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JUN 19 1997
CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

EDWIN H. BEATY,
Petitioner/Appellant,

v.

CASE NO: 89,356
DCA CASE NO: 96-03252

STATE OF FLORIDA,
Respondent/Appellee.
_____/

PETITIONER'S REPLY BRIEF

On review from the District Court of Appeal, Second District, State of Florida.

EDWIN H. BEATY 350297 M.B.#359
CHARLOTTE CORRECTIONAL INST.
33123 OIL WELL ROAD
PUNTA GORDA, FL 33955
PETITIONER PRO SE

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PRELIMINARY EMENT

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Respondent's [illegible]ef[illegible](any acknowledgment of the [illegible]titioner[illegible] claims in i[illegible] iction relief motion of newly [illegible]overed evi[illegible]/ violations, and the proper time period of filing these claims. In fact, respondent has completely evaded these important issues.

SUMMARY OF THE ARGUMENT

Contrary to respondent's attempt to make the instant case look like a regular procedural bar, time barred, case, there are a number of important issues before this Court that must be addressed in the interest of justice.

The first issue is whether or not the Supreme Court has the authority to accept: review jurisdiction of a per curiarn affirmed decision without a written opinion in certain legal instances? (Such as when a defendant requests direct review and claims actual innocence, and claims that the essential requirements of law have been violated resulting in a fundamental miscarriage of justice in his or her conviction, and the affirmance of that conviction by the appellate district court).

The second issue is whether or not the trial court lacks jurisdiction to consider postconviction motions until direct review proceedings are completed, which does not occur until the Supreme Court grants or denies review? (Such a5 when as in the instant case, a layperson makes an hónest good faith attempt to seek Supreme Court review by letter - which has probably happened hundreds of times in the history of this Court - and honestly believes he is still within all legal time frames concerning the appellate process when the Supreme Court denies review).

The third issue is whether or not a court of law can base it's decisions on assumptions and speculation? (Such as when as in the instant case, the district court refused to apply the precedent law of this state to the instant case and then refuse to certify conflict with the precedent law while it attempts to distinguish the same issue of law with assumptions and mere speculation).

The fourth issue is whether or not a pro se litigant (layperson) is held

to the same strict standards as those required of a person trained in law? (Such as when a layperson makes an honest good faith attempt to adhere to the law as it is written, and then allegedly violates procedural rules).

The fifth issue is whether or not procedural rules are meant to be adhered to so strictly that a layperson who has not purposely violated those rules, cannot expect fairness, justice, and due process and equal protection of the law when the rules have allegedly been violated? And, can an alleged time bar or an alleged procedural default claim defeat and override allegations of actual innocence, and violations of essential requirements of law which result in a fundamental miscarriage of justice? (Such as when a person knows his or her criminal conviction is inherently wrong and a travesty of justice and that person with average intelligence does not know he or she allegedly cannot seek this Court's review, or the appropriate means to seek this Court's review jurisdiction. But, the layperson writes a timely pro se letter to this Court seeking fairness and justice, and again, does not know he or she must also supply a copy of that letter to the lower court).

The sixth issue is whether or not the two year time limit of Rule 3.850 Fla.R.Crim.P., is predicated on the same two year time limit that applies to newly discovered evidence claims? (Such as when newly discovered evidence claims may come up years after the the two year time period is up to file a first postconviction motion under 3.850).

The seventh issue is whether or not a criminal defendant may be refused relief from the court's, when state interference impedes that persons access to the courts? (Such as when the office of the state attorney refuses to timely comply with a public records request and thwarts a defendant's attempts to diligently seek out those records. And, when state prison officials

purposely withhold a prisoners (petitioner) criminal trial transcripts, trial documents and papers, and a finished postconviction relief motion for six (6) months, and before actually turning the transcripts, documents and papers, over they destroy many documents and the finished postconviction relief motion).

Furthermore, the argument expounded on and cases cited therein by the respondent are either clearly distinguishable from the instant case, not applicable to the instant case, or basically in accordance with the law as the petitioner has claimed.

ARGUMENT

THE PETITIONER WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW WHEN THE REVIEWING COURT AFFIRMED THE LOWER COURT'S DECISION ALTHOUGH THAT DECISION DIRECTLY CONFLICTS WITH EXISTING LAW OF FLORIDA AND PRIOR SUPREME COURT PRECEDENT ON THE SAME QUESTIONS OF LAW

Contrary to respondent's claim that "disposition of the instant case requires the resolution of when a criminal defendant's judgment and sentence "becomes final."" The issues before this Court are not when a criminal defendant's judgment: and sentence become final, that issue of law is well settled and the petitioner claims to be within the law as it is written. The issues before this Court concern due process and equal protection of the law.

