dismissed if it states even one new and sufficient claim.[22]

One basic requirement of a motion to vacate under Rule One is that the motion state a prima facie case. That is, the motion must allege facts that, if proved, will entitle the prisoner to have his sentence vacated.[23] For example, in order to state a prima facie case on *Gideon* grounds, the following must be alleged: (1) lack of counsel at trial or other critical stages of the proceedings; (2) lack of intelligent waiver of the right to counsel; and (3) indigency at time of trial.[24] Some courts also have required the prisoner to allege conviction of a felony and custody by the state,[25] but because most motions are mailed from Raiford and written on prison stationery many courts have logically assumed that the movant was in state custody and had been convicted of a felony. It is uniformly recognized, however, that the motion must allege specific facts, not mere legal conclusions.[26] A motion stating simply that the movant has been denied his rights under the fourteenth amendment, or his right to counsel, may be summarily dismissed.[27]

When a Rule One motion fails to state a prima facie case, it should be dismissed with leave to amend within a specified time.[28] Amendments to Rule One motions should be liberally allowed. It must be remembered that although Rule One is not a substitute for habeas corpus, it is coextensive therewith[29] and is entitled to the same liberality traditionally accorded habeas corpus petitions.[30] A Rule One motion is normally drafted by a prisoner pro se and should not be held to the same high standard of pleading that would be required of a motion filed by an attorney.[31]

A Rule One motion should not be summarily dismissed if the elements necessary to state a prima facie case can be reasonably inferred from the motion. In *Hall v. State*[32] the prisoner filed a motion stating:[33]

20. Solitro v. State, 166 So. 2d 474 (2d D.C.A. Fla. 1964); *Ex parte* Welles, 53 So. 2d 708 (Fla. 1951).

21. Fortin v. State, 203 So. 2d 207 (3d D.C.A. Fla. 1967); Hunt v. State, 183 So. 2d 858 (3d D.C.A. Fla. 1966).

22. Piehl v. State, 173 So. 2d 723 (1st D.C.A. Fla. 1965), *rev'd on other grounds*, 184 So. 2d 417 (Fla. 1965); *cf.* Carnley v. Cochran, 369 U.S. 506 (1962).

23. *See* Sampson v. State, 158 So. 2d 771 (2d D.C.A. Fla. 1963).

24. King v. State, 157 So. 2d 440 (2d D.C.A. Fla. 1963).

25. Hicks v. State, 165 So. 204 (2d D.C.A. Fla. 1964).

26. *See* Tynes v. State, 163 So. 2d 19 (3d D.C.A. Fla. 1964).

27. *Cf.* Sanders v. United States, 373 U.S. 1 (1963).

28. *Cf.* Turner v. State, 161 So. 2d 11 (2d D.C.A. Fla. 1964).

29. Gideon v. Wainwright, 153 So. 2d 299, 300 (Fla. 1963).

30. Ashley v. State, 158 So. 2d 530 (2d D.C.A. Fla. 1963).

31. Andrews v. State, 160 So. 2d 726, 727 (3d D.C.A. Fla. 1964).

32. 160 So. 2d 527 (2d D.C.A. Fla. 1964).

33. *Id.* at 528.

> [A]t the time of my trial, I was unable to afford the services of an attorney for my defense and therefor [*sic*] pled "Guilty" for the purpose of receiving the mercy and good offices of the court in my behalf. It was my belief, at the time, that since I was unable to provide myself with adequate counsel for my defense and not being educationally equipped to defend myself, that a plea of "Guilty" was the most prudent choice.

The trial judge denied the motion without a hearing, apparently because it did not adequately allege all the essential elements of a prima facie case under Rule One. The Second District Court of Appeal reversed, correctly stating that a motion drafted by a prisoner "should not be held up to scrutiny for technical niceties."[34] The district court concluded that it was reasonable to infer from the facts stated in the motion that the prisoner was alleging lack of counsel at trial, indigency, and lack of intelligent waiver of his right to appointed counsel, the essential elements of a claim for relief on *Gideon* grounds.

Rule One was intended simply as an expedient vehicle for getting the belatedly recognized claims of prisoners before proper forums for examination and determination. If apparently meritorious claims are summarily dismissed on purely technical grounds, the purpose of the rule is defeated because the prisoner must then turn to another court for a hearing on his post-conviction contentions.

Almost any prison-drafted petition can be found technically inadequate. But the administration of criminal justice will be better served if trial judges will think in terms of trying to dispose of Rule One motions on their merits rather than on procedural shortcomings. This is often difficult because many prisoners have little regard for the facts, and some judges therefore become a bit cynical concerning the asserted constitutional claims of all prisoners. This is especially true under Rule One procedure because the trial judge who considers the motion often knows the prisoner through conducting his trial and passing the sentence he is serving. It must be remembered, however, that if a prisoner lies in his Rule One motion to the trial court he may also lie in his habeas corpus petition to an appellate court, which does not have the necessary files and records to determine the truth or falsity of his allegations.

If the prisoner fails to state a prima facie case, his motion may be cured by what is shown in the record. For example, if the record shows that the defendant did not have counsel at trial and was not offered counsel, this cures his failure to allege that he did not intelligently waive his right to counsel at trial.[35] A somewhat related problem is demonstrated by *Holmes v. State*[36] in which the prisoner filed a Rule One motion alleging that he was denied his right to counsel at trial. The trial judge examined the "files and

---

34. *Id.*

35. Dixon v. State, 163 So. 2d 771 (2d D.C.A. Fla. 1964); *cf.* Carnely v. Cochran, 369 U.S. 506 (1962).

36. 165 So. 2d 433 (2d D.C.A. Fla. 1964). *See also* Falagon v. State, 167 So. 2d 62 (2d D.C.A. Fla. 1964).

records" and denied the motion on the ground that the prisoner had waived his right to counsel by not advising the court of his indigency at the original trial. The Second District Court of Appeal reversed, holding that since the record also showed the prisoner was not advised of his right to appointed counsel, he could not be required to advise the court of his indigency.

Many trial judges apparently believe that it is more expedient to look immediately to the files and records when the prisoner's motion fails to state a prima facie case. In this way, the judge can proceed with a hearing if the record indicates that the prisoner may be entitled to relief. If the record "conclusively" shows that the prisoner is entitled to no relief, his Rule One motion may then be dismissed with prejudice to his right to file another similar motion. In either event, the prisoner's claims can be disposed of in less time and probably with less judicial effort than would ultimately be required as a result of dismissing an inadequate motion with leave to amend or to file another motion.

The practice of looking to the files and records in each case is actually more consistent with the language of the rule than the practice of summarily dismissing a motion that fails to state a prima facie case. The rule provides that a hearing shall be held "[u]nless the motion *and* the files and records of the case conclusively show that the prisoner is entitled to no relief."[37] Under this wording, it would seem that a prisoner's motion could be summarily dismissed without a hearing only when: (1) the motion fails to state a prima facie case *and* (2) the files and records conclusively show that he is entitled to no relief. This interpretation has not prevailed, however, and it is safe to say that under existing case law a Rule One motion can be summarily dismissed without a hearing if it fails to state a prima facie case.

Rule One procedure could be greatly improved and simplified through promulgation of a "Rule One Form" by the Florida Supreme Court. The Division of Corrections could make copies of the form available to all prisoners wishing to file a Rule One motion. The form could be designed to elicit concise answers to all questions necessary for prompt and proper disposition of the Rule One motion, thereby saving a great deal of judicial time and effort. Under the present system there is no uniformity whatsoever. The motion is often illegible, disorderly, repetitious, discursive, and generally unintelligible. Either intentionally or through ignorance, many Rule One motions are little more than a series of ambiguous conclusions interspersed with quotations from appellate decisions. Like some habeas corpus petitions, these motions often seem interminable and can continue for one hundred or more pages. Quite often, the movant is genuinely unable to state concisely his grounds for relief. This problem could be alleviated by adoption of a Rule One form. This form would contain only enough space for categorically listing the specific facts on which the motion is based and would require the prisoner to answer certain specific questions that are not required to be answered under the present procedure. For example, he would have to state whether he had taken an appeal from his original conviction and

37. *See* Appendix I (emphasis added).

whether he had filed any other similar motion or petition attacking his sentence. With these references, the trial judge might be able to determine quickly that the grounds raised in the motion before him had already been decided adversely to the prisoner in some other proceeding.

Some will argue that a form of this type should not be adopted because it will encourage the filing of Rule One motions. The contrary, however, would seem to be the more likely result. Many prisoners seem to enjoy the drafting and filing of voluminous, repetitious post-conviction motions containing wild allegations and conclusions. Under the present procedure, there is no way to determine quickly whether a Rule One motion is repetitious. The prisoner can always rearrange his facts and allegations. With a form, however, there would be a space for each specific answer, and the judge could quickly compare the motion with any others filed by the same prisoner.

Even if the form would encourage the filing of Rule One motions, this is not a valid argument against its adoption. The purpose of the rule is to provide a useful vehicle for the prompt and expeditious determination of post-conviction claims. If the prisoner's allegations have merit, he should be allowed to present them in a fair and orderly manner without the technical pitfalls built into the present procedure. It is simply unrealistic to require a legally untrained, and often uneducated, prisoner to draft his own Rule One pleading. Such a requirement does not aid the administration of justice and it certainly does not strengthen the operation of Rule One. It is recommended, therefore, that the Florida Supreme Court promulgate as an addendum to Rule One a form similar to that set forth at the conclusion of this article.[38]

Examination of the Files and Records

As discussed above, Rule One requires a hearing "[u]nless the motion and the files and records conclusively show that the prisoner is entitled to no relief . . . ." This creates a presumption in favor of a hearing in each case. Because of this presumption, it is important to determine what is included within the term "files and records" and what inferences may be drawn from their content.

Letters from the prisoner and parole reports cannot be considered as part of the files and records.[39] Also, an affidavit by an attorney filed with the prosecuting attorney's answer is not a part of the files and records; this is simply evidence to be considered at the hearing.[40] In *Richardson v. State*,[41] the county solicitor filed an unverified written summary of the trial proceeding made by a court reporter twenty years after the trial. This summary stated

38. *See* Appendix II. This form is substantially similar to that used successfully for many years by the United States District Court for the Northern District of Illinois in handling motions under 28 U.S.C. §2255 (1964). A form of this type could also improve Florida's habeas corpus procedure, but that reform must await another day.

39. Horton v. State, 170 So. 2d 470 (1st D.C.A. Fla. 1964), *cert. denied*, 174 So. 2d 33 (1965).

40. Sampson v. State, 158 So. 2d 771 (2d D.C.A. Fla. 1963).

41. 168 So. 2d 765 (1st D.C.A. Fla. 1964). *See also* Murphy v. State, 166 So. 2d 759 (1st D.C.A. Fla. 1964).

that the prisoner had counsel at trial, but the First District Court of Appeal held it could not be considered as part of the files and records so as to deny a hearing.

One recurring problem under Rule One procedure involves the question whether a trial judge can rely upon his memory or personal knowledge in summarily denying a prisoner's motion. Some trial judges are inclined to simply deny a motion without a hearing when they remember from conducting the trial that the prisoner either had counsel or waived his right to counsel. This procedure, however, is not permissible under the rule. The memory of the trial judge cannot serve as the basis for denying a Rule One motion without a hearing.[42] The record must *conclusively* show that the prisoner is entitled to no relief.[43] It is not sufficient that the files and records seem to prove, or strongly indicate, that the prisoner has no valid claim. Dismissing a Rule One motion without a hearing is akin to granting a summary judgment. It is a judicial holding that there are no factual issues to be determined and that the prisoner is not entitled to relief as a matter of law.

