

904/384-2999

Attorney for Appellant

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PRELIMINARY STATEMENT

References to the record herein will be “R” followed by the appropriate page numbers as assigned by the Clerk of Court.

The Appellant will be referred to as “Appellant” or “Defendant”.

STATEMENT OF ISSUES

ISSUE I

**THE TRIAL COURT ERRED IN DENYING DEFENDANT'S
MOTION TO VACATE JUDGMENT AND SENTENCE WITH
SPECIAL REQUEST FOR
LEAVE TO AMEND.**

ISSUE II

**THE TRIAL COURT ERRED IN DENYING DEFENDANT'S
MOTION TO
VACATE JUDGMENT AND SENTENCE WITH SPECIAL
REQUEST FOR
LEAVE TO AMEND WITHOUT HOLDING A HEARING
PURSUANT TO
FLA.R.CRIM.P.3.851(C).**

STATEMENT OF THE CASE AND OF THE FACTS

Defendant was indicted on two counts of first degree murder. He was convicted of both counts and sentenced to death. The Florida Supreme Court affirmed the convictions in Bell v. State, Case number 86-094.(R-4) and issued a mandate on November 17, 1997. (R-26). The United States Supreme Court denied Defendant's Petition for Writ of Certiorari on February 23, 1998. (R-27). On June 25, 1998, the Florida Supreme Court tolled Defendant's time to file a 3.851 motion until October 1, 1998. (R-27).

On September 1, 1998, the trial court appointed Baya Harrison to represent Defendant. Mr. Harrison withdrew and undersigned counsel was appointed on October 12, 1998. (R-27).

On May 27, 1999, Defendant filed his Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend (hereinafter referred to as the Motion). (R-1). The Motion was incomplete and was filed to toll the time to file a Petition for Writ of Habeas corpus in federal court. (R-1). The Motion requests more time to investigate to file an amended Rule 3.850 motion and to request an evidentiary hearing at that time. (R-2). The Motion alleges that all public records of state agencies were not received and interviews of all witnesses revealed in the public records have not been completed. Until completed the

Defendant would be denied effective legal representation. (R-3).

The Motion further alleged that due process requires leave to amend. The Defendant specifically requested the right to supplement and/or amend to include newly discovered evidence, Chapter 119 records; to add claims; and to provide a memorandum of law. (R-4).

The Motion pled that the Defendant is being denied his right to investigate and prepare in violation of his 6th, 8th and 14th constitutional amendments. It further stated that due process requires the right to amend as it has been granted to other inmates similarly situated. (R-7).

The Motion also pled the right to develop grounds that include: (a) no adversarial testing occurred because of the ineffective assistance of counsel, withholding of newly discovered evidence or improper rulings of the trial court; (b) newly discovered evidence make the convictions constitutionally unreliable; (c) due process was denied because the state withheld material evidence; (d) trial counsel was ineffective during voir dire which deprived Defendant of his constitutional rights under the 5th, 6th, 8th and 14th amendments to the United States Constitution; (e) trial counsel was ineffective in the guilt phase of the trial; (f) defendant did not have effective counsel and mental health experts during the guilt and innocence phase to provide information to the Court and to the Jury regarding

his mental state; (g) trial counsel failed to obtain mental health evidence in the guilt and penalty phase of his trial; (h) the trial was fundamentally unfair which deprived Bell of his constitutional rights; (i) trial counsel failed to adequately prepare for the penalty phase and therefore death was unreliable;

(j) Defendant was innocent; (k) Defendant was absent during some of the proceedings; (l) the penalty phase jury instructions shifted the burden regarding death; (m) the jury recommendations of death are unreliable; (n) the jury was inadequately guided on the aggravating factor, which are also too vague; (o) trial counsel failed to object or argue effectively as to the state's non-statutory aggravating factors; (p) the sentencing jury was misled by comments; (q) execution is cruel and unusual; (r) Florida's capital sentencing statute is facially unconstitutional ; (s) pre-trial publicity denied Defendant a fair trial; (t) the record did not provide for a proper direct appeal; (u) shackling and/or security at trial deprived defendant of a fair trial; (v) the jury and judge relied on misinformation; (w) Defendant's death sentence is based on an automatic aggravating circumstance and (x) the FBI crime lab may have been in error. (R-8-20).

