047

IN THE SUPREME COURT OF FLORIDA

JAMES J. HAAG, :

Petitioner, :

vs. : Case No. 77,132

STATE OF FLORIDA, :

Respondent. :

_____ :

ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT
OF APPEAL IN AND FOR BROWARD COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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TOPICAL INDEX

CASE AUTHORITIES

I. PRELIMINARY STATEMENT

Respondent's brief will be referred to in this brief as "RB." Other references will be as denoted in Petitioner's initial brief.

Petitioner would note for the Court's information that there was a typographical error on page 2 of Petitioner's initial brief on line 3; the District Court's affirmance of Petitioner's conviction took place on September 30, 1987, not 1977.

II. ARGUMENT

A PRO SE PRISONER'S MOTION FOR POST-CONVICTION RELIEF SHOULD BE CONSIDERED FILED AT THE MOMENT THAT IT IS DELIVERED TO PRISON AUTHORITIES.

Completely failing to recognize the uniquely powerless status of indigent pro se prisoners, the State argues in this case that because inmates have two years to file motions for post-conviction relief, the date of official filing by the court clerk should be the operative date for purposes of determining the timeliness of 3.850 motions. The State's argument is flawed because it nowhere acknowledges two quite possible contingencies: (1) the situation in which the inmate gives the motion to prison authorities well within the deadline but the prison authorities misplace it and mail it too late, or (2) the situation in which the motion arrives in the clerk's office within the deadline but the clerk fails to mark it filed in time to meet the deadline. The possibility of either type of state action requires that the "bright line" rule be calculated from the date of deposit with prison authorities rather than the date-stamped filing date.

Here, the petitioner gave his motion to prison authorities five days before the deadline for filing. For some reason, however, the motion did not get stamped in as "filed" until nine days later--October 20, 1989. On this record, it appears that one of the above contingencies took place. Respondent

argues that petitioner should not be rewarded for submitting his motion so late into the two year period (RB-5); but neither should he be punished for someone else's--the prison authorities' or the clerks'--dilatory practices. In this respect, petitioner was just like the petitioner in Houston v. Lack, 487 U.S. 266 (1988), where the U.S. Supreme Court noted:

> No matter how far in advance the pro se prisoner delivers his notice to the prison authorities, he can never be sure that it will ultimately get stamped 'filed' on time. And if there is a delay the prisoner suspects is attributable to the prison authorities he is unlikely to have any means of proving it, for his confinement prevents him from monitoring the process sufficiently to distinguish delay on the part of prison authorities from slow mail service or the court clerk's failure to stamp the notice on the date received. Unskilled in law, unaided by counsel, and unable to leave the prison, his control over the processing of his notice necessarily ceases as soon as he hands it over to the only public officials to whom he has access--the prison authorities--and the only information he will likely have is the date he delivered the notice to those prison authorities and the date ultimately stamped on his notice.

108 S.Ct. at 2383. These considerations are particularly compelling where the filing deadline sets up a complete jurisdictional bar to further consideration of the prisoner's 3.850 motion if it is not "filed" within two years.

Undersigned counsel has been unable to find a Florida case which provides a definitive answer to the certified question in this case. The Fourth District Court of Appeal recently ducked the issue in Hicks v. State, 565 So.2d 364 (4th DCA 1990) stating:

> In the present case we need not attempt to determine whether the holding in Houston is limited to Federal appeals or whether the decision announces a broader policy applicable to prisoners generally.

Id. at 363. Instead, the Court disposed of that case on the grounds that it was a guilty plea appeal. This Court dealt with a timeliness question regarding a notice of appeal in Walker v. Wainwright, 303 So.2d 321 (Fla. 1974), discharging a writ of habeas corpus because the petitioner's notice had been filed 33 days after the denial of his motion to vacate in the circuit court. Importantly, however, this Court noted in Walker that the petitioner "in no way alleges that the delay in the filing of his notice was occasioned by the requirements of prison rules or the neglect or oversight of a prison official." Id. at 322. To the contrary, the petitioner in that case simply alleged that there had been some delay in the mail. The Court found Walker's case identical to Tucker v. Wainwright, 235 So.2d 38 (Fla. 2nd DCA 1970), where again, there was no allegation that any action by the State prevented the timely filing of the notice of appeal.

Here it is clear that State action prevented the timely filing of petitioner's motion for post-conviction relief. Just as in Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969):

> State action is shown when a responsible official in the State's system of justice fails to take proper steps toward affording the necessary incidents of an appeal, e.g. appointment of counsel for a convicted defendant, after the State's duty to act in this particular is activated by the defen-

> dant's compliance with the requirements set forth in the first test stated above.

Id. at 242. Petitioner in this case did everything he reasonably could be expected to do by presenting his motion for post-conviction relief to prison officials five days before it was due. It certainly was not unreasonable as a matter of law for him to assume that the motion could be placed in the mail and filed within five days (See e.g. the five-day mail presumption in Fla.R. App.P. 9.420(d)), and he should not be punished because the motion was delayed in the prison or in the clerk's office before it was officially filed by the clerk.

Accordingly, petitioner James Haag requests this Court to adopt the U.S. Supreme Court's reasoning in Houston v. Lack, supra, and rule that a state prisoner's 3.850 motion is timely if it is deposited and logged with prison authorities within the two-year deadline.

III. CONCLUSION

For the reasons stated, petitioner respectfully requests this Court to reverse the holding of the Fourth District Court of Appeal and order that his case be remanded to the trial court for consideration on its merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. to Patricia G. Lampert, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, and a copy to James J. Haag, Inmate No. 104507, Union Correctional Inst., P.O. Box 221, Raiford, Florida 32083, this 17th day of April, 1991.

Nancy A. Daniels