IN THE SUPREME COURT OF FLORIDA

JAMES ROGER HUFF
Appellant

v. **CASE NO: 91,913**

STATE OF FLORIDA
Appellee
_____/

APPELLANT'S REPLY BRIEF ON THE DENIAL OF 3.850 RELIEF IN THE CIRCUIT COURT OF THE FIFTH JUDICIAL CIRCUIT

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I hereby certify that this Reply Brief in typed in 14 point New Times Roman.

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ARGUMENT I

THE TRIAL COURT ABUSED ITS' DISCRETION IN FAILING TO FIND HUFF'S COUNSEL FAILED TO ADEQUATELY ADVISE HIM ON THE PLEA OFFER AND COUNSEL FAILED TO CONVEY THE PLEA OFFER FROM HUFF TO THE STATE PRIOR TO TRIAL.

The state in its Answer Brief argues there was sufficient evidence in the record to support the trial court's finding that no plea offer was ever made by the state to James R. Huff.

This finding is used to defeat James R. Huff's first argument that he was not adequately advised by his attorney's as to the wisdom of taking the state's plea offer.

If there was no plea offer then trial counsel could hardly be found wanting in failing to properly advise Huff on the wisdom of accepting the offer.

The record showed there was a plea agreement made by the state to Huff sometime prior to his second trial.

Huff took the stand at this ***3.850*** evidentiary hearing on August 8,. 1997. Huff testified Mark Hill, his attorney at trial, came to him and told him that he had an offer from the state to plead to two second degrees murder charges. Huff would receive a sentence of eight to fourteen years. Huff would get credit for time served. He would get statutory gain time. Huff further testified he and his attorneys went into the conference room at the jail to discuss the plea offer. (R. 379-381)

At this conference Huff testified they discussed his case. Huff said he was advised by Hill that they would have a crime scene expert at the trial. This was very important in Huff's mind. A large part of his theory of defense was built around the theory that two other men had kidnaped himself and his parents. They were taken to a dump. Huff was hit over the head and knocked out. The other men then shot and killed his parents. The true perpetrators left the scene in another car. Huff was left un-conscience and his parents dead.

Huff's theory of the case was law enforcement officers investigating the murders had allowed the crime scene to become so contaminated that they destroyed any

evidence of the true perpetrators having been at the scene. In order to prove this theory, Huff believed he needed an expert on crime scene investigation to testify to the jury as to how and why the results of law enforcement's initial investigation was tainted and not worthy of belief.

Huff said he was assured by Hill the defense would have a crime scene expert by the time of trial. Huff said he was also told they would have a forensic expert to testify and Hill said he had evidence to impeach the testimony of Sheriff Johnson. (R. 381) but didn't tell him what it was. (R. 382) Johnson would testify that Huff had confessed to him saying, "I did it".

Huff testified he rejected the state's plea offer and said he would only plead to time served based on the representations of Hill that Huff would have: (1) a crime scene expert , (2) a forensic expert, and (3) information to impeach Sheriff Johnson, at trial (R-383)

Huff testified a few days later he was presented with Defendant's Exhibit Number 4. It was signed by Huff in the Sumter County Jail or Courthouse, Huff wasn't clear. The document was a written rejection of the state's plea offer. It also contained a counter offer of pleading to manslaughter for time served. (R.284) Huff said he signed it because Hill told him to sign it. (R.384-385)

He testified the reason he signed it was because Hill told him if he rejected the

plea offer in writing that the state might take the threat of going to trial seriously and accept Huff's offer to plead to two counts of manslaughter for time served. (R. 385)

Huff's testimony on his belief in the existence of a plea agreement is not rebutted by the record. All of the documentation prepared during that period of time demonstrates a plea agreement was offered by the state. The evidence of a plea offer from the state is so strong that Mark Hill felt it was necessary to get a "cover my tail" document in the file from Huff in order to have it in writing Huff rejected the states's plea offer (R. 320-321)

Jeffery Mark Pfister, the second chair for the state at Huff's retrial in 1984 testified a plea agreement was offered to Huff for less than a death sentence.(R. 211-212).

