IN THE SUPREME COURT OF THE STATE OF FLORIDA

LARRY CLARK, Appellant, v. STATE OF FLORIDA, Appellee.	Case No. 67,525

REPLY 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

Robert E. Sims
O'Melveny & Myers
1800 M Street, N.W.
Suite 500, South Lobby
Washington, D.C. 20036
(202) 457-5931

Clive A. Stafford Smith
Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, GA 30303

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I. ARGUMENT

A. THE COURT BELOW ERRED IN DENYING MR. CLARK'S MOTION TO VACATE.

In an attempt to justify a clearly erroneous decision by the Court below, the State refuses to accept a purported "assumption" of Mr. Clark's. That assumption, according to the State, is that the Court denied Mr. Clark's pro se Motion for Post-Conviction relief without realizing that Mr. Clark had previously attempted to withdraw it. In place of this purported assumption, however, the State offers several of its own. First it implies that the Court below not only discovered Mr. Clark's Motion to Withdraw, but withheld judgment on the Motion until it determined that Mr. Clark was not going to refile his 3.850 Motion in a "reasonable time."* State Br. at 8. The court then "implicitly" denied the Motion, without ever acknowledging its existence, and ruled

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* The State boldly asserts that three months is an "unreasonable" amount of time for Mr. Clark's new counsel to review the record in his case; investigate all factual matters related to it, including locating potential witnesses, some of whom no longer reside in the State; conduct the necessary legal research and prepare a 3.850 petition. State Br. at 8. This is a peculiar statement since it took the State over three months to file a 5-page Response to claims it characterizes as "meritless." State Br. at 4.

against Mr. Clark. State Br. at 8. In advancing this improbable scenario, the State not only suggests that the Court was aware that Mr. Clark was represented by counsel, since a retainer of counsel was included with the Motion to Withdraw, but also suggests that the Court willingly disregarded this fact when, without notice to counsel, it held an ex parte hearing in this case and denied Mr. Clark's pro se Motion.

If the State's position is correct, then the Court's actions are much more objectionable. Fortunately, the State is demonstrably wrong. The record in this case clearly indicates that the Court was never made aware of the Motion to Withdraw. The Court's refusal to correct this obvious mistake by rehearing the matter and granting Mr. Clark's Motion to Vacate therefore constitutes reversible error.* See App. Init. Br. at 6-9.

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* The State apparently does not argue here, as it did below, that the Court properly denied Mr. Clark's Motion to Vacate merely because it was not entitled a "Motion for Rehearing." It suggests, however, that another of its dubious arguments has not yet been refuted, i.e., that the Court below could not rule on Mr. Clark's Motion to Vacate because it was not signed by Mr. Clark nor by "an attorney licensed in the State of Florida to practice law (R83)." State Br. at 4. This contention is meritless. While it is apparent from the pleading that local counsel signed the

(Footnote cont'd to next page)

B. THE COURT ERRED IN REFUSING TO GRANT MR. CLARK'S MOTION TO WITHDRAW.

1. Mr. Clark Had No Meaningful Access to Court Pro Se.

A fair reading of Mr. Clark's pro se Motion for Post-Conviction Relief demonstrates clearly that he had no meaningful access to court pro se. See App. Init. Br. at 10-11. Mr. Clark had no direct access to a law library, nor did he possess a copy of the transcript of his trial. He was unable to investigate the facts of his case and, of course, pleaded them so inartfully as to jeopardize potentially meritorious claims. It is ludicrous to suggest, as does the State, that merely urging a court to "examine the victim's trial testimony" is proof that an uneducated and untrained prisoner can "raise" a claim. State Br. at 4. This is expecially true

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names of out-of-state counsel instead of his own, such procedural defects are rarely fatal, and may usually be cured by the movant's coming into compliance with the applicable rule. See, e.g., Szteinbaum v. Valores, No. 84-1184, slip op. (Fla. 3d DCA 1985); Hankin v. Blisset, No. 84-1161, slip op. (Fla. 3d DCA 1985); Magnolias Nursing and Convalescent Center v. Department of Health and Rehabilitative Services, 428 So. 2d 256 (Fla. 1st DCA 1982). In this case, counsel for Mr. Clark was admitted pro hac vice (R65).

where the prisoner does not have a copy of the trial transcript and, therefore, cannot cite to the offending testimony and cannot supply the court with additional facts to support his allegations because of his confinement. No fair reading of the record in this case supports the State's contention that Mr. Clark had adequate access to court.