Respondent attempts a round-about argument concerning this Court's jurisdictional authority, which respondent has already argued in it's brief to this Court on jurisdiction.

If this Court had accepted discretionary jurisdiction pursuant to the petitioner's pro se letter in 1993, the Court would have found after the examination of over 5000 pages of trial transcript the following:

1. That the state did not produce one shred of physical evidence to link the petitioner to the crime so to legally gain a conviction.

2. That the state produced no eye witnesses that could testify that the defendant was involved with the crime.

3. That the state was not able to refute the petitioner's reasonable hypothesis of innocence, nor able to refute the petitioner's alibi defense.

4. That the state did not prove every element of the crime the petitioner allegedly committed beyond a reasonable doubt. (Question for the jury perhaps)

5. That the petitioner's conviction rests solely on the testimony of two (2) state witnesses which at best could be considered circumstantial. (It appears from recent investigation that the testimony from one of the state witnesses was entirely fabricated and manufactured by law enforcement officials).

6. That the petitioner testified at trial and the testimony was not uncertain or ambiguous, and petitioner adamantly proclaimed his innocence.

7. That trial counsel perceived over fifty (50) trial court errors which he filed in the Statement of Judicial Acts to be Reviewed, and for some unknown reason court appointed appellate counsel chose only to raise a few issues and leave the majority of them alone.

8. That during the petitioner's trial and appellate review, the essential requirements of law had been violated which resulted in a fundamental miscarriage of justice.

However, this Court chose not to exercise it's discretionary authority and accept jurisdiction.

In researching historical committee notes concerning the 1980 Amendment to Art. V, § 3, Florida Constitution, and Rule 9.030, Fla.R.App.P., petitioner

is unable to find one instance where legislature when it amended the Florida Constitution in 1980, prohibited or eliminated this Court's authority to grant discretionary review except, where it concerns "any interlocutory order passing upon a matter which upon final judgment would be directly appealable to the Supreme Court." Rule 9.030 Fla.R.App.P., Committee Notes

The above issue is not before this Court in the instant case, therefore, this Court has the authority to grant discretionary review to criminal cases that have been per curiam affirmed without a written opinion in extraordinary cases. Normally the Supreme Court does not have jurisdiction to review a "citation PCA". City of Miami v. Arostegui, 616 So.2d 1117 (Fla.App. 1 Dist. 1993). However, where a constitutional violation has probably resulted in a conviction of one who is actually innocent, and the essential requirements of law have been violated which has resulted in a fundamental miscarriage of justice, this Court has the authority to accept jurisdiction. Combs v. State, 436 So.2d 93 (Fla. 1983); Haines City Community Dev. v. Heggs, 658 So.2d 523 (Fla. 1995); State v. Bock, 659 So.2d 1196 (Fla.App. 3 Dist. 1995).

Petitioner's timely pro se letter to this Court in 1993, basically alleged the above certain instances which would have given this Court the authority to accept jurisdiction. Respondent refuses to acknowledge this fact and continues with the same hue and cry of certain state attorneys/attorney generals who are only interested in the persecution of a person who is actually innocent, and not in the fair and proper administration of justice.

Respondent urges this Court to find that the petitioner should be time barred and/or procedurally barred, since the petitioner allegedly violated a few appellate procedure rules and the time limits within those rules, when he filed his pro se letter to this Court in 1993.

However, respondent's claim does not take into consideration that: an alleged procedural default shall not preclude relief for victims of a fundamental miscarriage of justice, or, that it would be a gross miscarriage of justice not to bend a rule of procedure a little rather than use the rule to prevent justice. Mills v. U.S., 36 F.3d 1052 (11th Cir. 1994); Carr v. Singletary, 904 F.Supp. 1356 (M.D. Fla. 1995); Hanson v. State, 187 So.2d 54 (Fla. 3rd DCA 1966); Jones v. State, 233 So.2d 432 (Fla. 3rd DCA 1970); MaCallum v. State, 559 So.2d 233 (Fla.App. 5 Dist. 1990).