On November 5, 1999, the Office of the Attorney General filed the State's Response to Defendant's Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend(hereinafter referred to as "State's Response"). (R-26).

The State's Response pled that the Motion should be denied because it is conclusory, fails to state facts as to why the investigation is not complete and that the defendant within the one year time period had not filed a motion in the Florida Supreme court to show good cause to extend the one year time period. (R-28-29). The State further pled that Defendant is not entitled to the assistance of collateral counsel at all nor effective collateral counsel. (R-29). The State argued that as Bell's one year time period expired on May 31, 1999, he cannot use the public records law to extend any time periods. The State referred to statements before the Court that the defendant was attempting to obtain trial counsel's file, but would file an amended Motion by the end of October. (R-30). The State pled that since the May 31, 1999, the deadline for a 3.850 had been passed for over 5 months and that the Motion should be denied. Further, the State pled that the Motion is conclusory and therefore legally insufficient and should be denied. (R-31).

On December 30, 1999, without any hearing, the retired senior trial judge issued an Order Denying Defendant's Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend. The Order incorporated the "attached" State's response to motion, but nothing was filed attached to the Order. (R-33).. The Notice of Appeal was timely filed on January 28, 2000. (R-34).

SUMMARY OF ARGUMENT

The trial court erred in denying Defendant's Motion to Vacate Judgment and Sentence with Special Request For Leave to Amend. Due process of law applies to postconviction proceedings. Similarly situated death row inmates have been allowed to amend or supplement initial 3.850 motions. The 1 year time limit does not strictly apply when collateral counsel was not appointed within 30 days of the disposition of the writ of certiorari from the U.S. Supreme Court. The Florida Courts have allowed amendment, particularly when there is a records request or other problem as in this case. Special consideration should be given to collateral attacks in a death case, and the Motion to Amend should be allowed.

The Court erred in not having a Huff hearing prior to denying the defendant's Motion to Vacate Judgment and sentence with Special Request for Leave to Amend. A Huff hearing is required by case law and the Rules of Criminal Procedure. It is not harmless error. The Court should remand for a Huff hearing.

ISSUE I

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND.

The main thrust behind the State's Response to Defendant's Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend is that since 1 year and 5 months had passed since the United State Supreme Court had denied Defendant's petition for writ of certiorari the time had expired to file an amended motion and that the motion to amend should therefore be denied. (R-26). Presumably this reasoning was adopted by the trial court. (R-33). The trial court adopted the State's Response but while noting that it was attached, in actuality attached nothing. (R-33). Denial of the motion denies the Defendant due process of law.

While the State refers to Fla.R.Crim.P.3.851(b)(1) to define the one year time limit(R-27), the State specifically fails to address, the explicit assumption set forth in (b)(3) that;

the time limitation in subdivision (b)(1) is established with the understanding that each death-penalty prisoner will have counsel assigned and available to begin addressing the prisoner's postconviction

issues within 30 days after the judgment and sentence become final.

In fact in the Court Commentary, the committee notes that part of the justification for reducing the time period from 2 years to one was the availability of counsel. In the instant case, the defendant did not have counsel within the first 30 days. In fact counsel was not appointed until 7 and ½ half months after the writ of certiorari in the United States Supreme Court had been turned down. (R-27).

Rule 3.851 does not specifically address whether the 1 year time limit is tolled or whether it is strictly enforced when counsel is not appointed within 30 days. The rule does, however, give an extension of time for good cause. But, contrary to the State's allegation, the rule does not state that the motion must be filed within the year. It only states that counsel must make a showing "for counsel's inability to file the postconviction pleadings within the one-year period established by this section." Rule 3.851(b)(4). Additionally, amendments and supplements to pending motions are specifically allowed by Fla.R.C.P.3.851(b)(3).

In the case of Brown v. State, 596 So.2d 1026, 1027(Fla.1992), the Florida Supreme Court held that the time limitation did not preclude the "enlargement of issues raised in a timely-filed first motion for postconviction relief."

The Court did not reach the issue of new grounds. Id. However, the Court has held that if public records have not been disclosed, that a motion to amend may be filed after they are disclosed. Ventura v. State, 673 So.2d 479, 483(Fla. 1996), Walton v. Dugger, 634 So.2d 1059(Fla. 1993).

