IN THE SUPREME COURT OF FLORIDA

CASE NO. **78,686**

BARRY HOFFMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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B

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's second summary denial of Mr. Hoffman's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850, and involved claims traditionally brought under Rule 3.850. However, again no evidentiary resolution of the facts was allowed.

The following shall be used in this brief to designate references to the record: "R. ___" (Record on Direct Appeal); "PC-R1. __" (first postconviction record on appeal); "PC-R2. ___" (second postconviction record on appeal); "PC-R3. __" (record on appeal on motion to release Mr. Alton's sealed records). All other citations shall be self-explanatory or otherwise explained.

INTRODUCTION

Mr. Hoffman's postconviction motion[1] and accompanying appendix were filed on October 2, 1987. The State filed no response. On October 7, 1987, the circuit court denied this motion in a one-line order (PC-R1. 290). This Court reversed the circuit court's order and remanded for a hearing. Hoffman v. State, 571 So. 2d 449 (Fla. 1990); (State's Answer Brief at 3).

Pursuant to this Court's order, Mr. Hoffman filed an amended motion to vacate on June 17, 1991. The State again filed no response,[2] and again, the circuit court summarily denied Mr.

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[1]Mr. Hoffman's current postconviction motion will be referred to as his amended post-conviction motion.

[2]The circuit court's denial twice, not even requiring a response from the State on Mr. Hoffman's postconviction motions, not only shows bias but a disregard for our adversarial system of justice. In State v. Kaufman, 456 So, 2d 531 (Fla. 4th DCA 1984), the court reasoned:

> We must not lose sight of the fact that we have an adversary system of justice as opposed to an inquisitorial system that is prevalent in the civil law nations where the courts have a great deal more responsibility in both the investigation and trial of the cases. Under our system, even in its modified form under Rule 3.850, the court must rely on the parties to initiate the proceedings, make the assertions and counter-assertions of law and fact, and present to the court the evidentiary basis for those assertions.

Kaufman, 456 So. 2d at 534. To the extent it was the trial court's interference that precluded the State's chance to respond, this is in violation of Blanco v. Sinnletarv, 943 F.2d 1477 (11th Cir. 1991).

Hoffman 3.850 relief. The circuit court again "failed to attach to its order the portion or portions of the record conclusively showing that relief is not required." Hoffman, 571 So. 2d at 450.[3] Despite Mr. Hoffman's postconviction motion being filed nearly five (5) years ago, this Court is still in no position to address the merits of Mr. Hoffman's claims. A hearing is still required.

RESPONSE TO STATEMENT OF THE CASE

Mr. Hoffman, Appellant, will rely generally upon the statement of the case as set forth in his initial brief. However, in response to the State's Statement of the Case (State's Answer Brief at 1-61, Mr. Hoffman would note that the State failed to mention that Mr. Hoffman obtained three votes for a life recommendation with the presentation of only Mr. Hoffman's testimony and no additional witnesses. In addition, the State acknowledged that two mitigating factors were found (State's Answer Brief at 3), but failed to note one of the mitigating factors was statutory (Mr. Hoffman had no significant history of prior criminal activity) and one of the mitigating factors was non-statutory (disparate treatment of co-defendants). The jury was instructed on three aggravating circumstances, though the judge found a fourth aggravator at the sentencing.

The State also noted that this Court reversed the initial summary denial by the circuit court and "remanded for a hearing" (State's Answer Brief at 3). It is also worth noting that during oral argument on Mr. Hoffman's first postconviction appeal, as to one of Mr. Hoffman's claims, "the State conceded that such a claim, if valid, would require relief under Bradv v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (19631." Hoffman, 571 So. 2d at 450. Thus, accepting Mr. Hoffman's allegations as true, the State conceded Mr. Hoffman's claim was not facially inadequate.

[3]Certainly, the circuit court's action in this case demonstrates bias which warrants recusal.

ARGUMENT I

FOR A SECOND TIME, MR. HOFFMAN HAS BEEN DENIED AN ADVERSARIAL TESTING BY HIS RULE 3.850 TRIAL COURT'S SUCCESSIVE SUMMARY DENIAL OF MR. HOFFMAN'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING IN VIOLATION OF THIS COURT'S PRIOR RULING AND THE SUMMARY DENIALS WERE ERRONEOUS AS A MATTER OF LAW AND FACT.