The government advanced the same type of argument to the U.S. Supreme Court, as respondent now argues to this Court, in Schacht v. United States, 90 S.Ct. 1555 (1970). The court firmly rejected the governments argument and held "procedural rules adopted by the Supreme Court for orderly transaction of it's business are not jurisdictional and can be relaxed by Court in exercise of it's discretion when the ends of justice so require."

The cases cited by respondent Kennedy v. State, 637 So.2d 987 (Fla. 1st DCA 1994) and Gust v. State, 535 So.2d 642 (Fla. 1st DCA 1988), depend on the law of this State and this Court found in Ward v. Dugger, 508 So.2d 778 (Fla. 1st DCA 1987), which is direct review proceedings are not completed until the Supreme Court: grants or denies review. This is the position petitiuner has brought before this Court and respondent refuses to accept this issue of law but, cites to cases that agree with petitioner's claim.

The petitioner certainly agrees that the district court had the jurisdiction to issue it's mandate, a ministerial act, despite pending discretionary review. City of Miami v. Arostegui, 616 So.2d 1117 (Fla.App. 1 Dist 1993). However, the trial court lacked jurisdiction to entertain a postconviction relief 3.850 motion until the Supreme Court denied or granted

the petitioner's request for direct review. The two year time limit began tolling for the filing of the postconviction relief 3.850 motion when this Court denied petitioner's timely authorized request. Ward, supra, Huff v. State, 569 So.2d 1247 (Fla. 1990); Nava v. State, 659 So.2d 1314 (Fla.App. 4 Dist. 1995).

Furthermore, respondent's claim that petitioner's pro se letter to this Court seeking review was untimely which constitutes an independent procedural bar is without merit according to the law of this Court. The order from the district court clearly states "NOT **FINAL** UNTIL TIME **EXPIRES** TO FILE **REHEARING** MOTION **AND**, IF FILED, DETERMINED." In St. Paul v. IINA, 675 So.2d 590 (Fla. 1996), this Court held "a district court of appeals order is not "rendered'' and, therefore, does not commence 30-day period for further review until there has been a disposition of all motions relative to that order."

Petitioner after receiving a copy of the order immediately requested that court appointed Public Defender file for rehearing by letter. Counsel responded in the negative to this request after the fifteen day time period for rehearing was **up**, The order was issued on June 2, 1993, the fifteen day time period for the filing of rehearing was up on June 17, 1993, making the petitioner's pro se letter of July 13, 1993, to this Court timely pursuant to St. Paul, supra,.

Respondent's claim "it was clearly time-barred for failure to comply with the requirements of Rule 9.120(c)", is absolutely without merit. And, petitioner believes respondent has the law of procedural bars and time bars mixed up. However, if the pro se letter filed to this Court was filed to the wrong court, the law of this State and Court: is that if a notice of appeal or petition for certiorari is filed to the wrong court it should be transferred

to the appropriate court with the date of filing being the date the document was filed in the wrong court. Alfonso v. Dept. of Env. Regulation, 616 So.2d 44 (Fla. 1993).

It would appear that respondent is not mindful of the law found in Haines v. Kerner, 92 S.Ct. 594 (1972), and it's progeny in this state, where a pro se litigant is not held to the same strict standards as those trained in law. Nevertheless, the petitioner believes his claims are within the legal limits of the law that guarantees him due process and equal protection of the law found in the Florida and United States Constitutions.

Respondent's claim that petitioner was represented by the Office of the Public Defender for the Tenth Judicial Circuit, after the direct appeal was affirmed by the district court is absolutely ludicrous and also without merit.

Criminal defendants have no right to have counsel represent them except for trial and direct appeal, which s the law of this state. As soon as the petitioner's direct appeal was over counsel refused to further assist the petitioner, and, immediately turned over the petitioner's entire case file to the petitioner's legal representative who made a complete list of all papers and documents then mailed them to the petitioner (entire case file) within two (2) weeks.

Petitioner is not aware of the procedure of how counsel withdraws from a case after direct appeal is Einished but, petitioner was not represented by counsel when he filed his pro se letter to this Court in 1993. The case cited by respondent Powell v. State, 206 So.2d 47 (Fla. 4th DCA 1968), is totally inapplicable to the instant case.

Respondent's reliance on the trial court's statement that "after being informed by the State in February 1994, that payment in advance for the copies

[of public records] was required, it was not until over a year later that Defendant's representative finally responded that she wished to view the documents, and therefore at least one year of delay in retrieving such documents was due to the lack of diligence on Defendant's part, not due to any misconduct by the State.", is inappropriate since the letter from the state is misleading and self-serving.