Everyone else who testified on the issue said they thought certain things did or didn't happen. They testified they may have said or didn't say something. The only thing they could testify to for sure was their memories had faded over the years and they could not be sure if a plea offer was conveyed or not. They could not say for sure a plea offer was conveyed or not.

Testimony that one does not recall whether something happened, or didn't happen, is not proof it happened or didn't happen. It is proof the witness can not remember.

In light of the positive testimony of two witnesses, Huff and Pfister, the second chair assistant state attorney at his trial, and the documention showing the offer and rejection of the plea agreement, it was an abuse of the trial court's discretion to find no plea agreement existed.

Confusion arises as to the facts and circumstances surrounding of the plea agreement issue because the C.C.R. in filing the initial ***3.850*** alleged that defense counsel never conveyed to Huff the existence of the plea agreement. What turned out in the testimony at the ***3.850*** hearing was that Huff was advised of a plea agreement that would have given him less than a death sentence, but was encourage to reject it based on defense counsel's mistaken representation as to what the defense was gong to be able to prove at trial. .

Defense counsel was ineffective in not properly advising Huff of the strength and weaknesses of his case and the advisability of taking an offer to a plea that involved less than death. Huff testified he rejected the offer because Hill led him to believe they had a strong defense because of (1) a crime scene expert, (2) a forensic expert, and (3) impeaching information on Sheriff Johnson of Sumter County, which would destroy Johnson's credibility on the witness stand.

Huff then testified that when he saw the first defense witness list a few weeks before trial he realized that no crime scene expert witness and no forensic expert were

listed as defense witnesses. (R. 335) . On April 8, 1984 he wrote a letter to his defense team telling them of his concerns (R. 337)

Huff received a second amended defense witness list dated April 18, 1984. Huff again notice that there was no crime scene expert witness or a forensic witness listed. (R. 338). Huff testified he was very distressed. He decided that his defense team was not prepared for trial which was only a little over a week away. Huff said he was also concerned about putting the rest of his family thorough another trail.

Huff testified he told both Mark Hill and Horace Danforth Robuck, Jr., two of his lawyers, about a week before trial, that he was willing to plead to the charges and made a concrete offer to the state through his attorneys. (R. 388-391) The offer apparently was not conveyed to the state 's attorney office as Joe Brown testified that his office never received a firm offer from the defendant to plead to anything at any time. (R. 183)

The state makes much in its brief that Huff knew the weaknesses in his case because this was a retrial (AB 19-22) Huff did know where the weakness in his case were. He also knew that he needed a crime scene expert to testify that the law enforcement officers that conducted the initial investigation so contaminated the scene that they had erased all evidence of the true perpetrators. He also knew that he needed a forensic expert to refute the state's experts

Huff was promised that these experts would be called at trial. Huff repeatedly

said he was afraid his trial counsel were making the same mistake as his previous attorney did in his first trial which ended in a conviction because of not having experts to refute the state's experts.

Huff's trial counsel assured him that this time around he would have those expert witnesses. Based on this representation from his attorneys Huff believed he had a good chance of a not guilty verdict and turned down the state's plea offer.

When Huff found out he wasn't going to have those witnesses he then re-evaluated his chances of getting a not guilty verdict and told his attorneys he would plea to the charges under certain conditions.

His attorneys never conveyed Huff's offer to plead to the state.

The state in its brief claims that Huff can not show prejudice even if this court finds his defense counsel did not convey Huff's offer to plead because he can not show that if the offer was conveyed to the state, the state would have accepted it. (AB 24)

No prejudice the state argues–no ineffective assistance of counsel.

This court on April 8, 1999 in ***Cottle v. State*** 700 So.2d 54 (Fla. 1999) Case No. 91,822 did an extensive analysis of ineffective assistance of counsel arguments.

This court stated the primary guide for ineffective assistance claims is the United States Supreme Court case in ***Strickland v. Washington,*** 466 U.S. 668 (1984), (adopted

by the Florida Supreme Court in ***Downs v. State,*** 453 So.2d 1102 (Fla. 1984).

Strickland held that claimants must show both (1) a deficient performance by counsel and (2) subsequent prejudice resulting from that deficiency to merit relief.

