

IN THE SUPREME COURT OF  
THE STATE OF FLORIDA

Larry Clark  
Appellant  
vs.  
State of Florida  
Appellee

67523.

Case No. 81-10608

INITIAL BRIEF OF APPELLANT

On Appeal From Denial of Motion to  
Vacate or Set Aside Sentence by the  
Circuit Court of the 13th Judicial Circuit  
of Florida, In and For Hillsborough County

**FILED**

SID J. W. ...

CLERK OF COURT

By

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AUG 22 1985  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

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### III. STATEMENT OF THE CASE

Larry Clark appeals the summary denial of his pro se Motion to Vacate and Set Aside Sentence (hereinafter the "Motion for Post-Conviction Relief"), and his Motion to Vacate the Order Denying Post-Conviction Relief (hereinafter "Motion to Vacate") in view of his previous pro se Motion for Permission to Withdraw said Motion for Post-Conviction Relief (hereinafter "Motion to Withdraw 3.850"). Mr. Clark submits that it was error for the Circuit Court to refuse to rehear and vacate its order denying post-conviction relief after it learned that said order was the result of a clerical error and the State's failure to review the court file. The jurisdiction of this Court is invoked pursuant to Rule 9.030(a)(1)(A)(i) of the Florida Rules of Appellate Procedure.

On April 4, 1982, Mr. Clark was convicted of the first degree murder of Dorothy Satey, the attempted murder of Felix Satey and armed robbery. He was sentenced to death on April 20, 1982. This Court upheld the conviction and sentence on December 22, 1983. See Clark v. State, 443 So.2d 973 (Fla. 1983), cert. denied, 104 S. Ct. 2400 (1984).

Larry Clark is thirty-five years old and, according to trial testimony, is only of marginal intelligence. He has

no transcript of his trial, no legal training and, since he is on Death Row at the Florida State Prison, no access to a law library.

Between September 1984, when an Executive Clemency hearing was held, and December 1984, Mr. Clark was without legal counsel. On December 6, 1984, Mr. Clark filed with the Court below a handwritten pro se Motion for Post-Conviction Relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure. His motion asserted fifteen allegations in conclusory terms, including a claim of ineffective assistance of counsel. See Motion for Post-Conviction Relief, appended as Exhibit A. No attorney advised Mr. Clark or assisted in the preparation of the motion. On December 27, 1984, after learning that pro bono publico counsel had been located for him, Mr. Clark filed with the court a pro se Motion to Withdraw 3.850 so that his legal claims could be assessed by an attorney. See, Motion to Withdraw 3.850, appended as Exhibit B. He also filed at that time an Affidavit of Indigency and a Retainer of Counsel.

Mr. Clark's Motion for Post-Conviction Relief was forwarded by the clerk of the court to Judge Rogers Padgett, who had presided over Mr. Clark's trial in 1982, and to the State Attorney's Office. Although it was filed December 27, 1984, the court clerk did not forward Mr. Clark's subsequent

Motion to Withdraw 3.850, and neither Judge Padgett nor the State Attorney apparently reviewed the file to discover that Mr. Clark had attempted to withdraw his petition. (Tr. at \_\_ ).\*

On March 20, 1985, the State filed its Response to Mr. Clark's Motion for Post-Conviction Relief (hereinafter the "State Response" or "Response"). The State mailed a copy of its Response to Mr. Clark on that date, but did not serve counsel for Mr. Clark, named in the Retainer of Counsel, as required by Rule 3.030 of the Florida Rules of Criminal Procedure. On the next day, March 21, 1985, a hearing was held before Judge Padgett at which neither Mr. Clark nor counsel was present. On March 27, 1985, an Order Denying Motion for Post-Conviction Relief was entered (hereinafter the "March 27th Order"), which simply adopted the proposed findings presented by the State.

Promptly upon learning of the State Response and the March 27th Order, counsel for Mr. Clark filed a Motion to Vacate which requested that the Court rehear its denial of Mr. Clark's motion. See, Motion to Vacate, appended as Exhibit C. A hearing on that motion was held on May 24, 1985,

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\* "Tr." refers to the Transcript of the hearing held on Mr. Clark's Motion to Vacate the Order Denying Post-Conviction Relief, held on May 24, 1985.

before Judge Manuel Menendez, Jr., because Judge Padgett had returned to the civil bench. On June 6, 1985, Judge Menendez entered an order denying Mr. Clark's Motion to Vacate without opinion. Notice of Appeal was filed in this case on June 30, 1985.