2. Mr. Clark Should Have Been Allowed To Withdraw His Pro Se Motion for Post-Conviction Relief.

The State devotes a good deal of its brief to responding to arguments not advanced by Mr. Clark, i.e., that the Federal Rules of Civil Procedure "automatically apply in federal habeas corpus proceedings" and a prisoner may always "withdraw his habeas petition without any procedural prejudice whatsoever." State Br. at 5. Since both of these arguments are only tangentially related to this case, it is perhaps appropriate to restate Mr. Clark's position.

First, while Mr. Clark is unaware of any cases addressing the withdrawal of a pro se 3.850 motion and the State has cited none, some instruction may be taken from civil practice. Under the Florida Rules of Civil Procedure a petitioner may voluntarily dismiss a cause of action without

prejudice during trial. Fla. R. Civ. P. 1.420(a)(1). Moreover, it is the general rule that a movant may voluntarily dismiss a cause before the other party has responded. See App. Init. Br. at 12. Given this general rule, the issue presented in this case is whether a different and more restrictive rule should be applied to Mr. Clark.* When viewed in this light, Mr. Clark's case is compelling. He moved to withdraw his pro se motion within weeks of its filing, and months before the State eventually responded, once he learned that he had obtained volunteer counsel. He provided the names of his new counsel and stated that they would submit a Motion for Post-Conviction Relief on his behalf in a reasonable time. (R 37-38.) Had the court been aware of Mr. Clark's Motion

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* The State's extensive reliance on Potts v. Zant, 638 F.2d 727 (5th Cir.), cert. denied, 454 U.S. 877 (1981), is inapposite. The State's assertion that the court in Potts "rejected the specific argument" raised by Mr. Clark is contradicted by the very quote it offers in support. State Br. at 5-6. The issue in Potts was whether the withdrawal before response and filing of successive petitions was "relevant evidence as to whether or not there has been an abuse of the writ . . . ." 638 F.2d at 742. Because the court found that such actions were relevant evidence, it rejected the "blind application of Fed. R. Civ. P. 41(a)" in such cases. Potts, in fact, implicitly supports Mr. Clark's contention that a voluntary dismissal, in the absence of extraordinary facts, may generally be taken before the opposing party responds. Id. at 742. The State implies that a habeas petitioner may never voluntarily dismiss an action without prejudice, which is clearly inaccurate.

to Withdraw, there is little doubt that his request would have been granted without prejudice.

The State offers no intelligible justification for the Court's action in this case.* Since the Court itself offered no justification for its decision (R66), this Court has before it a record which clearly demonstrates that Mr. Clark's Motion to Withdraw should have been granted.

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

In his Initial Brief, Mr. Clark demonstrated that in not serving counsel with the State's Response or any notice of the March 21, 1985 hearing and by not attaching to its order a copy of the files or records that supported the court's decision, both the State and the Court did not comply with Florida law. App. Init. Br. at 14-15. Only one additional point need be made. First, the State's repeated references to the lack of an address as an excuse for not

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* The State's characterization of a voluntary dismissal as "legal limbo for all eternity," State Br. at 8, while amusing, distorts reality beyond recognition. After all, it is Mr. Clark who is seeking to attack an unlawful conviction and sentence. It is in his interest to have the merits of his case brought before the court. The fact that this is more properly done with the aid of counsel and with something other than a successor Motion for Post-Conviction Relief is self-evident.

serving counsel for Mr. Clark are misplaced. The applicable Florida rule states specifically that a copy of the pleading must be filed with the court if no address for counsel is available. Fla. R. Crim. P. 3.030(b). The State did not so file and therefore violated this rule.

II. CONCLUSION

For the reasons stated above and in Appellant's Initial Brief, 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 with the assistance of counsel.

Respectfully submitted,

ROBERT E. SIMS
O'Melveny & Myers
1800 M Street, N.W.
Suite 500 South
Washington, D.C. 20036

STEPHEN B. BRIGHT
Clive A. Stafford Smith
Stephen B. Bright
600 Healey Building
57 Forsyth Street, N.W.
Atlanta, GA 30303

Attorneys for Larry Clark,
Appellant

CERTIFICATE OF SERVICE

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

Mark Ober
Assistant State Attorney
Thirteenth Judicial Circuit
Courthouse Annex,
Tampa, FL 33602

Robert J. Landry
Assistant Attorney General
Park Trammell Building
1313 Tampa Street, Ste. 804
Tampa, FL 33602

this 8th day of November, 1985.

Robert E Sims

(signature)