In conducting this two prong test, the court essentially decides whether the defendant's Sixth amendment right to a fair trial has been violated ***Id***. At 684. This analysis extends to challengers arising out of the plea process as a critical stage in criminal adjudication, which warrants the same constitutional guarantee of effective assistance as trail proceedings. ***See Hill v. Lockhart***, 474 U.S. 52, 57 (1985) see also ***Santobello v. New York***, 404 U.S. 25, 260 (1971)(recognizing plea bargaining as "an essential component of the administration of justice."

At issue in ***Cottle*** was whether the Fifth District erred in holding that ineffective assistance claims pertaining to an unrelated plea offer must allege that the trial court would have accepted the terms of offer to be legally sufficient.

Cottle wasconvicted for burglary of a motor vehicle and felony petit theft and sentenced to concurrent ten-year terms as a habitual felony offender for the two third-degree felonies. ***Cottle v. State*** 700 So.2d at 54. Adjudication as a habitual felony offender limits of Cottle's eligibility for parole or early release. The State had previously offered to forego habitualization in return for a guilty plea by Cottle

At sentencing, the prosecution informed the court that the Cottle court been given the opportunity to accept a plea offer and avoid habitual status. ***Id.*** However Cottle immediately denied being appraised of the plea offer and asserted that he would have accepted the plea offer if given such an opportunity. ***Id.*** Counsel for Cottle disputed this claim and asserted the existence of a note indicating that he had notified petitioner of the offer, who refused it and maintained his innocence instead. The trial court rejected Cottle's attempt to avoid habitualization. After an unsuccessful direct appeal, petitioner filed a rule ***3.850*** motion seeking relief on the grounds that his counsel had been ineffective in not conveying the State's plea offer to him. The trial court summarily denied relief, finding that the "files and records conclusively show that the defendant is entitled to no relief as to this allegation."] The Fifth District did not rule upon the reason given by the trial court for its summary denial but affirmed the order, holding that petitioner's claim was legally insufficient because it failed to allege the trial court would have approved of the terms of the plea offer. ***Cottle*** , 700 So.2d at 55.

INEFFECTIVE ASSISTANCE OF COUNSEL

The primary guide for ineffective assistance claims is the United States Supreme Court's hallmark opinion in ***Strickland v. Washington***, 466 U.S. 668 (1984) (adopted by this Court in ***Downs v. State***, 453 So.2d 1102 (Fla. 1984)). ***Strickland*** held that

claimants must show both a deficient performance by counsel and subsequent prejudice resulting from that deficiency to merit relief. ***Id.*** at 687.

. The first prong of the ***Strickland*** analysis requires a showing of a deficient performance. The defendant must show that counsel did not render "reasonably effective assistance."466 U.S. at 687. The appropriate standard for ascertaining the deficiency is "reasonableness under prevailing professional norms." ***Id***. at 688. The case law uniformly holds that counsel is deficient when he or she fails to relate a plea offer to a client. ***United States v. Rodriguez*** , 929 F.2d 747, 752 (1st Cir. 1991). Federal courts are "unanimous in finding that such conduct constitutes a violation" of the right to effective assistance. ***Barentine v. United States***, 728 F. Supp. 1241, 1251 (W.D.N.C. 1990), aff'd,908 F.2d 968 (4th Cir. 1990); see also ***United States ex rel. Caruso v. Zelinsky***, 689 F.2d 435, 438 (3d Cir. 1982)(noting that failure to inform client "constitutes a gross deviation from accepted professional standards"). State courts have also consistently held that this omission constitutes a deficiency. ***Lloyd v. State***, 373 S.E.2d 1, 3 (Ga. 1988);see ***Rasmussen v. State,*** 658 S.W.2d 867, 868(Ark. 1983) (finding duty to notify because any plea agreement is between accused and prosecutor); ***State v. Simmons,*** 309 S.E.2d 493 (N.C. Ct. App. 1983) (holding that such an allegation ordinarily states a claim). Many courts have cited the ***American Bar Association Standards for Criminal***