If the files and records conclusively show that the prisoner voluntarily and intelligently waived his right to counsel, a Rule One motion based on *Gideon* grounds should be summarily dismissed. But the question of what constitutes a conclusive showing of waiver has raised quite a few problems under Rule One.

The standard statement found in many records is that the defendant "does not have counsel and does not desire counsel." During the early stages of Rule One development, the Courts of Appeal of the First and Second Districts arrived at opposite conclusions in deciding whether this language conclusively showed a waiver. The first district rather consistently held that it did, while the second district consistently held that the language was inconclusive.[44] The first district had recognized an exception in one case involving a minor.[45] The problem was finally resolved by the Florida Supreme Court in *Mason v. State*.[46] The trial court in that case summarily denied Mason's Rule One motion with an order reciting the following portion of the record: "[U]pon inquiry by the court to each defendant as to whether they had counsel or desired counsel, each defendant announced that he was without counsel and did not desire the same." There were two defendants. The First District Court of Appeal affirmed, holding the record was sufficient to conclusively establish a waiver. The supreme court reversed, pointing out that there was no showing in the record that Mason was advised of his right to *appointed* counsel. The court reasoned that without such a showing the trial court could not conclusively and summarily determine that Mason had made an

42. *E.g.*, Beadles v. State, 162 So. 2d 4 (2d D.C.A. Fla. 1964).

43. Quillian v. State, 163 So. 2d 1 (3d D.C.A. Fla. 1964). *Cf.* Baker v. State, 202 So. 2d 563 (Fla. 1967) in which the supreme court held that two codefendants were denied their right to effective counsel by the appointment of two attorneys to represent them *jointly* rather than severally.

44. *See, e.g.*, Hale v. State, 162 So. 2d 5 (1st D.C.A. Fla. 1964); Flemming v. State, 165 So. 2d 261 (2d D.C.A. Fla. 1964).

45. Mullins v. State, 157 So. 2d 701 (1st D.C.A. Fla. 1963).

46. 176 So. 2d 76 (Fla. 1965).

intelligent waiver of his right to counsel. Since Mason's trial was prior to *Gideon* it would have been illogical to conclusively assume that he intended to waive his then unknown "right" to appointed counsel. How could he "waive" a nonexistent, or at least judicially unrecognized, right? It would have been just as reasonable to assume that Mason's statement "that he was without counsel and did not desire the same" meant that he was without hired counsel and did not desire to hire same, knowing that he could not afford to do so.[47]

The *Mason* decision has the effect of impliedly overruling several other cases involving slightly different statements in the records. For example, in *Spriggs v. State*[48] the record showed that the defendant, who had an eighth grade education, stated that he did "not require the services of counsel before entering a plea." The First District Court of Appeal affirmed a summary dismissal of the defendant's Rule One motion, holding the record was sufficient to conclusively show a waiver. In light of the holding and rationale of *Mason*, however, it is doubtful that such a statement in the record could now be held to conclusively establish a waiver.

It is difficult to see how a Rule One motion can ever be summarily dismissed on the basis of competent waiver unless the record affirmatively shows the defendant was advised of his rights. A record that is silent on the question of knowledge cannot "conclusively show" that a defendant made a knowing and intelligent waiver. This, apparently, is the rationale underlying decisions holding that a silent record does not create a presumption of waiver,[49] and that a waiver cannot be presumed from a plea of guilty.[50] Even if the record conclusively shows that the prisoner waived his right to counsel at trial, it cannot be assumed that this right was waived at other critical stages of the proceedings.[51]

If a Rule One motion is to be summarily dismissed because of a competent waiver, this waiver must affirmatively appear on the face of the "files and records." It is not permissible for the trial judge to independently investigate the waiver question and then summarily deny a Rule One motion on the basis of this investigation.[52] If an investigation is needed, it should be in the form of a hearing as provided by the Rule. It is also not permissible for the trial judge to rely upon his own knowledge of the case as the primary basis for denying a Rule One motion due to waiver when this waiver is not supported by the record.[53]

A basic distinction must be drawn between a waiver of the right to appointed counsel at trial and a waiver of the right to appointed counsel

47. *Cf.* Merritt v. State, 165 So. 2d 245 (2d D.C.A. Fla. 1964).

48. 158 So. 2d 786 (1st D.C.A. Fla. 1963).

49. King v. State, 157 So. 2d 440 (2d D.C.A. Fla. 1963); Carnley v. Cochran, 369 U.S. 506 (1962).

50. *E.g.*, Dortch v. State, 165 So. 2d 409 (1st D.C.A. Fla. 1964).

51. Fulmore v. State, 198 So. 2d 101 (2d D.C.A. Fla. 1967) (right to counsel at sentencing).

52. Caminita v. State, 159 So. 2d 921 (2d D.C.A. Fla. 1964); *cf.* Keur v. State, 160 So. 2d 546 (2d D.C.A. Fla. 1963).

53. Beadles v. State, 162 So. 2d 4 (2d D.C.A. Fla. 1964).

on direct appeal. At trial, the court is under an affirmative duty to advise an indigent defendant of his right to counsel. If the files and records do not show that such advice was given or that the defendant definitely knew of his right to appointed counsel, a summary dismissal of a Rule One motion because of competent waiver would be improper. But different standards are applied to the question whether a defendant has waived his right to appointed counsel on direct appeal. For Rule One purposes the present state of the law seems to be that a defendant can inadvertently waive his right to counsel on appeal,[54] but that waiver of the right to counsel at trial requires a knowing and intelligent waiver. This dichotomy, however, will probably be short-lived. With criminal due process expanding at such a rapid pace it seems only a matter of time until the requirement for advice is extended to the appellate arena.

GROUNDS FOR RELIEF UNDER RULE ONE

It is impossible to formulate a precise rule defining those situations that entitle a prisoner to relief under Rule One. The rule provides that a prisoner may seek relief on any of four grounds: (1) that the sentence was imposed in violation of the Constitution or laws of the United States or of the State of Florida, (2) that the sentencing court lacked jurisdiction, (3) that the sentence was in excess of the maximum authorized by law, or (4) that the sentence is otherwise subject to collateral attack. Generally, it may be said that the above four categories do not provide relief for the so-called "technical" errors that may have occurred at trial. Rule One is not a substitute for direct appeal; consequently, many errors that would constitute grounds for appeal cannot be considered under a Rule One attack.[55] The rule was designed to allow relief only for those "organic" errors that deprived the prisoner of a fair trial or basic fairness at some critical stage of the proceedings. In order to define more specifically the types of errors the courts have considered organic under Rule One, it is necessary to discuss the various cases that have interpreted the rule.

Denial of Counsel at Trial

The courts have uniformly recognized that the denial of an indigent defendant's right to counsel at a trial which results in conviction of a felony is a sufficient ground for relief under Rule One.[56] In *Fish v. State*,[57] however, the Florida Supreme Court held that an indigent defendant accused of a misdemeanor does not have a right to court-appointed counsel and that a Rule One motion based upon this ground should be denied. One year later the Fifth Circuit Court of Appeals reached a contrary conclusion in *Harvey v. Mississippi*,[58] holding that an indigent defendant accused of a mis-

54. Burchil v. State, 205 So. 2d 9 (3d D.C.A. Fla. 1967).
55. *See* Austin v. State, 160 So. 2d 730 (2d D.C.A. Fla. 1964).
56. *E.g.*, King v. State, 157 So. 2d 440 (2d D.C.A. Fla. 1963).
57. 159 So. 2d 866 (Fla. 1964).
58. 340 F.2d 263 (5th Cir. 1965).

demeanor does have a constitutional right to appointed counsel. This holding was quickly reaffirmed in *McDonald v. Moore*,[59] a federal misdemeanor case arising in Florida. The *Harvey* and *McDonald* cases caused some temporary confusion as to the law on this point in Florida; but it is now firmly established that the rule in Florida state courts is that an indigent defendant charged with a misdemeanor does not have a right to appointed counsel.[60] In *Watkins v. Morris*,[61] the Florida Supreme Court summarized its position as follows: "[U]ntil authoritatively determined to the contrary by the Supreme Court of the United States, the rule in Florida is that there is no absolute, organic right to counsel in misdemeanor trials."[62] Therefore, an indigent prisoner's allegation that he was denied his right to counsel at a misdemeanor trial does not state a ground for relief under Rule One.

It should be noted, however, that such a prisoner may still be able to obtain post-conviction relief in federal court. In *Rutledge v. City of Miami*,[63] the United States District Court for the Southern District of Florida released a state prisoner on a writ of habeas corpus, holding that he was not properly informed of his right to appointed counsel at his misdemeanor trial in the Miami Municipal Court. In so holding, the court stated that the prisoner was not required to exhaust his remedies under Rule One or by state habeas corpus because the Florida state courts do not recognize a right to appointed counsel in misdemeanor trials.

Denial of Counsel at "Critical Stage"

Denial of counsel at arraignment does not constitute a ground for relief under Rule One unless the prisoner is able to show that he was so prejudiced by the denial as to make the arraignment a "critical stage" in the proceedings.[64] Arraignment becomes a "critical stage" for Rule One purposes if the prisoner makes incriminating statements or enters a guilty plea.[65] But if the prisoner changes his guilty plea at trial, denial of counsel at arraignment when the plea was entered does not constitute a sufficient ground for relief under the rule.[66] Moreover, the denial of counsel during an arraignment at which a guilty plea is entered is considered to be waived if the accused appears at trial with privately retained counsel and makes no attempt to change his guilty plea.[67]

---

59. 353 F.2d 106 (5th Cir. 1965).

60. State *ex rel.* Taylor v. Warden of Orange County Prison Farm, 193 So. 2d 606 (Fla. 1967).

61. 179 So. 2d 348 (Fla. 1965).

62. *Id.* at 349. *See* Winters v. Beck, 239 Ark. 1151, 397 S.W.2d 364 (1965), *cert. denied*, 385 U.S. 907.

63. 267 F. Supp. 885 (S.D. Fla. 1967).

64. Sardinia v. State, 168 So. 2d 674 (Fla. 1964).

65. Murray v. State, 191 So. 2d 278 (2d D.C.A. Fla. 1966); Harris v. State, 162 So. 2d 262 (Fla. 1964).

66. Gobie v. State, 188 So. 2d 33 (3d D.C.A. Fla. 1966); Sampson v. State, 177 So. 2d 543 (2d D.C.A. Fla. 1965).

67. Sardinia v. State, 168 So. 2d 674 (Fla. 1964).

The same basic rules apply to the preliminary hearing. If the defendant can show he was prejudiced by lack of counsel at the preliminary hearing, the hearing becomes a "critical stage" in the proceedings for purposes of a Rule One motion.[68] Unless such prejudice is shown, denial of counsel at a preliminary hearing is not a sufficient ground for relief under the rule.[69] Also, complete failure to provide a preliminary hearing does not constitute a basis for Rule One relief unless the prisoner is able to show that he was prejudiced by this failure.[70]

A hearing at which the prisoner is placed on probation is not a "critical stage" of the proceedings. A hearing to determine if probation has been violated is also not a "critical stage" of the proceedings. Thus, the denial of counsel at either type of probation hearing is not a sufficient ground for relief under Rule One.[71] The longevity of this rule seems questionable, however, in light of the rapidly expanding concepts of due process in the probation area.