#### IV. SUMMARY OF ARGUMENT

A clerical error and the State's failure to review the court file resulted in an order denying post-conviction relief in this case, even though the defendant had attempted to withdraw his petition some twenty-one days after it was filed and some eighty-three days before the State eventually responded. While this proceeding could probably not survive constitutional scrutiny, such scrutiny is unnecessary since Fla. R. Crim. P. 3.850 provides a remedy for precisely this situation. That remedy is an opportunity for rehearing. A timely motion was filed in this case that substantially complied with the requirements of Rule 3.850, but the State argued that because this motion was not entitled a "Motion for Rehearing" the Court below had no jurisdiction to entertain it. The State's hypertechnical position, with which the Court below apparently agreed, is contrary to the clear weight of authority in Florida which holds that it is the substance and not the form that controls the legal status of a document and substantial compliance will satisfy the requirements of the Florida Rules of Criminal Procedure.

Mr. Clark should have been allowed to withdraw his pro se Motion for Post-Conviction Relief because he had no tools with which to investigate the legal or factual issues raised in his case and withdrawal of this petition would have occurred some eighty-three days before the State Response was

filed. Under these circumstances, the Court was required to grant Mr. Clark's Motion to Withdraw 3.850.

Finally, the March 27th Order was deficient insofar as the State and the Court failed to comply with Florida law. The State failed to serve counsel for Mr. Clark with its Response. No notice of hearing was filed or served and the Court failed to attach to its Order that portion of the record that conclusively shows that the prisoner is entitled to no relief.

Thus, this Court should reverse and remand, so that counsel for Mr. Clark may promptly file a complete § 3.850 motion.

V. ISSUES PRESENTED FOR REVIEW AND ARGUMENT

- A. THE COURT BELOW SHOULD HAVE GRANTED MR. CLARK'S "MOTION TO VACATE" AS IT WAS A MOTION FOR RE-HEARING WITHIN THE MEANING OF RULE 3.850 AND SET OUT REQUIRED GROUNDS ALLEGING THAT THE PREVIOUS DECISION HAD BEEN PREMISED UPON A MISTAKE

Because of the court clerk's failure to forward Mr. Clark's Motion to Withdraw 3.850 and the State's failure to examine the file in this case, an order denying all post-conviction relief was entered against Mr. Clark. Despite this obvious mistake, the State argued that the court below

had no jurisdiction to entertain Mr. Clark's Motion to Vacate the March 27th Order. The State was wrong.

The power of the circuit courts is broad. The Florida Constitution reserves for these courts the power "to issue. . .all writs necessary or proper to the complete exercise of their jurisdiction." Art. V, § 5(b) Fla. Const. See also English v. McCrary, 348 So.2d 293, 297 (Fla. 1977), citing B.F. Goodrich Co. v. Trammell, 140 Fla. 500, 192 So. 175 (1939); City of North Miami v. Engel, 109 So.2d 33, 34 (Fla. 3d DCA), cert. denied 115 So.2d 1 (1959). The United States Constitution, furthermore, protects the accused, even in post-conviction relief proceedings, from "'unreasoned distinctions that can only impede open and equal access to the courts.'" Mayer v. Chicago, 404 U.S. 189, 193 (1971), quoting Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

Access to the court can hardly be provided in a proceeding in which no copy of the State's papers nor any notice of a proposed hearing are provided to counsel and a simple clerical error results in a court order denying all post-conviction relief.

Such a proceeding could hardly pass constitutional muster, and the circuit court must have the power to remedy

such a deficiency. It is not necessary to invoke the Constitution, however, to find the Circuit Court's authority to remedy the problem in this case, for that authority is available in Rule 3.850 itself. That rule allows the court to remedy a mistake by rehearing the matter in question and vacating or modifying its original order. In opposing Mr. Clark's Motion to Vacate the March 27th Order, the State argued below that because Defendant's motion was entitled "Motion to Vacate" and not "Motion for Rehearing" the Court had no jurisdiction under Rule 3.850 to grant the relief requested. (Tr. at \_\_ ). The State's elevation of form over substance in this case is not only contrary to Florida law, but undermines the express policy supporting Rule 3.850.