In the State's answer brief, the State only cites to two cases in the entire argument on this issue. One of those cites was to this Court's opinion on Mr. Hoffman's postconviction appeal, in which this Court ordered a hearing. The other cite was to Jones v. State, 384 So. 2d 736 (Fla. 4th DCA 1980). The State cites Jones for the proposition that a legal sufficiency determination is within the trial court's discretion (State's Answer Brief at 9). The State implies that there is an abuse of discretion standard. However, Jones does not support such an inference. The Jones court relied on the committee notes accompanying Rule 3.850:

> The committee perceives that denial of a motion will either be based on the insufficiency of the motion itself or on the basis of the file or record which the trial court will have before it. The proposal provides for a simplified expeditious disposition of appeals in such cases. It is to be noted, however, that in those cases where the record is relied upon as a basis for denial of the motion, it may in exceptional cases involve a substantial record but the advantages of this procedure seem to justify coping with the unusual or exceptional case. It is opinion of the committee that trial courts will in any order of denial based upon the insufficiency of the motion or on the face of the record, set forth specifically the basis of the court's rulins with sufficient specificity to delineate the issue for the benefit of the appellate courts.

Jones, 384 So. 2d at 738 (emphasis added). The Jones court also clearly stated that if a motion to vacate is facially sufficient, then the trial court must consider the motion in conjunction with the files and records in the case. Jones, 384 So. 2d at 738. It is clear from Jones that the circuit court's order, here, was deficient.

The State does not address the many cases from this Court set out in the initial brief which reverse summary denials. These cases do not reflect an abuse of discretion standard as to the circuit court's determination of legal sufficiency. Nor do the recent decisions reversing the circuit court summary denials. Breedlove v. Sinnletarv, 595 So. 2d 8 (Fla. 1992); Brown v. State, 17 F.L.W. 159 (Fla. 1992); Rose v. State, 17 F.L.W. 319 (Fla. 1992).

The State has conceded both during oral argument in the previous appeal and in their current answer brief,[4] and this Court has ruled, that Mr. Hoffman's postconviction motion was not facially insufficient. Even if Mr. Hoffman's motion to vacate was facially insufficient, then the State should have moved to dismiss the motion and Mr. Hoffman should have been given a chance to amend the pleading. Balcar v. Ramos, 595 So. 2d 308 (Fla. 4th DCA 1992). This was not done.

Mr. Hoffman's postconviction motion with accompanying appendix and amended postconviction motion must be accepted as true. Linhtbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Mr. Hoffman has presented competent, substantial evidence in support of his claims. The State has presented nothing to the circuit court, and the circuit court has twice, without any specificity, summarily denied Mr. Hoffman relief. The circuit court's order is again in error.

Because the circuit court's order did not "set forth specifically the basis of the court's ruling with sufficient specificity," Mr. Hoffman and this Court are precluded from effectively addressing Mr. Hoffman's amended postconviction appeal. As this Court has previously ordered, a hearing is required and fairness would dictate a new judge.

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[4]The State argues the record as opposed to facial sufficiency of the motion for Arguments III-VII, and X. Thus, the State concedes that these Arguments were not deficient on their face. Therefore, the trial court's summary denial without attaching record violated Hoffman v. State, 571 So. 2d 449 (Fla. 1990); Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Gorham v. State, 521 So. 2d 1067 (Fla. 1988); and Jones v. State, 384 So. 2d 736 (Fla. 4th DCA 1980). The State inadequately attempts to argue record support for summary denial of Mr. Hoffman's motion to vacate, but this does not cure the trial court's deficient order. The State also inadequately argues procedural bar for the remaining claims, but it is the court's duty to rule "with sufficient specificity to delineate the issues for the benefit of the appellate courts." Jones, 384 So. 2d at 738.