The time of sentencing is deemed to be a "critical stage" of the proceedings as a matter of law. Therefore, a prisoner is not required to allege or prove resulting prejudice in order to obtain Rule One relief on the basis of denial of counsel at sentencing.[72] The remedy in this situation is not a complete new trial. Instead, the prisoner is entitled to have his sentence vacated and a new sentence entered, with counsel present.[73]

Denial of "Effective" Counsel

A prisoner may have his sentence vacated under Rule One for lack of *effective* counsel if he is able to prove that his appointed counsel was so incompetent that the trial became a farce or a mockery.[74] This is a heavy burden of proof. It is not sufficient to show that the appointed attorney made an obvious tactical blunder[75] or that he exercised very poor judgment.[76] Instead, the requirement seems to be that the prisoner prove his appointed counsel was so incompetent as to constitute almost no representation at all.[77]

A prisoner cannot use Rule One to attack the competency of a privately

68. Williams v. State, 184 So. 2d 525 (4th D.C.A. Fla. 1966). *Accord*, Rollins v. State, 194 So. 2d 247 (Fla. 1967); *cf.* Harris v. State, 162 So. 2d 262 (Fla. 1964) in which the Florida Supreme Court reversed a death sentence on substantially similar grounds.

69. Fauls v. State, 164 So. 2d 35 (2d D.C.A. Fla. 1964); Brookins v. State, 174 So. 2d 578 (3d D.C.A. Fla. 1965).

70. Wallace v. State, 184 So. 2d 443 (3d D.C.A. Fla. 1966).

71. Thomas v. State, 163 So. 2d 328 (3d D.C.A. Fla. 1964); Randall v. State, 188 So. 2d 334 (2d D.C.A. Fla. 1966).

72. Bryant v. State, 194 So. 2d 21 (3d D.C.A. Fla. 1967).

73. Langlois v. State, 191 So. 2d 284 (3d D.C.A. Fla. 1966).

74. Gillyard v. State, 175 So. 2d 798 (3d D.C.A. Fla. 1965); *cf.* Carroll v. State, 172 So. 2d 266 (2d D.C.A. Fla. 1965), *appeal dismissed*, 177 So. 2d 11 (1965).

75. Whitney v. State, 152 So. 2d 727 (Fla. 1963).

76. Simpson v. State, 164 So. 2d 224 (3d D.C.A. Fla. 1964), *appeal dismissed*, 169 So. 2d 383 (1964); Thomas v. State, 190 So. 2d 361 (3d D.C.A. Fla. 1966).

77. *See* Frand v. United States, 301 F.2d 102 (10th Cir. 1962); Black v. United States, 269 F.2d 38 (9th Cir. 1959).

retained attorney.[78] The courts have reasoned that a defendant who selects and retains a particular attorney waives the right to question the competency of that attorney.[79]

Rather than alleging general incompetency of counsel, many prisoners have filed Rule One motions claiming they were prejudiced by specific acts or omissions by their attorneys. In *Stratos v. State*,[80] the prisoner filed a motion alleging that he was denied the assistance of witnesses by the statement of his court appointed attorney that the state would not pay the cost of summoning these witnesses, this statement being contrary to section 932.37 of the Florida Statutes. The Third District Court of Appeal reversed a trial court denial of the motion, holding that this allegation did state a sufficient ground for collateral attack under Rule One. The *Stratos* case should be distinguished from the numerous cases holding that the decision not to call witnesses on behalf of the defense is a matter of personal judgment to be exercised by defense counsel and is not a ground for relief under Rule One.[81]

In *Cole v. State*,[82] the prisoner filed a Rule One motion alleging that his privately retained attorney had waived his right to be present at trial in a noncapital felony case without his knowledge or acquiescence. The trial court summarily denied the motion, but the Third District Court of Appeal reversed, holding that this allegation was sufficient to require a hearing under Rule One. It seems doubtful that *Cole* could have withstood an attack on the merits in the Florida Supreme Court. The right to be present whenever the jury is in the box can be waived in any noncapital case. This does not seem to be such a fundamental right that it cannot be waived by the defendant's privately retained attorney, even without the defendant's knowledge or acquiescence. Certainly it does not appear so prejudicial as to subject a judgment to collateral attack. As the *Cole* decision now stands, however, it represents a refinement of the general rule that a prisoner cannot collaterally attack the competency of private counsel. Perhaps a better statement of the rule would be that a prisoner cannot attack the general competency of his privately retained attorney, but, in exceptional circumstances, he can obtain Rule One relief by showing that his attorney committed some specific act that severely prejudiced his right to a fair trial.

A mere allegation that counsel was appointed on the day of trial does not state a sufficient ground for relief under Rule One when there are no factual allegations as to how this deprived the prisoner of a fair trial and the record reflects that the attorney was given time for preparation prior to trial.[83] A different result is reached, however, when the lawyer is appointed as the trial

78. Swindle v. State, 202 So. 2d 132 (3d D.C.A. Fla. 1967). *But see* Cole v. State, 181 So. 2d 698 (3d D.C.A. Fla. 1966).

79. Todd v. State, 176 So. 2d 344 (2d D.C.A. Fla. 1965).

80. 167 So. 2d 771 (3d D.C.A. Fla. 1964).

81. *E.g.*, Simpson v. State, 164 So. 2d 224 (3d D.C.A. Fla. 1964), *appeal dismissed*, 169 So. 2d 383 (1964); Walker v. State, 201 So. 2d 818 (3d D.C.A. Fla. 1967).

82. 181 So. 2d 698 (3d D.C.A. Fla. 1966). *See also* Cole v. State, 199 So. 2d 480 (3d D.C.A. Fla. 1967).

83. State v. Barton, 194 So. 2d 241 (Fla. 1967).

commences[84] or is otherwise given inadequate time for preparation.[85]

A prisoner can obtain Rule One relief by showing that his appointed attorney refused to prosecute an appeal from his conviction,[86] if he specifically alleges in the motion that some error occurred at his trial.[87] The prisoner may also be able to obtain reversal of his conviction under Rule One by proving that he was denied the right to appeal because of his inability to communicate with the public defender's office.[88] It is not sufficient, however, to simply allege that the public defender refused to furnish a transcript of the trial when there is no allegation of any attempt to appeal.[89]

Reliance upon statements or promises made by defense counsel is generally not an adequate ground for collateral attack under Rule One. An allegation that a defendant was induced to plead guilty by promises made to him by his privately employed attorney is not sufficient to state a prima facie case under Rule One.[90] Similarly, a prima facie case is not created by the prisoner's allegation that he pleaded guilty in reliance upon his retained attorney's expression of belief that a guilty plea would result in leniency.[91] A contention that the prisoner's attorney was ineffective because she was too worried and excited at trial to assist him is likewise without merit.[92]

Prejudicial Action by State

Unwarranted action by the prosecuting attorney has often been advanced as a ground for relief under Rule One. In *Brown v. State*,[93] the Third District Court of Appeal held that the use of perjured testimony by the state attorney, when he knew the testimony was perjured, was sufficient to justify relief under the rule. This is true even though the conviction has been affirmed on appeal, when the use of perjured testimony was not raised in that appeal.[94] No relief will be granted upon a mere showing that perjured testimony was used at trial when there is no evidence that the prosecutor knew the testimony was perjured.[95] Moreover, it is not sufficient to simply allege that the state knowingly used perjured testimony. To state a prima facie case

---

84. Watson v. State, 169 So. 2d 887 (3d D.C.A. Fla. 1964); *cf.* House v. Mayo, 324 U.S. 42 (1944).

85. French v. State, 161 So. 2d 879 (1st D.C.A. Fla. 1964).

86. Hinton v. State, 177 So. 2d 522 (2d D.C.A. Fla. 1965); Jackson v. State, 166 So. 2d 194 (3d D.C.A. Fla. 1964).

87. Murray v. State, 191 So. 2d 292 (3d D.C.A. Fla. 1966).

88. *See* Alderman v. State, 188 So. 2d 803 (Fla. 1966).

89. Maisonave v. State, 171 So. 2d 443 (3d D.C.A. Fla. 1965).

90. Manning v. State, 176 So. 2d 380 (3d D.C.A. Fla. 1965); Thomas v. State, 172 So. 2d 245 (2d D.C.A. Fla. 1965).

91. Baker v. State, 188 So. 2d 346 (3d D.C.A. Fla. 1966); Pait v. State, 188 So. 2d 15 (3d D.C.A. Fla. 1966).

92. Brown v. State, 164 So. 2d 34 (2d D.C.A. Fla. 1964).

93. 163 So. 2d 335 (3d D.C.A. Fla. 1964); *see* Smith v. United States, 259 F.2d 125 (9th Cir. 1958).

94. Rayburn v. State, 203 So. 2d 212 (2d D.C.A. Fla. 1967).

95. Gilliard v. State, 171 So. 2d 902 (2d D.C.A. Fla. 1965).

the prisoner must set forth specific factual allegations, such as which testimony was perjured.[96]

In *Paul v. State*,[97] the prisoner's Rule One motion alleged he pleaded guilty to four informations for forgery only because of the state attorney's promise that the sentence for forgery would run concurrently with that imposed on a robbery conviction. The prisoner further alleged the sentences had not been made to run concurrently. The trial court summarily denied the motion and the Third District Court of Appeal reversed, holding that these allegations, if true, would entitle the prisoner to relief under the rule.

In *Young v. State*,[98] the prisoner asserted that the assistant state attorney who prosecuted him had previously counseled him regarding the same crime while serving as an assistant public defender. The Second District Court of Appeal held the prisoner was entitled to a hearing on this allegation and that his sentence should be vacated if the allegation could be proved. The *Young* decision should be distinguished from *Todd v. State*.[99] In that case, the defendant's privately retained attorney was appointed as an assistant state attorney after trial but before judgment and sentence were imposed. The defendant then hired another lawyer, who expressly waived any objection the defendant might have to the state attorney's office representing the state at the time judgment and sentence was imposed. Under these circumstances, the Second District Court of Appeal held the defendant was not entitled to post-conviction relief under Rule One. *Todd* is distinguishable from *Young* on three grounds: (1) Todd's defense counsel was appointed assistant state attorney after the trial, while the attorney who counseled Young was the same attorney who prosecuted the entire case; (2) Todd, on the advice of counsel, expressly waived any possible disqualification, while in *Young* there was no waiver; and (3) Todd's defense counsel was privately retained, while Young's was supplied by the state.

