IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,959

MICHAEL MORDENTI,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE THIRTEENTH JUDICIAL CIRCUIT
FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

TERRI L. BACKHUS
Special Assistant CCR
Florida Bar No. 0946427
P.O. Box 3294
100 S. Ashley, Ste. 1300
Tampa, FL 33601-3294

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Mordenti's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Mordenti's claims without holding a hearing of any kind.

The following symbols will be used to designate references to the record in this instant cause:

"R." -- record on direct appeal to this Court;

"PC-R." -- record on 3.850 appeal to this Court;

"App." -- indicates that record omissions still exist.

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ARGUMENTS IN RESPONSE

ARGUMENT I

MR. MORDENTI IS ENTITLED TO A HUFF V. STATE HEARING ON HIS RULE 3.850 CLAIMS.

Mr. Mordenti is entitled to a hearing in circuit court under Huff and Ventura. The state's answer is factually and legally wrong.

In its one paragraph response, the state cites Jackson v. Dusser, 633 So. 2d 1051 (Fla. 1993), and Groover v. State, __So. 2d__, 22 Fla. L. Weekly S509 (Fla. 1997) as legal precedent for this Court to reject Mr. Mordenti's right to a hearing under Huff v. State, 622 So. 2d 982 (Fla. 1993). Neither case applies to the facts presented in Mr. Mordenti's case.

The state argues that Huff was to be applied prospectively from 1993 and that Jackson v. Dusser stands for the proposition that a case may be denied without a Huff hearing if the postconviction action was decided by the lower court prior to 1993.

Mr. Mordenti filed his initial post-conviction motion on September 2, 1995, **two years after** Huff became law (PC-R. 24). The trial court summarily denied the motion on September 30, 1996, **three years after** Huff became law (PC-R. 216-231). The Jackson case has no legal or factual relevance to Mr. Mordenti's case.

Next, the state argues that Groover v. State allows the lower court to summarily deny a Rule 3.850 postconviction motion without a Huff hearing if this Court determines that to do so would be harmless error. See, State's Answer Brief at page 9. Mr.

Groover's case was in a completely different procedural posture than Mr. Mordenti's case. Mr. Groover had previously filed three Rule 3.850 motions for postconviction relief and a state habeas petition. See, Groover, 1997 WL 57201, 1 (Fla.). This is Mr. Mordenti's first Rule 3.850 motion. Mr. Mordenti has never had an opportunity to be heard.[1] Mr. Mordenti has been cut off from pursuing his public records because the court prematurely denied his motion without an opportunity to be heard.

The state blindly ignores the reasoning behind this Court's decision in Huff. The purpose of requiring a hearing in the lower court was to give a death-sentenced inmate the opportunity to be heard because of the "severity of the punishment at issue." Huff v. State, 622 So. 2d at 983.

The same sentiment was repeated in Ventura v. State, 673 So. 2d 479 (Fla. 1996), which requires the court to examine the public records issues and allow a defendant leave to amend with new information or claims that may be presented from those materials. Clearly, Mr. Mordenti was unable to know the contents of records that the agencies did not disclose. In fact, agencies continued to respond well after the lower court had summarily denied the case (PC-R Supp. 235-387). The state failed to address the fact that no 119 hearing was ever held in which Mr. Mordenti could compel

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[1] Contrary to the holding in Groover, Mr. Mordenti's claims were not "attempts to circumvent this Court's procedural bar enforcement." See State's Answer Brief at page 9. In fact, Mr. Mordenti filed claims of ineffective assistance of counsel, Brady and claims of a constitutional nature that are specifically mandated by Rule 3.850.

reluctant state agencies to comply with Chapter 119. See, Ventura v. State, 673 So. 2d 479 (Fla. 1996).[2]

Further, the state in footnote one argues that Mr. Mordenti should not be entitled to a Huff hearing because Chapter 119 disclosures that have not been revealed would have been "irrelevant to the claims asserted." See, State's Answer Brief at page 10. Unless the state knows the contents of every undisclosed public records request in this case, it has no factual basis for making this clairvoyant argument.