Justice as confirmation that the failure to notify clients of plea offers falls below professional standards .See, e.g., ***Lloyd,*** 373 S.E.2d at 2. The ABA standards require defense attorneys to "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor." ***ABA Standards for Criminal Justice :Prosecution Function and Defense Function***, stds. 4-6.2(b) (3d ed. 1993). The commentary to standard 4-6.2 states: Because plea discussions are usually held without the accused being present, the lawyer has the duty to communicate fully to the client the substance of the discussions. . . . It is important that the accused be informed both of the existence and the content of proposals made by the prosecutor; the accused, not the lawyer, has the right to decide whether to accept or reject a prosecution proposal, even when the proposal is one that the lawyer would not approve ***.Id***. (emphasis added.) The Georgia Supreme Court in ***Lloyd*** noted ***Strickland's*** suggestion that the ABA standard would provide an appropriate guide for "[p]revailing norms of practice," although it did not constitute dispositive proof. 373 S.E.2d at 2. California's highest court has stressed counsel's "overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on the important decisions and to keep the defendant informed of important developments in the course of the prosecution."***In re Alvernaz***, 830 P.2d 747, 754 (Cal. 1992) (quoting ***Strickland***, 466 U.S. at 688).

Although this Court has not explicitly enunciated this rule in the case law, it has approved the proposition that defense attorneys have the duty to inform their clients of plea offers. See ***Fla. R. Crim. P. 3.171(c)(2)*** (mandating that counsel advise of "(A) all plea offers; and (B) all pertinent matters bearing on the choice of which plea to enter").

Huff's attorneys clearly had a duty under the prevailing case as recited by this court in ***Cottle*** to advise Huff that they did not have the crime scene expert and the forensic experts, and impeaching evidence of Johnson they were leading Huff to believe would be available.

When Huff realized he had rejected a plea agreement that would have allowed him to plead to less than death based on erroneous representations of his trial counsel he informed them of his willingness to plea. His attorney failed to convey the offer to plea to the state. The conveyance of Huff's offer to plead to the state was an essential part of the plea bargaining process.

The state now argues that Huff has a duty to show if the offer to plea was conveyed to the state that the state would have accepted the offer to plea. The law in Florida does not require Huff to show the state would have accepted the offer to plead in order to make out his case under ***Strickland***.

Florida case law has heretofore consistently relied on a three-part test for analyzing ineffective assistance claims based on allegations that counsel failed to properly advise the defendant about plea offers by the state. See ***Lee v. State***, 677 So.2d 312 (Fla. 1st DCA 1996); ***Seymore v. State***, 693 So.2d 647 (Fla. 1st DCA 1997); ***Hilligenn v. State*** 660 So.2d 774 (Fla. 3d DCA 1983).

Each of these cases hold that a claim must allege the following to make a prima facie case: (1)counsel failed to relay a plea offer, (2) defendant would have accepted it, and (3) the plea would have resulted in a lesser sentence.

PREJUDICE

Under ***Strickland***, claimants must, of course, also demonstrate that counsel's omission was prejudicial to their cause. Typically, claimants must show that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." 466 U.S. at 687.

However, courts have held that where counsel failed to disclose a plea offer, the claim is not legally insufficient merely because the claimant subsequently received a fair trial. ***People v. Curry***, 687 N.E.2d 877, 882 (Ill. 1997); ***In re Alvernaz***, 830P.2d at 753 n.5 (noting that no court has found a valid claim to be "remedied by a fair trial").

In lieu of a "fair trial" test for prejudice, the Supreme Court has crafted a test for

claims of ineffective assistance arising out of the plea stage. For example, the Court has held that a claimant must demonstrate that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." ***Hill v. Lockart***, 474 U.S. at 59.Where the defendant was not notified of a plea offer, courts have held that the claimant must prove to a "reasonable probability that he [or she] would have accepted the offer instead of standing trial." ***State v. Stillings***, 882 S.W.2d 696,704 (Mo. Ct. App. 1994) (rejecting claim where evidence showed appellant would have refused to plead guilty if made aware of plea offer); see also ***State v.James***, 739 P.2d 1161, 1167 (Wash. Ct. App. 1987) (requiring a "reasonable probability that but for an attorney's error, a defendant would have accepted a plea agreement").

Huff made an offer to the state, or thought he did, through his attorneys. There is nothing in the record to show that if state had accepted the offer that Huff would have turned around and rejected it as the trial court found it its order.