The letter does not show that petitioner had offered to pay for any and all documents when he made his initial public records request in 1994, to various law enforcement agencies. The letter does not include that the petitioner's representative who works for the U.S. State Department, flew to Florida in June/July of 1994 to examine state held records and was informed by the State Attorneys office of the Sixth Judicial Circuit, Pinellas County, she would not be able to view all the records at that time since the state was not sure what exemptions applied at that time, which was not taken care of by the state until May 18, 1995. Which was after the petitioner's representative had recently left Florida again in February of 1995. Four *(4)* months later in early June 1995, petitioner's representative once again flew to Florida to examine state held documents after receiving the letter of May 18, 1995 from the State Attorneys office, and was denied access to the majority of the records.

The letter from the state does not include all the telephone conversations between the petitioner's representative and the state attorneys office, where the state refused to give a specific date as to when the records would be available for inspection.

Clearly, any unnecessary delay within the seventeen (17) months after the petitioner's initial request to examine the records must be faulted to

the state and not the petitioner who diligently attempted to examine state held records.

Respondent's claim that the petitioner did not raise allegations of state interference by the Department of Corrections, in his brief on appeal in the Second District Court, is absolutely false. Apparently the respondent has not examined the brief.

The Department of Corrections (certain officials), purposely withheld the petitioner's criminal trial records and his original completed postconviction 3.850 motion for approximately six (6) months, not only did they withhold these records and motion, they eventually destroyed or lost many documents and the completed postconviction 3.850 motion before turning over what was left to the petitioner.

It would appear from the facts that the State Attorneys office delayed and or denied the petitioner's access to records for approximately seventeen (17) months, and State officials from the D.O.C. delayed and or denied the petitioner's access to the court's for approximately six (6) months. It would also appear from the facts that state agents wilfully acted to frustrate the petitioner's timely filing of the postconviction relief motion if in fact the motion was untimely. Moreover, the law of this state is that some interference by officials would constitute cause and prejudice.

Respondent claims the district court's affirmance of the trial court's decision was "well-reasoned" and should be approved by this Court. However, respondent fails to admit that the district court's decision was based on assumptions and pure speculation, which is in conflict with the law of Florida.

The federal circuit of Florida has held that postconviction relief may not be granted on assuptions. See Henson v. Estelle, *641* F.2d 250, 253

(5th Cir. Unit A March 1981); Hill v. Linahan, 697 F.2d 1032 (11th Cir. 1983); Alvord v. Wainwright, 731 F2d 1486 (11th Cir. 1984).

Petitioner contends that if relief may not be granted based on assumptions then certainly and logically, relief may not be denied on assumptions.

Petitioner would like to direct this Court's attention to the recent cases from the U.S. Supreme Court that concerns the granting of direct review. Stutson v. U.S., 116 S.Ct. 600 (1996); Lawrence on Behalf of Lawrence v. Chater, 116 S.Ct. 604 (1996) (Judicial efficiency and finality are important values, however, dry formalism should not sterilize procedural resources) ("We have previously refused to allow technicalities which caused no prejudice to the prosecution to preclude a remand") Stutson, at 603.

If this Court should determine that the petitioner's pro se letter to this Court seeking review in 1993, was somehow frivolous and or an unauthorized attempt and that his postconviction relief 3.850 motion was untimely, the petitioner believes he has met the requirements of cause and prejudice, actual innocence, and fundamental miscarriage of justice to warrant relief from this Court See Murray v. Carrier, 106 S.Ct. 2639 (1986); Hollis v. Davis, 941 F.2d 471 (11th Cir. 1991); Carr v. Singletary, *904* F.Supp. 1356 (M.D. Fla. 1995) Bolender v. Singletary, 898 F.Supp. (S.D. Fla. 1995); Schlup v. Delo, 115 S.Ct. 851 (1995).

CONCLUSION

Based upon the foregoing reasons, arguments, and authorities, and in the interest of justice, the Petitioner prays this Honorable Court will reverse the decisions of the lower courts and grant any other relief this Court deems just and proper,

Respectfully submitted,

Edwin H. Beaty

EDWIN H. BEATY PETITIONER PRO SE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief has been furnished by U.S. Mail to Katherine V. Blanco, Assistant Attorney General, Office of the Attorney General, Westwood Center, Suite 700, 2002 North Lois Avenue, Tampa, Fl 33607-2366, on this 16 day of June, 1997.

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