Finally, the state failed to file an answer in the lower court. Now, the state argues that a hearing is not necessary because the motion was not factually sufficient. (PC-R. 216-231); State's Answer Brief at page 11. The state cites to no claim or issue that is factually insufficient nor did they do so in the year between the filing of the Rule 3.850 motion and the court's ruling.

Under Lemon v. State, 498 So.2d 923 (Fla. 1986), the facts as pled must be taken as true or must be conclusively refuted by the record. See also, Rule 3,850. No portions of the record were attached to Mr. Mordenti's copy of the court's order. In fact, Mr. Mordenti was not provided with a complete copy of the court's order until the record on appeal was prepared for this court. In the

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The state argues in Issue III that it was improper for undersigned counsel to file 119 notices with the clerk as she was forced to do under Rule 3.852 or the issue would be waived forever. See, Rule 3.852. Counsel refused to waive Mr. Mordenti's right to public records because the agencies continued to file responses to his requests after the lower court had summarily denied his Rule 3.850 motion. See, State's Answer Brief at page 13.

record on appeal, the court revealed that it had relied on little of the record to show that the files conclusively rebut each of Mr. Mordenti's claims. The state failed to address the trial court's improper denial of Mr. Mordenti's postconviction motion by failing to file a response in the lower court or to factually argue the claim in this Court. See, Rule 3.850.

Because of the lower court's improper summary denial and its misinterpretation of the law, Mr. Mordenti was not given "fair notice and a reasonable opportunity to be heard." See, Huff at 983, quoting Scull v. State, 569 So.2d 1251, 1252 (Fla. 1990). Mr. Mordenti is entitled to the same Huff and Ventura hearings in the lower court that other similarly situated death-sentenced inmates must receive. Mr. Mordenti should not be arbitrarily foreclosed from a hearing in the lower court because the state and the lower court misunderstood the law. This case should be remanded back to the lower court to resolve the public records issues under Ventura. And, after proper amendent to the Rule 3.850 motion, a Huff hearing should be allowed to determine what claims merit an evidentiary hearing.

ARGUMENT II

MR. MORDENTI IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS 3.850 CLAIMS.

This is a circumstantial evidence case. The state cites no factual support for its position that Mr. Mordenti is not entitled to an evidentiary hearing. The state offers only conclusory statements that do not relate to a particular claim or issue. However, the claims that Mr. Mordenti raised were sufficient for

the state to respond in its answer brief. The state had no difficulty in responding nor did it have difficulty framing its arguments in opposition'. The state's argument is factually devoid of any reason why the court should not grant Mr. Mordenti an evidentiary hearing.

The state argues that insufficient facts were pled to warrant an evidentiary hearing. See, State's Answer Brief at page 11. The state substitutes its record support for the lower court's order that was not supplied by the court itself. This is improper. The state cannot substitute its interpretation of the lower court's order and then explain that the court has properly summarily denied Mr. Mordenti's claims.

The state invents its own strategy and tactical reasoning for trial counsel's failure to challenge the state's case, impeach state's witnesses, adequately investigate the case, or present a credible penalty phase. While entertaining, the state cannot invent trial strategy when no testimony was taken from the trial attorney in the lower court. If the state cannot respond to the issues raised in the 3.850 based on the files and records, then Mr. Mordenti is entitled to an evidentiary hearing. See, Lemon v. State, 498 So.2d 923 (Fla. 1986). This speculation suggests that the files and records do **not** conclusively rebut the claims raised.

Even if Mr. Mordenti had pled insufficient facts, which he did not, the state and its agencies blocked his ability to plead more

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In fact, counsel had to search the entire state response to understand what the state was arguing and why the state asserted that Mr. Mordenti is not entitled to an evidentiary hearing.

specific facts because he was not afforded public records compliance. In Issue III, the state relies on extra-record information from the Hillsborough County State Attorney's Office to rebut Mr. Mordenti's claim that he did not receive the Chapter 119 materials to which he was entitled. See, State's Answer Brief at page 12. The state filed no response to Mr. Mordenti's motion for rehearing in the lower court and there was no testimony taken regarding the state attorney's files in the lower court. The state cannot rely on extra-record material as evidence when no hearing or evidence was taken.