This Court and numerous lower courts have repeatedly stated that "[i]t is not what [a thing] is called but what it is that fixes its legal status. It is the substance and not the form which is controlling," Green v. State, 450 So.2d 1275, 1278 n.3 (Fla. 5th DCA 1984) quoting Underwood v. Underwood, 64 So.2d 281, 288 (Fla. 1953). Certainly one must read more than the title of a document in order to determine its substance. Cf. Craven v. Elmo, 442 A.2d 526, 528 (D.C. 1982) ("The nature of a motion is determined by the relief sought and not by its label or caption.").

Defendant's Motion to Vacate was plainly a request for rehearing within the meaning of Rule 3.850. See Exhibit C. The motion was filed in response to an order denying all post-conviction relief and it was filed within the fifteen-day statutory period for such motions, soon after counsel telephoned the clerk of the court and learned of the entry of the Court's order denying Mr. Clark's pro se Motion for Post-Conviction Relief. Neither counsel for Mr. Clark nor Mr. Clark himself had received a copy of the order at that time.

As the Advisory Committee Note suggests, Rule 3.850 permits the denial of a motion for post-conviction relief without the defendant's presence because it also permits the prisoner, through the use of a motion for rehearing, to "point out any errors the court may have made. . . ." Fla. R. Crim. P. 3.850. In this case, an error was made and called to the Court's attention by a timely motion.

It is a well-established principal that substantial compliance will generally satisfy the requirements of the Florida Rules of Criminal Procedure. See, e.g., State v. Bruno, 107 So.2d 9 (Fla. 1958); Underwood v. State, 388 So.2d 1333 (Fla. 2d DCA 1980). Mr. Clark's Motion to Vacate substantially complied with Rule 3.850 and the policy underlying it. The court below therefore had jurisdiction to entertain this motion and grant the relief requested.

B. MR. CLARK SHOULD HAVE BEEN PERMITTED TO WITHDRAW HIS PRO SE MOTION FOR POST-CONVICTION RELIEF.

1. Mr. Clark had no meaningful access to court pro se.

Mr. Clark filed his pro se Motion for Post-Conviction Relief on December 6, 1984. He filed his pro se Motion to Withdraw 3.850 on December 27, 1984.

Mr. Clark was characterized by a psychiatrist who testified at his trial as "a man of marginal intelligence. His I.Q. is low; probably had a learning disability or problems with learning from early childhood." R. 1029.\* Since Mr. Clark had no copy of his trial transcript, he faced an insurmountable barrier to challenging his conviction whatever his intelligence.

Mr. Clark had no direct access to a law library, but had to make a request for a maximum of two cases per week, identified by legal citation. See Application of the Fla. Bar for the Special Committee on Representation of Death Sentenced Inmates, Appended as Exhibit A, at 1; see also Hooks v. Wainwright, 536 F.Supp. 1330, 1339 (M.D. Fla. 1982). Mr. Clark could not "investigate cases, interview witnesses,

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\* "R." refers to the record of Mr. Clark's trial held in 1982.

appear in court, or even make long distance telephone calls." 536 F.Supp. at 1348. As the Supreme Court has held: "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers . . . ." Bounds v. Smith, 430 U.S. 817, 828 (1977) (emphasis supplied). Mr. Clark's lack of tools with which to make a collateral attack upon his conviction rendered his "access to the courts" illusory. See Hooks, supra.\*

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\* Mr. Clark's pro se motion contained fifteen allegations. The State responded by arguing either that Mr. Clark had not pleaded his issues correctly, that they were procedurally barred, or that they were meritless. The Court adopted the State's contentions.

As would be expected of a person of his limitations and lack of legal resources, Mr. Clark's pleadings were not artfully drawn. For example, all the issues which the State argued "could have been raised on direct appeal", presumably should have either been pleaded as ineffectiveness claims, or set out in a habeas corpus before this Court. See State Response at 1. Neither Mr. Clark nor his counsel received notice of the hearing held March 21, so no opportunity was given for timely amendment. By the time counsel for Mr. Clark received notice of the Court's order, it had already been entered, and it was too late to amend the original petition. The only recourse was for counsel to move for reconsideration and vacation of the final order.

The Circuit Court failed to apply the rule requiring liberal construction of pro se pleadings. See, e.g., Andrews v. State, 160 So.2d 726, 727 (Fla. 3d DCA 1964) quoting Ashley v. State, 158 So.2d 530, 531 (Fla. 2d DCA 1963).