ARGUMENT II

THE CONTINUING FAILURE OF THE STATE TO DISCLOSE PUBLIC RECORDS VIOLATES THIS COURT'S ORDER; CHAPTER 119, FLA. STAT.; THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT; THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION; AND, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The State challenges Mr. Hoffman's Argument II (State's failure to disclose public records) as being improperly raised in a Rule 3.850 motion, despite this Court's prior case law. Mendvk v. State, 592 So. 2d 1076 (Fla. 1992); Hoffman v. State, 571 So. 2d 449 (Fla. 1990); State v. Kokal, 562 So. 2d 324 (Fla. 1990); and Provenzano v. Duaaer, 562 So. 2d 541 (Fla. 1990). In fact, the State's Answer Brief, Issue II, in Mr. Hoffman's case not only concedes that this issue was directly ruled upon in Provenzano but seeks to have this Court reverse its holding in Mendvk. Specifically, the State argues that the following passage in Mendvk should be overturned:

> . . . The State argues that Provenzano should be limited solely to the State Attorney's files and that defendants seeking disclosure from other state agencies must pursue their requests through civil action. We decline to so limit Provenzano and thus find Mendyk's request in the instant case appropriate. To the extent the agencies at issue here have doubt as to the content of their particular files being subject to disclosure, the trial court shall hold an in camera inspection for its determination. See Kokal, 562 So. 2d at 327.

(State's Answer Brief at 11)(quoting Mendvk, 592 So. 2d at 1081).

The State's answer is essentially a motion for rehearing of this Court's current case law regarding denial of public records requests being properly raised in a Rule 3.850 motion. The State makes no reference to the form of Mr. Hoffman's Chapter 119 request. In addition, the State makes no reference to an ambiguity in the case law or the statutes and makes no effort to distinguish or limit the precedent, but instead asks this Court "to revisit its decision in Mendvk v. State" (State's Answer Brief at 13). This line of argument is not only improper but frivolous. According to Fla. R. Prof. Conduct 4-3.1:

> A lawyer shall not . . , defend a proceeding, or assert or controvert an issue therein unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

As in Mendvk and Provenzano, Mr. Hoffman asserts his denial of public records argument in his motion to vacate because it precludes him from developing arguments that rely not only on Florida case law, statutes, and constitution but federal case law, statues, and constitution. Moreover, combining the Chapter 119 claim in the Rule 3.850 proceeding provides for judicial economy. If they were litigated separately as the State seeks, then when Chapter 119 disclosure occurs months or years down the road, the disclosures would authorize a new Rule 3.850 proceeding.

The State also argues that Chapter 119 is not "intended to expand or limit the provisions of Rule 3.220" (State's Answer Brief at 11)(quoting Fla. Stat. sec. 119.07(8)). Mr. Hoffman agrees and would argue they are apples and oranges. Although Chapter 119 disclosures may support Mr. Hoffman's motion to vacate claims, Mr. Hoffman has asserted the Chapter 119 claim on its own merits by noting its possible repercussions on the other arguments. The State's refusal to comply with Chapter 119 requests is causing delay. The State should turn over the documents so that we can get to the merits of Mr. Hoffman's claims of constitutional violations,

In desperation, the State argues "nothing prevents Hoffman from adding to his list of agencies from which he seeks public records demands and continuing to delay the prosecution of his Rule 3.850 motion" (State's Answer Brief at 13). The State is wrong -- state agencies disclosing their public records or claiming appropriate exemptions followed by an in camera hearing would foreclose any further delay. Mr. Hoffman cannot be expected to "demonstrate a basis" as the State suggests for his denial of public records argument without knowing what is being withheld, or why it is being withheld, or, in the least, a neutral court's determination of exemption with the appropriate appeal.

ARGUMENTS III - XIII

The circuit court's order does not, with any specificity, state why Mr. Hoffman's motion to vacate is legally insufficient and the circuit court's order did not have any records attached. Therefore, the State's answer amounts to nothing but a concession that the circuit court's order is

deficient and a wish list for filling in the circuit court's defective, improper order. The State argues in Issue I that the circuit court's order was proper; however, in Issues III-XIII, the State argues record support for a denial -- none of which is found in the circuit court's order. This Court reversed and remanded this case for an evidentiary hearing. Hoffman, 571 So. 2d at 450; (State's Answer Brief at 3). The State has even conceded that a hearing is required. Hoffman, 571 So. 2d at 450. An evidentiary hearing is **still** required, but before a new judge

CONCLUSION

On the basis of the arguments presented here and in Mr. Hoffman's initial brief, Mr Hoffman respectfully submits that he is entitled to an evidentiary hearing, a new trial, and a resentencing. Mr. Hoffman respectfully urges that this Honorable Court remand to the circuit court for such an evidentiary hearing, order a new judge assigned, and set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 22, 1992.

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