IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

Criminal Division

STATE OF FLORIDA,

Plaintiff/Appellee,

vs. CASE NO. CRC 89-11425-CFANO

KEVIN RICHARD HERRICK,

Defendant/Appellant.

_____/

NOTICE OF APPEAL

NOTICE IS GIVEN that the defendant, **KEVIN RICHARD HERRICK,** appeals pursuant to Fla.R.App.P. 9.140(g) to the District Court of Appeal of Florida, Second District, the order of this Court rendered **December 1, 1993.**

The nature of the order appealed is a final order summarily denying defendant's motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850.

All parties to this cause are called upon to take notice of this appeal.

Dated this 20th day of December, 1993.

Kevin Richard Herrick #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **NOTICE OF APPEAL** has been furnished by United States Mail to the Office of the State Attorney, 5100 144th Avenue North, Clearwater, FL 34620; Office of the Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, FL 33607, this **20th day of December, 1993.**

Kevin Richard Herrick #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

IN THE DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

KEVIN RICHARD HERRICK,

Appellant,

vs. CASE NO. 93-04351

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S MOTION FOR REHEARING

In accordance with the provisions of Fla.R.App.P. 9.330, the appellant respectfully moves this Honorable Court for an Order granting rehearing. The appellant submits that the Court overlooked controlling points of law or fact, and shows the Court as follows:

Decision Premature;

Appellant submits that this panel must have overlooked the fact that appellant has a clear legal right to file a brief on the merits of his appeal, though he is not required to do so. Fla.R.App.P., 9.140(g). Appellant, a pro se litigant who is serving a life sentence with no possibility of parole (ever), was clearly denied his right to file a brief on the merits of his appeal when this panel prematurely issued its putative decision only thirty-five (35) days after the notice of appeal was filed, thirty (30) days after the clerk of the lower tribunal

transmitted (mailed) the record to this Court.

This panel must have overlooked the fact that proceedings under Rule 3.850 to attack a judgment or sentence or both are collateral to the criminal action under attack, and such proceedings must be litigated in accordance with the rules governing civil procedure, at both the trial and appellate levels, except where those rules are inconsistant with the specific provisions of Rule 3.850. Green v. State, 280 So. 2d 701 (Fla. 4th DCA 1973); See generally Jackson v. State, 452 So. 2d 533 (Fla. 1984); Cobb v. State, 424 So. 2d 980 (Fla. 4th DCA 1983).

This panel must have overlooked the fact that an initial brief in a civil appeal must be served within seventy (70) days of the filing of the notice of appeal. Fla.R.App.P. 9.110(f). All subsequent briefs are governed by the general time schedule set forth in Rule 9.210(f). An answer brief must be served within twenty days of service of the initial brief, and a reply brief must be served with twenty days of service of the answer brief. If a brief is served by mail, an additional five days shall be added to prescribed period. Fla.R.App.P. 9.420(d).

In State v. A.D.H., 429 So. 2d 1316, 1318 (Fla. 5th DCA 1983), the Fifth District Court of Appeal explained that the purpose of an appellate brief is:

> to present to the Court in concise form the points and questions in controversy, and by fair argument on the facts and law of the case, to assist the Court in arriving at a just and proper conclusion, and to notify opposing counsel of the questions to be presented and the authorities relied on. In other words, the purpose is to aid the appellate court in determining the law.

Appellant submits that his brief would have served as an aid to the Court by providing a complete and accurate statement of the case. It would have aquainted the Court with the material facts, the points of law involved, and the arguments supporting appellant's position. However, appellant was precluded from submitting his brief when this panel prematurely issued its decision.

Further, while oral argument is not permitted as a matter of right, appellant was denied his clear legal right to request it pursuant to Rule 9.320. If not for this panel's premature decision, appellant would have requested oral argument. It would have been beneficial to the Court in resolution of the issues, and oral argument would have explained and clarified the written arguments in the briefs.

Fundementally, it should be noted that appellant discovered an error in the record on appeal that need to be corrected, however, this panel prematurely issued its decision before he could file a corrective pleading pursuant to Rule 9.200(f)(1). Thus, appellant was denied his clear legal right to correct an error in the record on appeal, and this panel's putative decision is based upon an inaccurate record.

It goes without saying that appellant was denied his clear legal right to supplement the record on appeal pursuant to Rule 9.200(f)(2). See Trans-Continental Finance Corp. v. Baxter, 402 So. 2d 1289 (Fla. 5th DCA 1981). Thus, this panel's decision is based upon a record that appellant had no opportunity to supplement.

Additionally, appellant was denied his clear legal right to request relief under the Florida Rules of Appellate Procedure by motion pursuant to Rule 9.300(a). Particularly, appellant was denied his clear legal right to request an extension of time in which to file his initial brief on the grounds that the record on appeal needed to be corrected and supplemented, and because appellant is an incarcerated pro se litigant, handling a very complicated and important case, the outcome of which will determine if appellant obtains relief or dies in prison.

Appellant was further disadvantaged in this appeal because the clerk of the district court of appeal had not yet provided appellant with verification that he had received the record on appeal, nor did the clerk provide appellant with the assigned case number. Nonetheless, appellant finally obtained the case number from this panel's per curiam affirmance.

Appellant submits that the foregoing constitutes a clear departure from the essential requirements of law, which clearly violates appellant's rights to due process and equal protection under the law, guaranteed by the Florida and United States Constitutions.

Appellant respectfully submits that this panel's decision on this issue will be one that "passes upon a question of great public importance", and that it should therefore be certified to the Florida Supreme Court pursuant to Rule 9.020(a)(2)(A)(v).

The correct application of the rules governing civil proceedings to collateral proceeding pursuant to Rule 3.850 attacking the judgment or sentence or both of a criminal action

is an issue that will have a future impact on a large number of courts, trial and appellate, and the importance of this issue is undersocred by the great number of appeals from denials of motions for post-conviction relief pursuant to Rule 9.140(g) each district court of appeal handles on a daily basis.

While the foregoing question is one that should be resolved by the Florida Supreme Court, there is no jurisdictional basis upon which the parties can request Florida Supreme Court review of the issue.

Under these circumstances, appellant suggests that the appropriate course of action for this Court would be to certify this panel's decision as one passing upon question of great public importance.

WHEREFORE, appellant prays that this Honorable Court will issue an Order granting rehearing.

Respectfully submitted,

Kevin Richard Herrick #240583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, FL 33607, this ____ day of _____, 19____.

Kevin Richard Herrick #840583
DeSoto Correctional Institution
Post Office Drawer 1072
Arcadia, FL 33821-1072