2. The Court was required by other compelling factors to grant Mr. Clark's Motion to Withdraw.

The Court below should have granted Mr. Clark's Motion to Withdraw 3.850 to ensure a full and competent presentation of all claims by counsel. The reasons for granting Mr. Clark's motion in December were compelling. Even now the State would suffer no prejudice were Mr. Clark's counsel permitted to submit a new motion.

The Florida rule does not specifically discuss the circumstances under which a defendant may withdraw his Rule 3.850 motion. Instruction may be derived, however, from other practice. In civil cases, for example, an action may be dismissed voluntarily without prejudice during trial. Fla. R. Civ. P. 1.420. In other jurisdictions the rule is equally liberal. Since there is no prejudice, a voluntary dismissal may generally be taken by the movant prior to the other party's response. See, e.g., Goodman v. Gordon, 103 Ariz. 538, 447 P.2d 230 (1968); see also 24 Am. Jur. 2d Dismissal, Discontinuance, and Nonsuit §22 (1983). This is also the rule adopted in the federal courts. Fed. R. Civ. P. 41(a)(1). See Winterland Concessions Co. v. Smith, 706 F.2d 793 (7th Cir. 1983).



Rule 3.850 generally favors counselled proceedings for post-conviction relief. See, e.g., Graham v. State, 372 So.2d 1363, 1365 (Fla. 1979); Halpin v. State, 448 So.2d 1153 (Fla. 2d DCA 1984). The Rule should therefore be construed to preserve counsel's opportunity to make a thorough review of the record. Finally, the Rule guards against piecemeal litigation, since it places considerable limits on successor petitions. Fla. R. Crim. P. 3.850. In preventing piecemeal litigation, however, the Rule should not be construed to prevent thorough litigation of constitutional claims, since the Rule also protects "avenues of review so long and so well established, that they must be counted among the basic 'protections' with which our judicial system has 'surrounded' all persons convicted of a crime." Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980) quoting Evans v. Bennett, 440 U.S. 1301, 1303 (1979).

Applying these principles to this case, the reasons for granting Mr. Clark's Motion to Withdraw 3.850 are overwhelming. He filed his pro se Motion for Post-Conviction Relief without the benefit of any legal training and without the resources to investigate adequately either the law or facts of his case (he did not even possess a transcript of his trial). The State's apparent position is that Mr. Clark should bear the burden of the court clerk's mistake and their own failure to review the file. Under these circumstances,

that position is patently unreasonable. The Court below was required by Rule 3.850, well-developed principles of Florida law, equity and the Constitutions of Florida and the United States to vacate its order denying post-conviction relief.

C. NEITHER THE STATE NOR THE COURT COMPLIED WITH FLORIDA LAW.

The March 27th, Order was deficient insofar as the State and the Court failed to comply with Florida law.

First, Florida law provides that "[e]very pleading subsequent to the initial indictment . . . shall be served on each party. . . ." Fla. R. Crim. P. 3.030. The State failed to serve a copy of the response to Mr. Clark's pro se motion upon his counsel as required by law. See Fla. R. Crim. P. 3.030(b). Service upon Mr. Clark was made by mail, posted on the day prior to the hearing. Thus, he did not even receive it until after the hearing had been held and was denied the opportunity to respond to the State's contentions.

Second, no notice of the March 21, 1985 hearing was filed or served, as required by law. Fla. R. Crim. P. 3.060.

Finally, despite the admonition of Rule 3.850 that "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief

shall be attached to the order, the Court failed to give notice in the order of the parts of the record which supported the decision.\* It was therefore impossible for counsel for Mr. Clark to know how to respond to the Court's denial of relief.

#### VI. Conclusion

For the reasons stated above, the Court's order denying Mr. Clark's Motion to Vacate should be reversed. The Order Denying Post-Conviction Relief should be reversed and Mr. Clark should be allowed to withdraw his pro se Motion to Vacate and Set Aside Sentence without prejudice to his refiling such a petition with the assistance of counsel.

Respectfully submitted,



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\* It is apparent from the State's response that the resolution of certain claims required "a review of the . . . trial testimony." State Response, at 2.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing document were served by mail, postage pre-paid, on:

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this 21st day of July, 1985.

Robert E. Sims  
(signature)