Comment by the prosecuting attorney on the defendant's failure to testify is a fundamental error that constitutes a ground for relief under Rule One.[100] However, prejudicial comments by the prosecutor during closing argument on matters other than the defendant's failure to testify are not sufficient to support a collateral attack under Rule One.[101] An allegation that the prosecutor suppressed certain testimony is also inadequate to justify relief under the rule.[102]

An allegation that a guilty plea was obtained by a police officer's coercion is sufficient to state a prima facie case under Rule One.[103] This is true even though the defendant was represented by an appointed or a privately retained

96. House v. State, 199 So. 2d 134 (1st D.C.A. Fla. 1967).
97. 165 So. 2d 779 (3d D.C.A. Fla. 1964).
98. 177 So. 2d 345 (2d D.C.A. Fla. 1965).
99. 176 So. 2d 344 (2d D.C.A. Fla. 1965).
100. Burse v. State, 175 So. 2d 586 (3d D.C.A. Fla. 1965); *see* Gordon v. State, 104 So. 2d 524 (Fla. 1958); *cf.* State v. Jones, 204 So. 2d 515 (Fla. 1967).
101. House v. State, 199 So. 2d 134 (1st D.C.A. Fla. 1967).
102. *Id.*
103. Lee v. State, 175 So. 2d 95 (2d D.C.A. Fla. 1965).

attorney at the trial.[104] It has been held, however, that an allegation that the police promised the defendant that charges against him would be dropped if he turned state's evidence was insufficient to support a collateral attack, when this contention was raised for the first time in the Rule One motion.[105] The failure to advise a defendant of his rights before taking a confession, as now required by *Miranda v. Arizona*[106] is not a basis for Rule One relief in those cases in which the defendant's trial began prior to June 13, 1966, the day *Miranda* was decided.[107]

In *Reddick v. State*,[108] Rule One relief was granted to a defendant who showed his guilty plea was indirectly coerced by the trial judge. Reddick and two codefendants were charged with murder. The three defendants filed individual motions for severance, but these motions were denied. Prior to trial, at a conference with Reddick's attorney and the state attorney, the trial judge made statements which strongly indicated that he would impose a sentence of life imprisonment if Reddick would plead guilty. Relying upon these statements, Reddick changed his plea from not guilty to guilty. He and his codefendants, who were convicted on pleas of not guilty, were then sentenced to death in the electric chair. The codefendants appealed to the Florida Supreme Court, which reversed their convictions, holding that the denial of their motions for severance was a gross abuse of discretion. Reddick then filed a Rule One motion in the trial court, which was denied after a brief hearing. On appeal from this denial, the Second District Court of Appeal reversed with directions that Reddick be given a new trial. After reviewing the pretrial colloquy between the attorneys and the trial judge, the district court held that Reddick had been indirectly coerced into pleading guilty by the judge.

The *Reddick* decision also held that the trial judge committed fundamental error in denying Reddick's motion for severance, and that this error could be reached under Rule One. The court recognized that the denial of a motion for severance would not support a collateral attack in many cases,[109] but held that this error could be remedied through Rule One "under the peculiarly aggravating facts of this particular case."[110] The court emphasized the significance of the motion for severance by pointing out that one of Reddick's codefendants was convicted of only second-degree murder on retrial and that the other codefendant was allowed to plead guilty to second-degree murder.

In *Byers v. State*,[111] the Third District Court of Appeal held that the trial court erred in summarily denying a Rule One motion which alleged that the sentencing court had refused compulsory process to obtain witnesses to testify

104. Bennett v. State, 203 So. 2d 211 (3d D.C.A. Fla. 1967).
105. Baker v. State, 188 So. 2d 583 (4th D.C.A. Fla. 1966).
106. 384 U.S. 436 (1966).
107. Stone v. State, 201 So. 2d 472 (1st D.C.A. Fla. 1967); Cameron v. State, 196 So. 2d 182 (2d D.C.A. Fla. 1967); *see* Johnson v. New Jersey, 384 U.S. 719 (1966).
108. 190 So. 2d 340 (2d D.C.A. Fla. 1966).
109. *See* Amaral v. State, 171 So. 2d 549 (3d D.C.A. Fla. 1965).
110. Reddick v. State, 190 So. 2d 340, 349 (2d D.C.A. Fla. 1966).
111. 163 So. 2d 57 (3d D.C.A. Fla. 1964).

on the defendant's behalf. The movant did not allege specific facts in support of the motion. A motion that simply sets forth the ground as a bare legal conclusion, with no supporting facts, can be summarily dismissed.[112]

Although it would be ground for reversal on direct appeal, an instruction to the jury that a defendant convicted of first-degree murder with a recommendation of mercy could be eligible for parole is not a sufficient basis for collateral attack under Rule One.[113] No relief will be granted under Rule One upon a showing that the trial court refused to provide a court reporter at trial, even though the defendant's attorney requested that one be present.[114]

A prisoner may be able to obtain Rule One relief by showing that he was an unmarried minor at the time of his trial and that his parents were not notified of the trial as required by section 932.38 of the Florida Statutes.[115] It is not sufficient, however, to prove that the parents of an unmarried minor defendant were not notified of a retrial, if they were notified of the original trial.[116] Of course, this ground cannot be raised in a Rule One motion if a habeas corpus petition based on the same allegation has previously been denied on the merits.[117]

In *Phillips v. State*,[118] the prisoner filed a Rule One motion alleging that his sentence, which was imposed after the revocation of his probation, was invalid because he was not afforded a hearing in connection with the probation revocation as required by section 948.06 (1) of the Florida Statutes. The trial court denied the motion and the Second District Court of Appeal reversed, holding that the sentence was void and that Phillips was entitled to a hearing on his probation revocation.

Many errors involving the deprivation of constitutional rights have been held insufficient to constitute a ground for relief under Rule One. Among these are: (1) an illegal arrest;[119] (2) an illegal search and seizure;[120] (3) lack of a speedy trial;[121] (4) denial of bail;[122] (5) delay in taking the defendant before a committing magistrate, when no prejudice is shown;[123] and (6) the systematic exclusion of members of the defendant's race from grand and petit juries, when this is raised for the first time in a Rule One attack.[124]

---

112. Walker v. State, 201 So. 2d 818 (3d D.C.A. Fla. 1967).

113. Williams v. State, 184 So. 2d 525 (4th D.C.A. Fla. 1966); *cf.* Burnette v. State, 157 So. 2d 65 (Fla. 1963).

114. Lee v. State, 165 So. 2d 443 (2d D.C.A. Fla. 1964).

115. *See* Colebrook v. State, 191 So. 2d 309 (3d D.C.A. Fla. 1966); Miles v. State, 174 So. 2d 576 (3d D.C.A. Fla. 1965).

116. Falagon v. State, 186 So. 2d 804 (4th D.C.A. Fla. 1966).

117. *See* Mitchell v. State, 203 So. 2d 676 (1st D.C.A. Fla. 1967).

118. 165 So. 2d 246 (2d D.C.A. Fla. 1964).

119. *See* Hall v. State, 183 So. 2d 277 (3d D.C.A. Fla. 1966), *cert. denied*, 188 So. 2d 816 (1966).

120. Duncan v. State, 161 So. 2d 718 (3d D.C.A. Fla. 1964).

121. Marti v. State, 163 So. 2d 506 (3d D.C.A. Fla. 1964); *see* Kemp v. State, 177 So. 2d 58 (3d D.C.A. Fla. 1965).

122. Anderson v. State, 164 So. 2d 887 (3d D.C.A. Fla. 1964).

123. Marti v. State, 163 So. 2d 506 (3d D.C.A. Fla. 1964).

124. House v. State, 199 So. 2d 134 (1st D.C.A. Fla. 1967); Lee v. State, 173 So. 2d 520 (1st D.C.A. Fla. 1965).

These are all serious constitutional deficiencies, but they have not been considered sufficiently prejudicial to support a collateral attack under Rule One.

Miscellaneous Grounds for Relief

In *Knight v. State*,[125] the prisoner filed a Rule One motion alleging his sentence should be vacated because he was mentally incompetent at the time of his trial. This motion specifically alleged he had received treatment for mental disorders on three occasions prior to his trial. The trial court summarily denied the motion, and the Third District Court of Appeal reversed, holding the movant was entitled to a hearing to determine whether his sentence should be vacated due to his having been mentally incompetent at the time of trial. The fact that the prisoner in *Knight* made specific allegations concerning his history of mental illness is significant. In a subsequent decision involving similar facts, the third district held that a motion based on insanity at time of trial was properly dismissed when there were no allegations and no showing in the record of any type of prior mental illness.[126] Similarly, it is not sufficient to show that a defendant was adjudged insane prior to trial, when the record also shows that this fact was made known to the court and jury, and that the jury found he was sane after presentation of evidence on this point by the state and appropriate instructions by the court.[127]

Thus, it appears that insanity at time of trial is not a ground for relief under Rule One unless the prisoner is able to show some history of mental illness prior to trial. If he is able to show some type of prior mental disorder, he may be able to obtain a hearing on his motion. At this hearing the prisoner has the substantial burden of proving that he was insane at the time of his trial. The above rule may seem rather dubious, but a more definitive one cannot be formulated from existing case law.

Excessive publicity prior to trial may be sufficient to entitle a prisoner to Rule One relief if he is able to show it was so excessive that he was deprived of a fair trial.[128] There is presently no basis for relief on this ground when the record shows that no motion for change of venue was made and that some peremptory challenges were not used.[129]

A prisoner cannot obtain Rule One relief on the ground that he was brought into the state under illegal extradition proceedings, when the record shows that he pleaded guilty at trial.[130] Also, a prisoner is not entitled to relief upon an allegation that he was not furnished with a copy of the indictment pursuant to sections 906.28 and 940.04 of the Florida Statutes, when there is no allegation that he applied for a copy.[131] There is, of course, no

125. 164 So. 2d 229 (3d D.C.A. Fla. 1964).

126. Rodriguez v. State, 176 So. 2d 516 (3d D.C.A. Fla. 1965).

127. Boone v. State, 183 So. 2d 869 (1st D.C.A. Fla. 1966).

128. *See* Brooks v. State, 188 So. 2d 883 (4th D.C.A. Fla. 1966); *cf.* Singer v. State, 109 So. 2d 7 (Fla. 1959).

129. Whitney v. State, 184 So. 2d 207 (3d D.C.A. Fla. 1966), *appeal docketed*, 386 U.S. 970 (1967).

130. Hunter v. State, 174 So. 2d 415 (2d D.C.A. Fla. 1965).

131. Shannon v. State, 172 So. 2d 479 (3d D.C.A. Fla. 1965).

merit to a prisoner's contention that his sentence for second-degree murder should be vacated because he was charged by information rather than indictment.[132]

A prisoner can obtain Rule One relief by showing that he pleaded guilty to one crime under the mistaken belief that he was pleading guilty to another unrelated crime.[133] Of course, there is no basis for relief in the contention that a prisoner's guilty plea was involuntary because he had previously confessed.[134]

It is impossible to formulate a precise rule defining those situations that entitle a prisoner to have his sentence vacated under Rule One. The basic question to be determined in each case is whether the prisoner was deprived of his fundamental right to a fair and impartial trial, not whether he was deprived of some specific constitutional guaranty.

In determining the specific grounds that constitute bases for Rule One relief it is necessary to consider the appellate decisions interpreting the Rule, as discussed above. However, there are other sources of case law that are very helpful in this regard. It must be remembered that Rule One is co-extensive with habeas corpus and that, generally, the same type of showing is required to obtain Rule One relief as is required to gain relief by post-conviction habeas corpus. Therefore, a Florida decision either granting or denying post-conviction habeas corpus relief on a particular ground can be quite persuasive in arguing that Rule One relief should or should not be granted on the same or similar ground. Cases interpreting section 2255, title 28, U.S. Code, are also quite useful in determining the types of errors that are sufficient to justify relief under the rule.