FLORIDA CASES

As noted above, before Cottle, and consistent with the practice in the federal courts and other state courts, courts in this state have recognized claims arising out of counsel's failure to inform a defendant of a plea offer, and have required a claimant to

show that: (1) counsel failed to communicate a plea offer or misinformed defendant concerning the penalty faced, (2)defendant would have accepted the plea offer but for the inadequate notice, and (3) acceptance of the State's plea offer would have resulted in a lesser sentence.

Huff met all three tests. (1) His trial attorneys failed to communicate the offer to plead guilty to the state (2) Had the state accepted the plea offer Huff would have accepted it, and (3) his acceptance of the plea offer would have been for less than death.

See ***Young v. State***, 608 So.2d 111, 113 (Fla. 5th DCA 1992)(citing ***United States ex rel. Caruso v. Zelinsky,689*** F.2d 435, 437 (3d Cir. 1982)); accord ***Rosa v.State,*** 712 So.2d 414, 415 (Fla. 4th DCA 1998); ***Gonzalesv. State***, 691 So.2d 602, 603 (Fla. 4th DCA 1997); ***VanDyke v. State,*** 697 So.2d 1015 (Fla. 4th DCA 1997);***Seymore v. State,*** 693 So.2d 647, 647 (Fla. 1st DCA1997); ***Lee v. State,*** 677 So.2d 312, 313 (Fla. 1st DCA1996); ***Steel v. State***, 684 So.2d 290, 291-92 (Fla. 4thDCA 1996); ***Hilligenn v. State***, 660 So.2d 361, 362 (Fla.2d DCA 1995); ***Graham v. State***, 659 So.2d 722, 723 (Fla.1st DCA 1995); ***Wilson v. State***, 647 So.2d 185, 186(Fla. 1st DCA 1994) (finding the foregoing elements stated "colorable ground for relief"); ***Majors v. State,*** 645 So.2d 1110 (Fla 1st DCA 1994) (finding a "sufficient" basis for an evidentiary hearing); ***Ginwright v. State***, 466 So.2d 409, 410 (Fla. 2d DCA 1985) (remanding because

the"allegations, if true, may be found by a trier of fact to constitute a substantial omission by defense counsel");***Young v. State***, 625 So.2d 906 (Fla. 2d DCA 1993);***Martens v. State***, 517 So.2d 38, 39 (Fla. 2d DCA 1987),review denied, 525 So.2d 38 (Fla. 1988). But see ***Zamora v. Wainwright***, 610F. Supp. 159, 161 (S.D. Fla. 1985) (noting that claim of failure to plea bargain must allege the State would have offered plea and court would have accepted it).

CURRY

This court rejected a fourth prong to the test which would have required to Huff to show that if the plea offer was made, it would have been accepted by the state and approved by the judge.. This court in ***Cottle*** appears to have rejected such a requirement.

This court in this opinion said the Illinois Supreme Court recently discussed the issue before us and rejected the additional mandatory requirement for such claims of proof of court acceptance of a plea offer after extensively reviewing the law of other jurisdictions and finding the consensus weighed against such a requirement. ***Curry***, 687 N.E.2d at 889-90. The Curry court, in rejecting such a requirement, reasoned that it "is at odds with the realities of contemporary plea practice and presents inherent problems of proof.***" Id.*** at 890 (citation omitted). The court found that "the majority of cases from

other jurisdictions do not require a defendant to prove that the trial judge would have accepted the plea agreement".***Id***. at 889; see, e.g., ***Turner v. Tennessee***, 858 F.2d 1201, 1207 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989); ***Caruso***, 689F.2d at 438 n.2; ***Williams v. State***, 605 A.2d 103, 110(Md. 1992); ***Commonwealth v. Napper,*** 385 A.2d 521, 524(Pa. Super. Ct. 1978); ***Judge v. State***, 471 S.E.2d 146,148-49 (S.C. 1996).