An unauthenticated copy of a bill from the State Attorney's Office does not prove that all of the records had been disclosed. For example, the state could have copied only the files it determined Mr. Mordenti was entitled to. Traditionally, the state withholds files that it claims are exempt. The state's reliance on this extra-record information proves that a hearing is necessary to resolve the issues that are in dispute.

Further, the state argued regarding only one agency out of the ten agencies that were listed in the 3.850 motion. It is clear that the issues regarding the other state agencies listed have not been resolved. A public records hearing is necessary under Ventura. The lower court misconstrued the role of public records in postconviction proceedings. In its order, the lower court stated that:

> ...certain state agencies have failed to comply with Chapter 119 records requests are **wholly unrelated** to Defendant's conviction and sentence as required by 3.850 (a).

(PC-R. 221).

The court misunderstood the rule and then denied Mr. Mordenti's public records claim as a matter of law. Rule 3.852 was enacted while Mr. Mordenti's postconviction motion was pending. Rule 3.852 specifically states that the public records avenue was to be used as a form of discovery in postconviction. Fla. R. Crim. P. 3.852. This is clearly contrary to the lower court's ruling.

Mr. Mordenti pled substantial, factual allegations that go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Because we cannot say that the record conclusively shows [Mr. Mordenti] is entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So.2d 808, 809 (Fla. 1982) (citation omitted).

Mr. Mordenti pled that his trial counsel was ineffective for failing to challenge the state's case. The state's argument is that the records show that he did cross-examine the state's witnesses regarding the case. However, if a critical examination is done of the record, it is clear that the level of cross-examination is woefully inadequate. Many state crime scene experts went unchallenged even though there was evidence that the crime scene had been tainted.

Michael Malone, an agent with the FBI Crime Lab, testified about hair and fiber analysis. Since that time, the FBI lab has been discredited for its inferior work and Mr. Malone in particular has been named as one of the agents who exaggerated his testimony

to fit the case in which he was testifying. Mr. Mordenti could not supply more detail for this allegation because he was not given an opportunity to amend with new information he learned as a result of 3.852 disclosures.

The state argues that Mr. Atti adequately cross-examined the state's witnesses about their relationships and financial dealings. However, a critical examination of the record shows that it is rife with instances of Mr. Atti's lack of preparation. In some instances, Mr. Atti's cross-examination is two transcript pages of ineffective questioning that did nothing to impeach the witness (R. 641-642, 675-676). Mr. Mordenti specifically points out in his Rule 3.850 motion where trial counsel complains that he has not interviewed witnesses who were listed on the state's witness list and must interview the witnesses in the hallway (PC-R. 109-120). Regardless of what the witness said during his hallway discussion, trial counsel had **no** opportunity to investigate or gather impeachment evidence to rebut their testimony. These are a few of the facts presented in Mr. Mordenti's Rule 3.850. It is obvious that sufficient facts exist that warrant an evidentiary hearing.

Had Mr. Mordenti been given an opportunity to receive his public records, he would have been able to add more detail to his allegations. However, no hearing of any kind was conducted.

The state cannot prevent Mr. Mordenti from receiving his public records then benefit from a perceived lack of specificity in his pleadings. See, Ventura v. State, 673 So. 2d 479 (Fla. 1996). Mr. Mordenti is entitled to a public records hearing, leave to amend and an evidentiary hearing.

CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Mordenti respectfully urges this Court to reverse the lower court, order an a public records, Huff, and evidentiary hearing, or grant such other relief as the Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 21, 1998.

TERRI L. BACKHUS
Florida Bar No. 0946427
P.O. Box 3294
100 S. Ashley, Ste. 1300
Tampa, FL 33601-3294
(813) 226-3140
Attorney for Mr. Mordenti

Copies furnished to:

Bob Landry
Assistant Attorney General
Department of Legal Affairs
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, FL 33607