The Rule One Hearing

If the prisoner's Rule One motion states a prima facie case, which is not conclusively refuted by the record, the prisoner is entitled to a hearing on his motion. The rule provides that notice shall be served on the prosecuting attorney of the court if a hearing is required, so that he can file a reply and defend the state's position at the hearing.[135] The prisoner has no absolute right to be present at the hearing, but either he or his attorney must be present if testimony is taken.[136] If the prisoner is brought to the hearing, the transportation expenses must be borne by the county in which the hearing is held.[137]

The question whether an indigent prisoner has a right to appointed counsel at the Rule One hearing is one that must be determined on the facts of each particular case. If an attorney is essential to accomplish a fair and

132. Portee v. State, 176 So. 2d 585 (3d D.C.A. Fla. 1965).

133. Blake v. State, 171 So. 2d 207 (3d D.C.A. Fla. 1965).

134. Weeks v. State, 201 So. 2d 764 (3d D.C.A. Fla. 1967); *see* Taylor v. State, 169 So. 2d 861 (3d D.C.A. Fla. 1964).

135. Note the analogy between this and habeas corpus procedure.

136. Lambert v. State, 169 So. 2d 374 (1st D.C.A. Fla. 1964); Dickens v. State, 165 So. 2d 811 (2d D.C.A. Fla. 1964).

137. Wainwright v. Gillis, 166 So. 2d 770 (1st D.C.A. Fla. 1964).

thorough presentation of the prisoner's claims, then due process requires that an attorney be appointed.[138] All doubts as to the need for an attorney should be resolved in the prisoner's favor.[139] Under this rule of resolving all doubts in the prisoner's favor there would seem to be very few cases that do not require the appointment of counsel. Most Rule One allegations are not so simple that they can be adequately and thoroughly presented by an indigent prisoner untrained in the law. Clearly it is an abuse of discretion not to appoint counsel for a prisoner whose motion involves "delicate and technical constitutional questions."[140]

The Rule One hearing is an adversary proceeding at which both sides are given an opportunity to offer evidence and to present arguments.[141] No jury is involved, so the court must determine all legal and factual issues.[142] The prisoner has the burden of proving each essential allegation of his motion. These allegations must be proved by a preponderance of the evidence, not beyond a reasonable doubt.[143] There is no absolute right to a transcript of the original trial proceedings to assist the prisoner in proving his allegations.[144] Fundamental fairness and due process would seem to dictate, however, that an indigent prisoner is entitled to those portions of the transcript directly relating to his specific claims for relief, provided that a reporter was present at trial so that a transcript can be prepared.[145] If the Rule One motion is granted, and the sentence is vacated, the prisoner is not automatically discharged from custody but may be held for a new trial.[146]

Soon after the promulgation of Rule One, a distinguished authority on Florida criminal law, Professor Vernon Clark, expressed the view that the rule should be revised to assure that the judge who sentenced the prisoner originally would not be called upon to consider his motion to vacate that sentence.[147] Experience has shown that this recommendation has merit. In *Reddick v. State*,[148] previously discussed, the prisoner was placed in the impossible position of having to file his Rule One motion with the same trial judge who had allegedly coerced the prisoner into pleading guilty. The motion was denied, of course, with an order that the Second District Court of Appeal described as merely "an attempt to justify the acts of the Judge and the course of the pre-trial proceedings generally."[149]

138. State v. Weeks, 166 So. 2d 892 (Fla. 1964); *cf.* Sanders v. United States, 373 U.S. 1 (1963), which held there is no absolute right to counsel in a proceeding under 28 U.S.C. §2255.

139. State v. Weeks, 166 So. 2d 892 (Fla. 1964).

140. Harper v. State, 201 So. 2d 65, 67 (Fla. 1967).

141. Kelly v. State, 175 So. 2d 542 (1st D.C.A. Fla. 1965).

142. *See* Rollins v. State, 179 So. 2d 377 (2d D.C.A. Fla. 1965).

143. Leeds v. State, 187 So. 2d 77 (2d D.C.A. Fla. 1966).

144. Harper v. State, 168 So. 2d 325 (1st D.C.A. Fla. 1964).

145. *Cf.* Draper v. Washington, 372 U.S. 487 (1963); *cf.* Norvell v. Illinois, 373 U.S. 420 (1963).

146. OPS. ATT'Y GEN. 063-62 (1963).

147. Clark, *Curable Ills of the Criminal Law of Florida*, 16 U. FLA. L. REV. 258, 294-99 (1963).

148. 190 So. 2d 340 (2d D.C.A. Fla. 1966).

149. *Id.* at 342.

The *Reddick* case is an extreme example of the prejudice that can result from the requirement in Rule One that the motion to vacate must be filed with "the court which imposed the sentence."[150] But there are many other cases in which this requirement results in lesser degrees of partiality. In practically all cases, the Rule One movant must allege that his sentence is void because of some fundamental and highly prejudicial error that occurred at, or at least permeated, his trial. This creates an awkward situation when the judge who must consider the alleged error is the same judge who must bear responsibility for having allowed the error initially. This is almost as improper as designating a sentencing court to hear an appeal from that sentence. Even the most impartial trial judge must find it difficult to be totally objective when considering the question whether he imposed a sentence notwithstanding some fundamental error. Moreover, the sentencing judge, having presided at trial, may be personally convinced of the prisoner's guilt. Under these circumstances, he is not in an ideal position to apply the rule, basic to Rule One procedure, that the guilt or innocence of the prisoner is totally irrelevant.[151]

The requirement that a Rule One motion be filed with the sentencing court also makes it difficult to restrict consideration of the motion to the "files and records" or the evidence adduced at the hearing, as required by the rule. The judge who presided at the original trial often has an intimate knowledge of the case and is inclined to grant or deny a motion on the basis of his own memory. Numerous cases have been reversed because the judge denied relief upon his personal "knowledge" of the case rather than the files and records or the evidence taken at the Rule One hearing.[152]

It is recommended, therefore, that the Florida Supreme Court amend Rule One by deleting the following language:[153]

> [M]ay move the court which imposed the sentence to vacate, set aside or correct the sentence . . . .

and substituting the following therefor:

> [M]ay file, with the Clerk of the Circuit Court of the county in which the sentence was imposed, a motion to vacate, set aside or correct the sentence. The senior judge of the circuit shall assign consideration of the motion to any trial judge of the court which imposed the sentence, or to any trial judge of a higher court within the county having criminal jurisdiction; provided, however, that in no case shall the judge who imposed the sentence receive the assignment, unless the sentence was imposed by a circuit court in a circuit having only one circuit judge.

---

150. This language has been interpreted to mean that the motion must be filed with the same *judge* "which imposed the sentence" in those cases in which the particular court has more than one judge, and the sentencing judge is still sitting.

151. Dickens v. State, 165 So. 2d 811 (2d D.C.A. Fla. 1964).

152. *E.g.*, Beadles v. State, 162 So. 2d 4 (2d D.C.A. Fla. 1964); Williams v. State, 163 So. 2d 767 (2d D.C.A. Fla. 1964).

153. FLA. R. CRIM. P. 1.

This amendment would retain the desirable feature of having the files and records readily available to the court that considers the motion, while obviating the undesirable feature of having a trial judge sit in judgment on his own alleged errors.

This new procedure would help to accomplish two of the recognized objectives of Rule One; (1) to provide a remedy similar to that provided by post-conviction habeas corpus;[154] and (2) to equitably distribute the Rule One workload.[155] It would facilitate the first objective by assuring, as in post-conviction habeas corpus procedure, that the judge who imposed a sentence would usually not be required to consider a motion to vacate that sentence. It is possible in Florida for the circuit judge who imposed a sentence to be called upon to consider a habeas corpus petition seeking release from that sentence. It seems unlikely that this happens very often, however, since the prisoner is logically more inclined to file his petition with some court other than that which imposed sentence, for example, a district court of appeal or the Florida Supreme Court. The proposed amendment would help accomplish the second objective by allowing all circuit court judges to handle a substantial number of Rule One motions. Under the present procedure, many circuit judges have very limited contact with the rule because they serve in counties that have criminal courts of record; and, in those counties their criminal jurisdiction is limited to capital cases.[156] The proposed amendment would allow the circuit judges in those counties to share in the increased workload created by Rule One.

The revision outlined above is substantially the same as that recommended by Professor Clark. There are, however, two differences. Professor Clark would retain the present procedure in misdemeanor cases. This distinction, however, seems unwarranted. Circuit courts have appellate jurisdiction in misdemeanor cases, but this should not cause any serious complications. This appellate jurisdiction and the proposed jurisdiction in Rule One cases could never overlap because Rule One cannot be used while any appellate remedy is available.[157] Furthermore, the fact that a court has previously reviewed a case on appeal does not disqualify that court from subsequently considering a Rule One motion in the same case. The standards of review on appeal are quite different from those employed in a collateral attack under Rule One. Indeed, it might be advantageous to have the same court consider the appeal and the Rule One motion, since this court could quickly dispose of the motion if it raised grounds substantially similar to those argued on appeal. In any event, it would seem that a prisoner in custody under a misdemeanor conviction is entitled to the same degree of impartiality under Rule One that is provided to the convicted felon.

The proposal above also differs from Professor Clark's recommendation in one other particular. It would necessarily retain the present procedure

154. Gideon v. Wainwright, 153 So. 2d 299, 300 (Fla. 1963).

155. *Id.*

156. FLA. CONST. art. V, §§6 (3), 9 (2).

157. Mitchell v. State, 167 So. 2d 27 (2d D.C.A. Fla. 1964); Austin v. State, 160 So. 2d 730 (2d D.C.A. Fla. 1964).

in the event of a Rule One attack upon a sentence imposed by a circuit court in a circuit having only one circuit judge. At present, this exception would apply only to the Sixteenth Judicial Circuit. That circuit has a criminal court of record, so the circuit court has criminal jurisdiction only in capital cases. There seems to be no satisfactory alternative to this proviso. The circuit judge in this situation could not very well be required to assign the Rule One motion to a judge of a court of lesser jurisdiction. This would amount to an attempt to give an inferior court the power to vacate a sentence imposed by a superior court. Similarly, the circuit judge could not properly be required to assign the motion to a circuit judge of another circuit. Aside from the problem of not having the records readily available, this would be an attempt to give a court of equal jurisdiction the power to vacate a sentence imposed outside its jurisdiction. Thus, it appears that in this limited circumstance, now applicable to only one circuit judge who has criminal jurisdiction only in capital cases, the present system of having a judge review his own sentences will have to be retained under the proposed amendment.

It is recognized that the recommended amendment will not eliminate all possibility of prejudice under the rule. One of the most flagrant cases of prejudice occurred when the judge hearing the Rule One motion was *not* the same judge who originally sentenced the prisoner. In *Dickens v. State*,[158] the record disclosed that the prisoner had been sentenced to twenty years imprisonment in 1946. His Rule One motion alleged that he was seventeen years old at the time of trial, that his parents were not notified of the trial, that he had no attorney because he could not afford one, and that he pleaded guilty only because the arresting officer told him to do so.

Filed with the motion was an affidavit of insolvency and a motion requesting appointment of counsel for the hearing. The trial judge set a hearing on the motion, but did not order that the prisoner be produced at the hearing and refused to appoint an attorney to represent him. At the outset of the hearing, at which the assistant county solicitor was present, the judge announced: "State of Florida versus Oliver Dickens, who stands charged in three Informations, Numbers 29420, 29421, and 29422." The prisoner's grandmother was the only witness present at the hearing. She was informed by the judge that she could sit and listen to what the court did about the matter. Then, *before* any testimony was heard, the judge began dictating his order denying the Rule One motion. The grandmother was subsequently questioned by the judge concerning the prisoner's early commitment to the industrial school for boys, his escapes from prison, and various charges brought against him during these escapes, all of which was totally irrelevant to the issue raised by the Rule One motion, that is, whether Dickens was denied the right to counsel at his original trial. The hearing concluded with a statement by the judge that the motion had been denied. On appeal from this denial, the Second District Court of Appeal reversed, holding that Dickens had obviously been denied his right to due process of law.

158. 165 So. 2d 811 (2d D.C.A. Fla. 1964).