In ***Turner***, the Sixth Circuit also rejected the notion that claimants must establish that the trial court would have approved the plea offer, 858 F.2d at 1207. While the court recognized that court approval was a necessary precedent to a binding plea, it uncovered "no case or statute that imposes such a requirement, and we think it unfair and unwise to require litigants to speculate as to how a particular judge would have acted under particular circumstances." ***Id.*** Other courts have also noted that due to the speculative nature of this counter-factual inquiry, it would be extremely difficult to resolve. See, e.g., ***Napper***, 385A.2d at 524. The burden may not be justifiable, more over, considering the gravity of the constitutional right deprived when counsel fails to inform a criminal defendant of a plea offer. ***Id.*** As an alternative to the requirement, the ***Napper*** court viewed any uncertainty of court approval in light more favorable to the claimant. ***Id***. The court observed: [W]e cannot be sure that the trial court . . . would have accepted the plea

bargain. These uncertainties, however, in no way affect the fact that counsel, for no good reason, failed to take action that arguably might have furthered appellant's interests. In other words: It cannot be denied that upon proper advice, appellant might have accepted the offered plea bargain; nor that, while a court may reject a plea bargain, as a practical matter-especially in crowded urban courts-this rarely occurs. ***Id.***

CONCLUSION

We agree with the holding in ***Curry*** and other decisions rejecting a requirement that the defendant must prove that a trial court would have actually accepted the plea arrangement offered by the state but not conveyed to the defendant. Those courts have correctly noted that any finding on that issue would necessarily have to be predicated upon speculation. In essence, the holdings of these cases suggest ,and we agree, that an inherent prejudice results from a defendant's inability, due to counsel's neglect, to make a uninformed decision whether to plea bargain, which exists independently of the objective viability of the actual offer. Cf. ***Hill***, 474 U.S. at 56-57 (reasoning that the validity of plea bargain hinged on the defendant's informed volition); see also ***United***

States v. Day, 969 F.2d 39, 43 (3d Cir. 1992) (reasoning that defendant has a right to an informed decision to plea bargain); ***Williams,*** 605 A.2d at 110 (noting that courts presume prejudice from the inference that a "defendant with more, or better, information, would have acted differently"). That is not to say, however, that a defendant making such a claim does not carry a substantial burden. In its earlier opinion in ***Young***, the Fifth District properly emphasized that claimants are held to a strict standard of proof due to the incentives for a defendant to bring such a post trial claim. 608 So.2d at 112-13. Consistent with the prior Florida case law we have discussed above, the Fifth District instructed:"Appellant must prove his counsel failed to communicate a plea offer . . ., that had he been correctly advised he would have accepted the plea offer, and that his acceptance of the state's plea offer would have resulted in a lesser sentence."***Id***. at 113. We agree that these are the required elements a defendant must establish in order to be entitled to relief. In conclusion, we quash the decision under review and approve ***Seymore, Id. Hilligenn, Id. and Abella v. State,*** 429 So.2d 774 (Fla. 3d DCA 1983). We remand this case for further proceedings consistent herewith.

Huff met all these requirements in his evidentiary hearing.

ARGUMENT II

THE TRIAL COURT ABUSED ITS' DISCRETION BY FAILING TO PROVIDE HUFF WITH AN EVIDENTIARY HEARING ON THE ISSUES RAISED IN HIS 3.850 MOTION.

The ***3.850*** motion filed by Huff's attorneys was a total of 258 pages. It had 42 issues and sub-issues. The trial court ruled that only one of the issues warranted an evidentiary hearing.

On the remaining issues the trial court ruled either (1) the claims were legally insufficient on their face , or (2) the claims were conclusively refuted by the record and did not require an evidentiary hearing.

Huff in his Initial Brief went through each of the denied grounds and will not simply repeat his arguments in this Reply Brief. The question this court must determine

in examining the trial court's order is whether or not the issues as contained in the ***3.850*** motion, that the trial court found on their face to be legally insufficient, were in fact legally sufficient.

If this court finds the allegations in the ***3.850*** were sufficient this court should remand this case to the trial court with instructions to provide an evidentiary hearing on the issues.

If this court finds that the issues raised in the ***3.850*** were legally insufficient then this court must look long and hard at the issue raised in Argument III of Huff Initial Brief. Huff argued the trial court abused its discretion in failing to grant Mr. Eble's motion for leave to supplement the ***3.850*** motion prior to the scheduled evidentiary hearing.

The trial court rejected a second group of issues because the trial court found their was no need for an evidentiary hearing because the record conclusively showed Huff was not entitled to an evidentiary hearing.