In the instant case due process of law is applicable. See, Holland v. State, 503 So.2d 1250 (Fla. 1987). Many inmates have been able to amend an initial motion to vacate. Were the Defendant not allowed to file an amended motion, due process of law under the 6th, 8th and 14 amendments to the United States Constitution will be denied.

The case should be remanded to handle all outstanding records requests as well as obtain trial counsel's file and Bell should be allowed to file an amended motion after receipt of all information.

ISSUE II

**THE TRIAL COURT ERRED IN DENYING DEFENDANT'S
MOTION TO
VACATE JUDGMENT AND SENTENCE WITH SPECIAL
REQUEST FOR
LEAVE TO AMEND WITHOUT HOLDING A HEARING
PURSUANT TO
FLA.R.CRIM.P.3.851(C).**

Fla.R.Crim.P.3.851(c) requires that the trial court conduct a hearing on a 3.850 motion filed by a prisoner on death row. The hearing, commonly referred to as a Huff hearing, is to determine whether an evidentiary hearing is required or even to determine the status of a public records request. In the instant case the trial court entered an order prior to having a hearing, thereby violating the requirement of Fla.R.Crim.P.3.851(c) and requiring a remand to conduct a hearing.

In the seminal case of Huff v.State, 622 So.2d 982(Fla. 1993), the trial court summarily denied the 3.850 motion to vacate judgment and sentence. The trial court signed a proposed order from the State before the defendant's counsel had an opportunity to object or submit a proposed order. The Florida Supreme Court in reversing the order and granting a hearing held that because the death penalty was involved, as well as other reasons, that Huff's rights to due process of law were

violated. Id. at 983. The Court held that:

Because of the severity of punishment at issue in a death penalty postconviction case, we have determined that henceforth the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion.

Id. An evidentiary hearing would not always be required, but the attorneys must have the opportunity to be heard and to give “legal argument” regarding the motion. Interestingly, after remand Huff filed an amended 3.850 on November 8, 1996, which was the basis for an evidentiary hearing on one of the issues. Huff v. State, 25 Fla.L.Weekly S411 (Fla. May 25, 2000).

Huff was incorporated in Fla.R.Crim.P.3.851(c) as a 1996 amendment. Fla.R.Crim.P.3.851(c) Court Commentary. The requirement is one of due process in cases involving the death penalty.

In a similar case, Mordenti v.State, 711 So.2d 30 (Fla. 1998), Mordenti file a motion to vacate judgment with a special request for leave to amend. The trial court summarily denied the motion without holding either an evidentiary hearing or a Huff hearing. Id. at 31. While the State conceded that a Huff hearing was required, the State argued that it was harmless error. The Court held that the hearing was necessary to ensure due process and to allow Mordenti to be heard on the status of his public records requests. Id. at 32. The Court specifically found that a public

records request could be heard in a 3.850 motion. Finally, the Court held that if public records had been withheld that Mordenti should be allowed to amend his postconviction motion once those records were furnished. The Court then set a hearing schedule. Id.

In the instant case, the Defendant's Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend was summarily denied without a Huff hearing. The State in their Response to Defendant's Motion conceded that the Defendant indicated that he was having trouble obtaining trial counsel's file and needed it to complete the motion to vacate. (R-30). Despite the known difficulty that defendant was having with records and without having any hearings the trial court denied the Motion to Vacate Judgment and Sentence with Special Request for Leave to Amend. This denial should be reversed and if trial counsel has not provided defendant's trial file or there are any other public records problem, then leave to amend should be allowed after the problems have been cured.

CONCLUSION

The Court should remand the case to the trial court to allow the filing of an amended claim under 3.850 within 90 days of the receipt of the trial counsel's file and all other outstanding record requests have been resolved. In the alternative, the Court should remand the case to the trial court to hold a hearing consistent with Rule 3.851(c) to determine if an evidentiary hearing should be held and/or to consider whether an amendment should be allowed to be filed to the Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to George Bateh with the, Office of the State Attorney, Duval County Courthouse, 330 East Bay Street, Room 600, Jacksonville, Florida 32202, Barbara Yates, Assistant Attorney General, 107 W. Gaines Street, Tallahassee, Florida 32304, Michael Bernard Bell, DC No. 108426, Union Correctional Institution, P.O. Box 221, Raiford, Florida 32083, by regular United States Mail this 24th day of July, 2000.

Jeanine B. Sasser
Attorney for Appellant