The *Dickens* case is discussed in detail only to demonstrate what can occur through judicial prejudice or a misunderstanding of Rule One. It must be emphasized that cases of this type are in the extreme minority. A reading of the approximately 450 appellate decisions to date dealing with Rule One indicates a patient and judicious understanding of the rule by most trial judges. It is submitted, however, that the possibility of partiality can be further decreased by adoption of the amendment proposed above, which deletes the requirement that a trial judge sit in judgment on his own alleged errors. This requirement was not a great problem during the early operation of the rule because most of the initial motions filed under it were based on *Gideon* grounds. In those cases, the trial judge was not actually being asked to review an "error" he had made. If the judge had refused the appointment of counsel, he did so under controlling precedent from both the United States and Florida Supreme Courts. During the five years following *Gideon,* however, the cases involving the retroactive effect of that decision have been substantially exhausted. Thus, most Rule One motions currently being filed do allege real errors involving judicial judgment at the original trial. It is simply not reasonable to require the judge who imposed sentence despite these alleged errors to sit in judgment on the question whether the errors were committed.

Appeal From Denial of a Rule One Motion

Appeals from final orders under Rule One are controlled by the jurisdictional rules applicable to appeals generally. Thus, most appeals are taken to the district court of appeal for the district in which the court entering the order is located. The jurisdictional basis in the district court is established solely by the order entered on the Rule One motion. The original judgment of conviction being attacked in the Rule One proceeding is irrelevant for jurisdictional purposes. Therefore, an appeal from an order denying a Rule One attack on a death sentence is not an appeal from a judgment "imposing the death penalty" so as to vest jurisdiction in the Florida Supreme Court.[159] Under very limited circumstances, it may be possible to obtain review of the district court's decision in the Florida Supreme Court by either appeal or certiorari.[160] An appeal may be taken directly to the Florida Supreme Court only if the order denying the Rule One motion (1) directly passed upon the validity of a state statute or a federal statute or treaty, or (2) construed a controlling provision of either the United States or Florida Constitution.[161]

Under the rule established by the Florida Supreme Court in *State v. Weeks,*[162] and recently reaffirmed in *State v. Herzig,*[163] an indigent prisoner does not have an absolute, organic right to the assistance of appointed counsel

159. Williams v. State, 178 So. 2d 586 (Fla. 1965).
160. Fla. Const. art. V, §4 (2).
161. *Id.*
162. 166 So. 2d 892 (Fla. 1964).
163. 208 So. 2d 619 (1968).

on appeal from a Rule One denial. Each case must be decided in light of fifth amendment due process requirements, the primary question being whether counsel is required for a fair and complete presentation of the prisoner's claims.

When appealing from the denial of a Rule One motion, the indigent prisoner is entitled to a transcript of the proceedings relating to the Rule One hearing.[164] He is not entitled to a complete transcript of the original trial record. He has a right only to those portions of the trial record that relate directly to matters raised at the Rule One hearing.[165] This trial record need not necessarily contain a verbatim transcript of the events occurring at trial if a narrative summary is sufficient to show the basis of the trial court's rulings.[166] Of course, if the indigent does not file a notice of appeal, or a Rule One motion, he is not entitled to any type of trial transcript.[167]

For several years following the promulgation of Rule One there was some uncertainty whether sixty or ninety days should be allowed for taking an appeal from an order denying relief under the rule. Several early decisions indicated that the appeal time should be the same as that governing criminal appeals, that is, ninety days,[168] while later decisions came to the conclusion that the appeal time should be sixty days since Rule One was a collateral attack in the nature of a civil proceeding.[169] In *Rolon v. State*,[170] after tracing the chronology of cases that made this transition and explaining their effect, the Florida Supreme Court established the following rule: The time for taking an appeal from an order denying relief under Rule One was ninety days if the order was entered on or before June 29, 1965, and sixty days if the order was entered after that date. This sixty-day time limit is tolled by the filing of a notice of appeal with the trial judge, regardless of when the notice is marked as having been filed in the clerk's office.[171] The notice of appeal must identify the order denying the Rule One motion,[172] and separate notices of appeal are required to review separate orders denying Rule One relief to the same prisoner.[173]

The sixty days allowed for filing a notice of appeal is jurisdictional and no court has the power to waive this requirement, even if the delay is caused by state officers or employees.[174] If the notice of appeal is not timely filed, for whatever reason, "the appellate court simply has no jurisdiction — no power — to act"[175] and the appeal must be dismissed. If the prisoner can show that

164. Grizzell v. State, 184 So. 2d 465 (1st D.C.A. Fla. 1966).
165. Hall v. State, 165 So. 2d 428 (1st D.C.A. Fla. 1964).
166. Lee v. State, 165 So. 2d 443 (2d D.C.A. Fla. 1964).
167. Cowan v. State, 202 So. 2d 831 (3d D.C.A. Fla. 1967).
168. *E.g.*, Roy v. Wainwright, 151 So. 2d 825 (Fla. 1963).
169. *E.g.*, Lawrence v. State, 198 So. 2d 328 (Fla. 1967); Barton v. State, 176 So. 2d 597 (1st D.C.A. Fla. 1965).
170. 201 So. 2d 541 (Fla. 1967).
171. Hodd v. State, 163 So. 2d 893 (1st D.C.A. Fla. 1964).
172. Nelson v. State, 181 So. 2d 192 (1st D.C.A. Fla. 1965).
173. Carroll v. State, 171 So. 2d 197 (2d D.C.A. Fla. 1964).
174. Burke v. State, 160 So. 2d 523 (1st D.C.A. Fla. 1964).
175. State *ex rel.* Ervin v. Smith, 160 So. 2d 518, 520 (Fla. 1964).

the delay was the result of some type of state action, or inaction, the dismissal should be without prejudice to the prisoner's right to seek review of his Rule One denial by way of habeas corpus.[176] All too often, untimely appeals are caused by a court clerk's failure to notify the prisoner of his Rule One denial within a reasonable time. The prisoner's appeal time may have expired before he is even notified of the order denying his Rule One motion. When this happens, it is clear that habeas corpus can be used in lieu of an appeal since the orderly appellate remedy has been rendered unavailable to state action.[177]

Under *Anders v. California*,[178] recently decided by the United States Supreme Court, an appointed attorney cannot withdraw from an appeal on the ground that the appeal is frivolous unless he first files a brief with the appellate court referring to anything in the record that might arguably support the appeal. The *Anders* decision was recently applied by the Florida Supreme Court.[179] *Anders* actually dealt with a direct appeal, but its rationale may be applied to appeals from Rule One denials and other collateral attacks. Already it is established that a trial judge cannot refuse to adjudicate a prisoner's insolvency on the ground that an appeal from a Rule One denial would be frivolous.[180]

Appeals from orders denying Rule One relief are governed by the same general principles applicable to other types of appeals. Thus, the evidence in the record on appeal must be "viewed in a light most favorable to the trial court's ruling."[181] And, of course, the prisoner cannot raise any matters on appeal that were not raised in the Rule One motion.[182] An appeal may be quashed as frivolous if the same question presented by the appeal has been previously decided contrary to the prisoner's position.[183] The prisoner has no absolute right to have his appointed attorney heard orally by the appellate court, if that court determines that oral argument would serve no useful purpose.[184]

Following the promulgation of Rule One, the district courts of appeal adopted rules to eliminate costs for movants appealing from Rule One denials.[185] These rules eliminate fees and costs "in like manner and to the same extent as in habeas corpus proceedings or appeals therefrom, arising out of, or in connection with criminal causes or convictions," as provided by Rule 2.2 (b) (6) of the Florida Appellate Rules.[186] The rules provide that

176. Burke v. State, 160 So. 2d 523 (1st D.C.A. Fla. 1964).

177. Cappetta v. Wainwright, 203 So. 2d 609 (Fla. 1967).

178. 386 U.S. 738 (1967). *But see* dissenting opinion by Thornal, C.J.; Price v. State, 184 So. 2d 681 (1st D.C.A. Fla. 1966). *Contra,* Baker v. Wainwright, 197 So. 2d 290 (Fla. 1967).

179. State v. Herzig, 208 So. 2d 619, 623 (1968).

180. Foxworth v. Wainwright, 167 So. 2d 868 (Fla. 1964).

181. Plymale v. State, 201 So. 2d 85, 86 (3d D.C.A. Fla. 1967).

182. McKenzie v. State, 202 So. 2d 578 (2d D.C.A. Fla. 1967).

183. Jeffers v. State, 174 So. 2d 552 (2d D.C.A. Fla. 1965).

184. Gillen v. State, 172 So. 2d 1 (2d D.C.A. Fla. 1965).

185. *In re* Internal Gov't of the Dist. Court of Appeal, 156 So. 2d 896 (1st D.C.A. Fla. 1963); 156 So. 2d 655 (2d D.C.A. Fla. 1963); 156 So. 2d 415 (3d D.C.A. Fla. 1963).

186. *Id.*

no trial court clerk shall require the payment of fees or costs upon the filing of a notice of appeal, regardless of the movant's insolvency.[187] The movant, however, is not entitled to bail pending appeal of a Rule One denial.[188]

Custody Requirements Under Rule One

Rule One can be used by any "prisoner *in custody* under Sentence of a court established by the Laws of Florida claiming the right *to be released.*"[189] This language has placed serious limitations on the operation of the rule, limitations which probably were not intended by the drafters of the rule and which certainly are not consistent with the general purpose of the rule, that is, to provide a broadly based post-conviction remedy.

The early decisions from the district courts of appeal consistently held that a prisoner must, in fact, be presently "in custody" under a particular sentence in order to use Rule One to attack that sentence.[190] In *Jones v. State,*[191] however, the second district reversed two of its previous decisions and held that a prisoner could attack a consecutive sentence *even though he did not attack the sentence he was presently serving.* The court reasoned that the prisoner was actually "in custody" under both sentences even though he was *serving* only one because, if the sentence being served were vacated for any reason, the consecutive sentence would prevent the prisoner's release from custody. The Florida Supreme Court accepted jurisdiction of the *Jones* decision by conflict certiorari. While the case was pending, the first sentence expired and Jones began serving the sentence that was the subject of his Rule One attack. Thus, the issue presented by *Jones* became moot and could not be decided.[192]

The *Jones* case was impliedly overruled, however, by the Florida Supreme Court in *Johnson v. State,*[193] a case that allowed a prisoner to attack not only the sentence he was serving, but ten consecutive sentences as well although he was not literally "in custody" under any of these consecutive sentences. The court reasoned that it would be ludicrous to require the prisoner to attack his eleven sentences one at a time, and held that he could attack them simultaneously, since they were imposed by the same court, and since the prisoner would be entitled to release if successful. Under *Johnson,* a prisoner can use Rule One to attack a sentence he is not presently serving if: (1) that sentence was imposed by the same court which imposed the sentence he is serving, and (2) he will be entitled to immediate release if successful. Implicit in this rule is the requirement that the prisoner must also attack the sentence he is serving.

---

187. *Id.*

188. Simmons v. State, 163 So. 2d 888 (2d D.C.A. Fla. 1964).

189. See Appendix I (emphasis added).

190. *E.g.,* Paul v. State, 165 So. 2d 779 (3d D.C.A. Fla. 1964). *See also* Pritchett v. State, 193 So. 2d 185 (4th D.C.A. Fla. 1966).

191. 174 So. 2d 453 (2d D.C.A. Fla. 1965); Dovico v. State, 178 So. 2d 340 (2d D.C.A. Fla. 1965).

192. State v. Jones, 181 So. 2d 644 (Fla. 1966).

193. 184 So. 2d 161 (Fla. 1966), *aff'd on rehearing,* 185 So. 2d 466 (1966).