This may or may not turn out to be ultimately true. One can not tell from the order the trial court entered in Huff's case.

No portions of the record were attached to the order which the court states it based its reasoning on. The order does not recite in any way how what appears in the record

conclusively shows Huff was not entitled to an evidentiary hearing. Portions of the record are cited to but not attached to the order.

The trial court's order simply states its conclusions and provides no facts upon which the conclusion is based .The order states a claim is refuted by the record. The portion of the record which severs as the bases for denial of an evidentiary hearing is not attach to the order.

The order does not explain how what is in the unattached record conclusively refutes Huff's ***3.850*** claim.

It may well be that record properly cited and explained would show Huff was not entitled to an evidentiary hearing on the issued raised in the ***3.850.*** The current order of the trial court does not present a sufficient bases to deny an evidentiary hearing to Huff.

This court should remand this matter back to the trial to court attach those portions of the record that the trial court's order found refuted the claim for relief in Huff's ***3.850.*** This court should also require the trial court to provide written reasoning as to how a particular portion of the record affirmatively and conclusively refutes Huff's claim for relief requested in his ***3.850*** motion.

The state in its Answer Brief admits the judge did not attach the relevant portions of the record to the trial court's order.. The state contends that such attachment is wholly

unnecessary. (Answer Brief AB page 28).

The state says that Huff complained throughout his appellate brief that the trial judge failed to explain how the point raised on direct appeal related to that raised in the ***3.850*** motion. The state concedes the trial judge did not explain how the points raised on direct appeal related to the issue raised in the ***3.850*** motion. The state's position is the trial judge didn't have to give any explanation.

The question for this court then is: How much detail must a trial judge put in his order summarily denying an evidentiary hearing?

The state's position is the burden is met when the trial judge makes reference to the record and states an ultimate conclusion. The state's position apparently is that the trial judge need provide no reasoning for its conclusion.

In ***Davis v. State,*** 716 So.2d 274 (Fla. 4 Dist. 1998) the trial court denied Davis an evidentiary hearing on his ***3.850*** motion. Davis claimed he was not told what the consequences of pleading to the charges and being notified as an habitual felony offender was going to have on his sentence. He claimed his trial attorney never explained it to him.

The trial court summarily denied the ***3.850*** motion and attached a copy of the transcript of the change of plea hearing to show what was said. The District Court of

Appeals reversed saying the transcript did not show that all of the requirements of the taking of a plea to someone who was going to be sentenced as an habitual felony offender had been met. The ***Davis*** court also cited ***Salihng v. State,*** 705 So.2d. 937 (Fla. 2d DCA 1997) and ***Hills v. State,*** 671 So.2d 223 (Fla. 1st DCA 1996).

The appellate court in each of these cases remanded the case back to the trial court because the attached transcripts of the proceedings below which were attached to the order did not conclusively refute the claim of ineffective assistants of counsel.

It appears to be the state's argument in Huff that had these trial courts (1) summarily deny the ***3.850*** motions, (2) cited in their order that they were relying on the arguments of the state, and (3) state in the order that the record of the hearing conclusively refuted the allegations in the ***3.850*** motion they would have been upheld as long as they didn't attach the portion of the record the trial court referred to in its order.

The state can not be in a better position by not providing copies of the record to the trial court's order summarily denying a ***3.850*** motion than those who do.

Simply because the trial court in Huff cited to a portion of the record doesn't mean the record supports the conclusion the judge reached. This court can only make that determination if the portion of the record referred to in the order is attached so this court can review it.

The trial court in Huff's case erred in not attaching those portions of the record it based its denial of a ***3.850*** evidentiary hearing. Without those attachments this court can not evaluate if the conclusions reached by the trial court were supported by the record.

Such a failure effectively denies Huff a right to appeal the trial courts ruling.

It is Huff's position that the law requires the trial court to: (1) give a cite to the record, (2) attach a copy of that portion of the record, and (3) provide some analysis as to why that particular portion of the record cited conclusively shows Huff is not entitled to an evidentiary hearing. This the trial court in the instant case totally failed to do.

ARGUMENT III

THE TRIAL COURT ABUSED ITS' DISCRETION BY FAILING TO ALLOW HIS NEWLY APPOINTED COUNSEL, WILLIAM EBLE, TO FILE A SECOND AMENDED 3.850 MOTION WHICH SOUGHT TO CURE THE VAGUENESS GROUNDS THE TRIAL COURT USED FOR DENYING HUFF A HEARING ON ISSUES RAISED IN HIS AMENDED 3.850 MOTION.

In light of the state's strong position that the trial court was correct in finding that certain of the issues raised in Huff's ***3.850*** were legally insufficient this court needs to closely exam the trial judge's denial of Huff's attorney, William Eble's motion to amend the ***3.850*** motion.

If this court finds the issues raised in the ***3.850*** were legally sufficient and therefore Huff was entitled to an evidentiary hearing this point is moot. However, if this court finds the issues raised in the ***3.850*** were legally insufficient on their face then this court must look closely at the trial judges denial of the request to supplement the allegations with more specific facts.

In answer to the argument raised in Huff's Initial Brief the state in its Answer Brief states: "Huff complains that the trial judge should have permitted him to further amend his previously filed and ruled on ***Rule 3.850*** motion (IB 90). He claims that (t)he purpose of (his) request...was to provide the very details... which the Circuit court said were lacking in the ***3.850*** motion as filed by CCR and served a bases for the denial of an

evidentiary hearing on those issues." (AB 93)

The states argument against this boils down to "The State disagrees." (AB 93)

The state cited no cases to support its position that Eble should not have been allowed to supplement the motion with additional facts to meet the state's objections and the judge's concerns.

Huff in his Initial Brief filed a nine page argument, including case law, in support of his position in Argument III. The argument will not be repeated here as there is nothing presented in the state's Answer Brief to refute.

Huff contented the trial court abused its discretion in failing to allow his attorney to file a supplement to the ***3.850*** motion. The purpose of the request by his attorney was to provide the details the trial court said were lacking in the ***3.850*** motion as filed.

The state in its Answer Brief filed a one and half page answer citing no cases to support its positions that the court was correct in its ruling.

CONCLUSION AND RELIEF SOUGHT

James R. Huff request this Honorable Court to:

1. Find that the limited 3.850 evidentiary hearing held on August 8, 1997 provided sufficient bases to find

(a.) There was a plea offer from the state of Florida to Huff.

(b). that Huff's trial counsel provided ineffective assistance of counsel in failing to properly discuss with him the merits and demerits of his case, specifically;

(i.) they should have told him they did not have a crime scene expert who would testify for the defense that the crime scene was contaminated by law enforcement officer investigating the murder scene, and

(ii.) they had no forensic expert to testify for the defense at trial that the conclusions reached by the states experts were incorrect, and

(iii). the impeaching evidence they had on Sheriff Johnson was weak and was not likely to impeach his testimony that Huff had confessed to him..

These revelations would have allowed Huff to have an adequate bases to determine the merits or demerits of accepting or rejecting the state's plea offer when it was originally offered.

(c.) that Huff's trial counsel were ineffective in that they did not convey to the

state Huff's willingness to enter a plea.

If the court remands on this ground only this court should reverse the death penalty sentence and order the case remanded to the trial court for Huff to be sentenced to life.

2. Of this court should find there is a sufficient bases plead in the ***3.850*** motion, as filed by C.C. R., to warrant an evidentiary hearing on the issues raised it should remand this case back to the trial court with orders to hold an evidentiary hearing on the issues raised in the 3.850 pleading, or to attach those portions of the record which show that Huff is not entitled to an evidentiary hearing to the order along with an explanation as to why the record shows there is no need for an evidentiary hearing on the issue raised.

3. If this court finds that the 3.850 motion filed by C.C.R. was insufficiently vague and legally insufficient then this court should find the trial court abused its discretion in failing to allow William Eble, court appointed counsel, to file an amended 3.850 which would have supplied the very details the court and the state said were lacking.

If the court finds error on this ground it should remand this case back to the trial court with instructions to permit the attorney for Huff to file an amended 3.850 which contains additional detail supporting the motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by regular United States Mail, postage prepared to Judy Taylor Rush, Assistant Attorney General at 444 Seabreeze Blvd. Suite 500 Daytona Beach, Florida, 32118 this _____ day of August, 1999.

_____

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