It must be recognized that the requirement of release in *Johnson* has reference only to cases in which the prisoner is attempting to attack a sentence *in addition to* the one being served. Although at least one district court of appeal case decided since *Johnson* has held to the contrary,[194] it is respectfully submitted that there is nothing in Rule One or the *Johnson* decision, other than dictum, to prevent a prisoner from attacking the sentence he *is serving* simply because he would not be entitled to release due to some *other* concurrent or consecutive sentence pending against him.[195] The *Johnson* case began by reciting the fact that the trial judge had granted the Rule One motion "as to the first of the consecutive sentences which was the one *then being served,* but denied it as to the remaining sentences on the ground that they could not be attacked under a Rule One motion because they were not then being served."[196] The court then stated that the issue to be determined was "whether our Rule of Criminal Procedure No. 1 authorizes a motion attacking a series of *consecutive* sentences when no other presumptively valid sentence against the same individual is outstanding."[197] That the supreme court in *Johnson* was concerned only with the consecutive sentences is also shown by its opinion on rehearing, which stated that the first opinion "dealt *only* with petitioner's right to seek relief from ten of the eleven judgments and sentences laid upon him. . . ."[198] The trial court had held that Johnson could attack his first sentence, which he was serving, even though he would *not be entitled to be released* because of the other consecutive sentences. The court simply accepted this holding as correct and moved on to the question whether the petitioner could attack the ten *consecutive* sentences in addition to the one he was serving.

If the rule stated in *Johnson* is applied to sentences presently being served, several unwarranted and unintended results will necessarily follow. For example, a prisoner in custody serving two allegedly void concurrent sentences would not be able to use Rule One to attack either sentence if they were imposed by different courts. He could not attack the sentence he was actually serving because he would not be entitled to be released if successful, and he would be unable to attack the sentences simultaneously, as allowed in *Johnson,* because they were imposed by different courts. For the same reasons, a prisoner could not attack the allegedly invalid sentence he was serving, or an allegedly invalid consecutive sentence, if they were imposed by different courts. If a prisoner were serving a series of consecutive sentences imposed by different courts, he would have to serve all except the last, and only then would he be allowed to attack that sentence. As stated by Justice Thornal in *State v. Weeks,*[199] a proceeding under Rule One is "analogous to post-conviction habeas corpus." This analogy lends

194. McDowell v. State, 195 So. 2d 586 (1st D.C.A. Fla. 1967).

195. *E.g.,* Falagon v. State, 167 So. 2d 62 (2d D.C.A. Fla. 1964).

196. Johnson v. State, 184 So. 2d 161, 163 (Fla. 1966) (emphasis added).

197. *Id.* (emphasis added).

198. Johnson v. State, 185 So. 2d 466 (Fla. 1966) (emphasis added).

199. State v. Weeks, 166 So. 2d 892, 897 (Fla. 1964). *See also* Gideon v. Wainwright, 153 So. 2d 299 (Fla. 1963), in which Justice Thornal stated that Rule One was "coextensive" with habeas corpus.

additional support to the proposition that the *Johnson* rule does not apply to sentences being served because there is no requirement that a prisoner seeking habeas corpus relief be entitled to release if successful.[200] In fact, habeas corpus can be used even though the petitioner would not be entitled to be released from the sentence being served. This has been allowed in cases in which the prisoner alleges that his sentence has not been computed correctly, and habeas corpus is used to reduce, rather than vacate, the sentence.[201] It seems likely that this same type of relief could be allowed under Rule One. One of the specific grounds for relief under the rule is that the sentence was in excess of the maximum authorized by law. This ground seems inconsistent with the "release" language in the rule since a person claiming his sentence was in excess of the maximum would not actually be claiming the right to be released from the sentence. Instead, he would simply be seeking to have the sentence reduced. When this problem arises, the more reasonable approach would be to hold that a prisoner can use the rule to have his sentence reduced if it is in excess of the maximum allowed by law.

The *Johnson* decision represents the outer limits in relieving the restrictive requirements of the "in custody" language. To allow any broader coverage under the rule would be tantamount to interpreting away this language. Even after *Johnson*, however, there are still many situations that should be covered by the rule, but which are not covered because of the "in custody" requirement. Moreover, there are other situations in which opposite results may be reached due to the purely fortuitous circumstances in which the court imposed a particular sentence.

This latter situation is demonstrated by *Holstein v. State*,[202] a decision recently handed down by the First District Court of Appeal. In 1962, at age fifteen, Holstein received an indefinite sentence of six months to five years in Jackson County for larceny of an automobile. He was paroled from this sentence in 1965, but while on parole, he received an eight-year sentence from the Dade County Criminal Court of Record for possession of burglary tools. Holstein's parole was then revoked and the Jackson County sentence was reinstated to begin at the expiration of the Dade County sentence. While serving this Dade County sentence, Holstein filed a Rule One motion attacking the Jackson County sentence, contending that it was preventing his eligibility for parole. The trial court denied the motion and the first district affirmed. The district court recognized the *Johnson* requirement that a movant "must attack the sentence which he is presently serving,"[203] but did not base its decision on this ground. Instead, the court grounded its affirmance primarily on the fact that the consecutive sentence being attacked was imposed by a

200. Dora v. Cochran, 138 So. 2d 508 (Fla. 1962) (the only requirement is that the prisoner be in custody under the sentence he is attacking); Fretwell v. Wainwright, 185 So. 2d 701 (Fla. 1966).

201. *E.g.*, Falagan v. Wainwright, 195 So. 2d 562 (Fla. 1967).

202. 205 So. 2d 6 (1st D.C.A. Fla. 1967).

203. *Id.* at 7.

different court from that which imposed the sentence he was serving. The first district stated:[204]

> Holstein's complaint here is that since he was so unfortunate as to be convicted and sentenced in more than one court, he is being denied the advantage of presently attacking his sentence which will begin in the future. This is a procedural matter. The only body having authority to change this procedure is our State Supreme Court . . . .

Under this reasoning, a movant would be prevented from attacking a consecutive sentence even though he simultaneously attacked the sentence he was serving, if the consecutive sentence was imposed by a different court. Thus, the result would be contrary to that obtained in *Johnson*, although the only distinction would be in the court imposing the consecutive sentence. This dichotomy may be required by *Johnson*, but it has no basis in logic or reason and was probably not anticipated at the time Rule One was initially drafted.

The *Johnson* decision was concerned only with the circumstances under which a prisoner can attack sentences scheduled to begin in the future. But in a later case also involving a prisoner named Johnson, *Johnson v. State*,[205] the Second District Court of Appeal extended the supreme court's *Johnson* decision to apply to a sentence that had been completely served. In the district court's *Johnson* decision, the defendant was convicted on a guilty plea in circuit court of being a convicted felon in possession of firearms in violation of section 790.23 of the Florida Statutes. The basis for this conviction was a 1948 felony conviction imposed by the same circuit court, the sentence for which had been served. The defendant moved to vacate the 1948 conviction under Rule One, which would also require the setting aside of the conviction under section 790.23. The trial judge denied this motion, but the second district reversed, holding the defendant could attack the 1948 conviction "as though it were a successive sentence since he is presently in custody."[206] The district court reasoned that such a result was required under the supreme court's *Johnson* decision, since the 1948 conviction was imposed by the same court and the movant was seeking to be released from

---

204. *Id.* at 8.

205. 203 So. 2d 36 (2d D.C.A. Fla. 1967). A somewhat related situation was presented in McCormick v. State, 164 So. 2d 557 (3d D.C.A. Fla. 1964). There the prisoner was serving a life sentence imposed under §775.10 of the Florida Statutes, which provides for a life sentence for any person convicted of a fourth felony. He filed a Rule One motion claiming to have been illegally punished under this section because he was denied the right to counsel at all three of the previous felony trials, which served as a basis for his life imprisonment. The trial judge summarily denied this motion, and the Third District Court of Appeal affirmed, holding the three prior convictions could not be attacked because the prisoner was not in custody under any of these convictions. The *McCormick* case was decided prior to the two *Johnson* decisions discussed above, but it seems unlikely that the result would be any different today, even if the three prior convictions had occurred in the same court. This follows because the prisoner would still not be entitled to be released if successful, he would still be subject to custody for the fourth felony.

206. *Id.* at 38.

custody. Presumably a different result would have been required if the 1948 conviction had been imposed by a different court.[207]

It is apparent from the above discussion that the "in custody" requirement has created many uncertainties and technical distinctions in the operation of the Rule One. Many of these distinctions seem to have little basis in policy or reason. It is recommended, therefore, that the custody requirement be removed from the rule. This could be accomplished by deleting the following language:[208]

> A prisoner in custody under sentence of a court established by the laws of Florida claiming the right to be released upon the ground that . . . .

and substituting the following therefor:

> Any person who has received, and is suffering or will suffer a serious deprivation because of, a sentence imposed by a court established under the Laws of Florida, who claims that . . . .

This amendment would allow relief in cases similar to those discussed above, without any distinctions based on such fortuitous factors as which court imposed a particular sentence. This revision would also allow relief in several other situations in which relief is now denied.[209] For example, a different result would have to be reached in such cases as *Pritchett v. State*,[210] which held that a prisoner would have to complete his present twenty-year sentence before attacking a consecutive twenty-year sentence. This decision was undoubtedly correct under the present rule,[211] but the better post-conviction procedure would seem to be to allow prisoners to attack their consecutive sentences at the earliest possible time. If the prisoner is required to wait until he is literally "in custody" under the consecutive sentence, he may have great difficulty in presenting his claims. Many witnesses might be dead or missing and much of the evidence might be misplaced. Conversely, if the prisoner is successful in having his sentence vacated, the state might have trouble in convicting him on retrial for the same reasons. If a sentence is subject to collateral attack, there is no valid reason for delaying a decision on the merits of this attack. Such delays do not aid the administration of criminal justice; they simply postpone until tomorrow decisions which could be more fairly made today.

---

207. *See generally* Echols v. State, 201 So. 2d 89 (2d D.C.A. Fla. 1967); State v. Dixon, 193 So. 2d 62 (2d D.C.A. Fla. 1966).

208. FLA. R. CRIM. P. 1.

209. Under this amendment, a prisoner could probably attack a concurrent sentence, which is not presently allowed. Yates v. State, 199 So. 2d 340 (1st D.C.A. Fla. 1967). Also, a parolee or probationer might be able to attack sentences pending against him.

210. 193 So. 2d 185 (4th D.C.A. Fla. 1966).

211. See Pritchett v. State, 198 So. 2d 19 (Fla. 1967), in which the Florida Supreme Court denied Pritchett's petition for a writ of habeas corpus on the authority of Johnson v. State, 184 So. 2d 161 (Fla. 1966).

RELATION OF RULE ONE TO POST-CONVICTION HABEAS CORPUS

Rule One has seriously limited the use of post-conviction habeas corpus in Florida. The rule provides:[212]

> An application for a writ of habeas corpus in 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 which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

Thus, the petitioner seeking a writ of habeas corpus must show that Rule One is inadequate or ineffective to test the legality of his detention, or that he has exhausted his remedies under the rule,[213] including appellate remedies.[214] Habeas corpus cannot be used as a substitute for timely appeal from a Rule One denial.[215]

In certain exceptional circumstances, however, the petitioner may be able to employ the writ in lieu of an appeal by showing that his failure to appeal was due to some prejudicial action, or inaction, by an agent of the state.[216] If Rule One remedies have not been exhausted, the habeas corpus petition should be denied without prejudice to file a Rule One motion. In some cases, the petition for habeas corpus will be denied without prejudice to proceed again under the rule even though all Rule One remedies have been exhausted; this may be done in cases in which the habeas corpus petition alleges adequate grounds for relief and the court believes they can be determined more efficiently under the rule.[217]

In other cases, however, the court may issue a writ of habeas corpus notwithstanding the fact that the petitioner has not exhausted his Rule One remedies. This can be done, for example, in cases in which there is some fundamental error appearing on the face of the record, such as a sentence greater than the maximum allowed for the crime of which the petitioner has been convicted.[218]

CURRENT STATUS OF *Coram Nobis*

The Florida Rules of Civil Procedure were revised in 1962 to provide that: "[w]rits of error coram nobis . . . are abolished."[219] This revision created some doubt as to the continued efficacy of *coram nobis* as a post-conviction

212. Appendix I.
213. Mitchell v. Wainwright, 155 So. 2d 868 (Fla. 1963).
214. Brown v. Wainwright, 158 So. 2d 527 (Fla. 1963); Gafford v. Wainwright, 157 So. 2d 138 (Fla. 1963).
215. Evans v. State, 175 So. 2d 226 (1st D.C.A. Fla. 1965).
216. Cappetta v. Wainwright, 203 So. 2d 609 (Fla. 1967); *cf.* Hollingshead v. Wainwright, 194 So. 2d 577 (Fla. 1967).
217. Evans v. State, 168 So. 2d 134 (Fla. 1964).
218. Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965).
219. FLA. R. CIV. P. 1.38.

remedy for attacking criminal judgments.[220] The prevailing opinion seems to be, however, that the writ can still be used when Rule One and habeas corpus are unavailable.[221] It is clear that the writ cannot be used whenever Rule One is adequate and effective.[222] The Third District Court of Appeal has indicated that the writ can be used to attack a sentence when the movant is not "in custody" under that sentence and would therefore be unable to use Rule One or habeas corpus.[223] The First District Court of Appeal has impliedly held that *coram nobis* can still be used to attack a criminal judgment on the basis of newly discovered evidence.[224]

While habeas corpus is substantially similar to Rule One, there are numerous differences between the rule and *coram nobis*. For example, application for the writ of error *coram nobis* must be made with the time allowed for appeal, unless good cause is shown for the delay,[225] but a Rule One motion may be filed at any time. If the judgment has been affirmed on appeal, leave must be obtained from the appellate court before applying for the writ in the trial court.[226] If the writ is issued, a jury trial is held to resolve any factual issues.[227] The primary purpose of the writ is to direct the attention of the court to specific facts *not* known to the petitioner at trial, but which are of such a vital nature that they would have prevented the rendition of the judgment had they been revealed.[228] If the writ is denied, the defendant has the right of appeal.[229] The state, however, has no right of appeal.[230]

Credit Upon Resentencing

Practically all movants who are successful in having their sentences vacated under Rule One, or any other proceeding, are subject to retrial.[231] Therefore, a tangential issue in any discussion of post-conviction remedies involves the determination of what credit, if any, should be allowed upon resentencing for time served under the vacated sentence. The prisoner is clearly entitled to

---

220. *See, e.g.*, Grant v. State, 166 So. 2d 503 (2d D.C.A. Fla. 1964); Pynes v. State, 66 So. 2d 277 (Fla. 1953); *cf.* United States v. Morgan, 346 U.S. 502 (1954).

221. *Cf.* Kinsey v. State, 19 So. 2d 706 (Fla. 1944); Lee v. State, 173 So. 2d 520 (1st D.C.A. Fla. 1965).

222. Falagon v. State, 167 So. 2d 62 (2d D.C.A. Fla. 1964).

223. *See* McCormick v. State, 164 So. 2d 557 (3d D.C.A. Fla. 1964).

224. Sanders v. State, 190 So. 2d 399 (1st D.C.A. Fla. 1966); Wolfe v. State, 190 So. 2d 397 (1st D.C.A. Fla. 1966).

225. Guarino v. State, 69 So. 2d 784 (Fla. 1953).

226. Russ v. State, 95 So. 2d 594 (Fla. 1957); *Ex parte* Welles, 53 So. 2d 708 (Fla. 1951).

227. Chambers v. State, 117 Fla. 642, 158 So. 153 (1934); Horner v. State, 158 So. 2d 789 (3d D.C.A. Fla. 1963).

228. Lamb v. State, 91 Fla. 396, 107 So. 535 (1926).

229. Reed v. State, 94 Fla. 32, 113 So. 630 (1927).

230. Washington v. State, 92 Fla. 740, 110 So. 259 (Fla. 1926); Lamb v. State, 91 Fla. 396, 107 So. 535 (1926).

231. One exception to this relates to those cases in which the sentence is set aside on grounds of double jeopardy. *Cf.* Ray v. State, 200 So. 2d 529 (Fla. 1967) .

credit for time served on the void sentence,[232] and the trial judge is presumed to have given credit for time served on the void sentence when he imposes a new sentence on retrial.[233] Under this presumption, it is possible for the sentence on retrial to be greater than the one which was set aside. The appellate courts will allow such sentences to stand, provided that the new sentence plus the time served on the vacated sentence, including gain time, does not exceed the maximum allowable for the particular crime involved.[234] The new sentence will be interpreted according to the plain meaning of the language used; the appellate court will not try to second guess the trial judge as to what credit was intended.[235]

A prisoner cannot receive credit on a valid sentence for time previously served on a void sentence.[236] But when a valid sentence is consecutive to a void sentence, the valid sentence will be deemed to have begun when it was imposed rather than at the expiration or vacation of the void sentence.[237] In this manner, the prisoner can receive "credit" for time served on a void sentence.

CONCLUSION

The *Gideon* decision presented a severe test for Florida's collateral post-conviction remedies. As a result of that decision the state was faced with the herculean task of trying to consider and determine the post-conviction claims of almost 5,000 prisoners who suddenly became eligible to file motions to vacate their sentences. In order to handle the anticipated deluge of motions, the Florida Supreme Court promulgated Criminal Procedure Rule One. After five years of operation it is clear that the rule has fulfilled its primary purpose of providing an efficient forum for prompt and fair consideration of belatedly recognized constitutional rights.

This is not to say, however, that Rule One cannot be improved. This article recommends three specific amendments: (1) adoption of a form to be used in the filing of all Rule One motions; (2) abolishment of the requirement that the motion to vacate a sentence be heard by the judge who imposed the sentence; and (3) deletion of the requirement that a person be "in custody" under a sentence before attacking that particular sentence. Through the adoption of these amendments, the Florida Supreme Court can substantially improve the operation of Rule One.

---

232. Tilghman v. Mayo, 82 So. 2d 136 (Fla. 1955); Perry v. Mayo, 72 So. 2d 382 (Fla. 1954).

233. Little v. Wainwright, 161 So. 2d 213 (Fla. 1964).

234. *Id.*; Lassiter v. State, 166 So. 2d 159 (1st D.C.A. Fla. 1964).

235. Falagan v. Wainwright, 195 So. 2d 562 (Fla. 1967).

236. Montford v. Wainwright, 162 So. 2d 663 (Fla. 1964).

237. Sterns v. Wainwright, 195 So. 2d 860 (Fla. 1967); Helton v. Mayo, 15 So. 2d 416 (Fla. 1943).

APPENDIX I

RULE 1.850, FLORIDA RULES OF CRIMINAL PROCEDURE

Motion To Vacate, Set Aside or Correct Sentence; Hearing; Appeal

"A prisoner in custody under Sentence of a court established by the Laws of Florida claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or Laws of the United States, or of the State of Florida, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or 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 prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the appropriate appellate court from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in 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 which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

APPENDIX II

Motion To Vacate Sentence, Filed Pursuant to Rule 1.850, Florida Rules of Criminal Procedure

_____
(Sentencing Court)

_____
Full name and prison number of Petitioner

vs.

Case No. _____
(to be supplied by Clerk of sentencing court)

_____
Name of Respondent

Instructions — Read Carefully

In order for this motion to receive consideration by the sentencing court, it must be typewritten or legibly handwritten, must be signed and verified by the Petitioner, and must set forth in concise form the answers to each applicable question. If necessary, Petitioner may finish answering a particular question on the reverse side of the page or an additional blank page.

Because every motion under Rule 1.850 must be sworn to under oath before relief can be granted, any misrepresentation of a material fact in this motion may serve as the basis of prosecution and conviction for perjury. Therefore, the Petitioner should exercise great care to assure that all answers are true. When this form is completed, the original and one copy shall be mailed to the clerk of the court which imposed the sentence being attacked.

1. Place of detention _____
2. Name and location of court which, and name of judge who, imposed sentence _____
3. Indictment or information number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:
   (a) _____
   (b) _____
   (c) _____
4. The date upon which sentence was imposed and the terms of the sentence:
   (a) _____
   (b) _____
   (c) _____
5. Check whether a finding of guilty was made
   (a) after a plea of guilty _____
   (b) after a plea of not guilty _____
   (c) after a plea of nolo contendere _____
6. If you were found guilty after a plea of not guilty, check whether that finding was made by
   (a) a jury _____
   (b) a judge without a jury _____
7. Did you appeal from the judgment of conviction or the imposition of sentence? _____
8. If you answered "yes" to (7), list
   (a) the name of each court to which you appealed:
      i. _____
      ii. _____
      iii. _____

(b) the result in each such court to which you appealed:
i. _____
ii. _____
iii. _____
(c) the date of each such result:
i. _____
ii. _____
iii. _____

9. State concisely the grounds on which you base your allegation that the sentence which was imposed on you is invalid:
(a) _____
(b) _____
(c) _____

10. State concisely and in the same order the acts which support each of the grounds set out in (9):
(a) _____
(b) _____
(c) _____

11. Have you previously filed petitions for habeas corpus, motions to vacate sentence under Rule 1.850, Florida Rules of Criminal Procedure, or any other applications, petitions or motions with respect to this conviction? _____

12. If you answer "yes" to (11), list with respect to each petition, motion or application
(a) the specific nature thereof:
i. _____
ii. _____
iii. _____
(b) the name and location of the court in which each was filed:
i. _____
ii. _____
iii. _____
(c) the disposition thereof:
i. _____
ii. _____
iii. _____
(d) the date of each such disposition:
i. _____
ii. _____
iii. _____
(e) if known, citations of any written opinions or orders entered pursuant to each such disposition:
i. _____
ii. _____
iii. _____

13. Has any ground set forth in (9) been previously presented to this or any other court by way of petition for habeas corpus, motion to vacate sentence under Rule 1.850, Florida Rules of Criminal Procedure, or any other petition, motion or application? _____

14. If you answer "yes" to (13), identify
(a) which grounds have been previously presented:
i. _____
ii. _____
iii. _____
(b) the proceedings in which each ground was raised:
i. _____
ii. _____
iii. _____

15. Were you represented by an attorney at any time during the course of:
    (a) your arraignment and plea? _____
    (b) your trial, if any? _____
    (c) your sentencing? _____
    (d) your appeal, if any, from the judgment of conviction or the imposition of sentence? _____
    (e) preparation, presentation or consideration of any petitions, motions or applications with respect to this conviction, which you filed? _____
16. If you answered "yes" to one or more parts of (15), list
    (a) the name and address of each attorney who represented you:
        i. _____
        ii. _____
        iii. _____
    (b) the proceedings at which each such attorney represented you:
        i. _____
        ii. _____
        iii. _____

_____
Signature of Petitioner

) ss
)

_____, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

_____
Signature of Affiant

SUBSCRIBED and SWORN to before me this _____ day of _____, _____
month year

_____
Notary Public

My commission expires _____
(month, day, year)