IN THE

Supreme Court of Florida

COSTA T. VATHIS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC03-2268

REPLY BRIEF OF PETITIONER

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1. The district court erred by affirming the summary denial of Petitioner Vathis' postconviction claim because the pleading requirements exacted by the district court run counter to the established purpose of Florida Rule of Criminal Procedure 3.850 and decisions of this Court [restated].

In its Answer Brief, the State contends that the district court below was correct in its conclusion that Petitioner Vathis' postconviction claim was "facially insufficient." *See* Answer Brief at 11-13. The State repeats the reasoning of the majority panel below:

> All we know from the defendant's allegation is that his lawyer did not object to the emotional outburst. The argument advanced by the defendant proceeds from this simple fact to an assumption that an evidentiary hearing is required. *However, the defendant has not alleged that an objection was necessary, or even that it would have been wise*.

Vathis v. State, 859 So. 2d 517, 518 (Fla. 1st DCA 2003) (emphasis added); Answer Brief at 12. Contrary to the State's claim and the district court's reasoning, the postconviction motion filed by Petitioner Vathis clearly alleged that an objection was necessary:

> Trial counsel rendered ineffective assistance by *failing to object and move for an immediate mistrial* at the conclusion of the testimony of the alleged victim, [K.S.]. At the conclusion of the testimony of [K.S.], her parents spontaneously rushed to the witness stand without permission from or request by the Court, and escorted her back to the gallery in full view of the jury. Such an emotional display should not have been permitted by the Court, and the trial judge failed to exercise proper control over courtroom proceedings. The *failure to object* by defense counsel resulted in the physical display being omitted from the record,

> and the *failure to object* further prevented any appellate review of the issue of whether the silent accord of the Court constituted vouching and bolstering of the credibility of the alleged victim. Further, the *failure to object and move for mistrial* prevented appellate review of the harmful and prejudicial nature of such an emotional display in close proximity to the jury. The spontaneous display of emotion by the parents served solely to garner sympathy for the alleged victim, thereby tainting the subsequent jury verdict due to the consideration of sympathy and the silent bolstering of the testimony of the alleged victim by the Court absent a timely objection and motion for mistrial. But for the omission by counsel, the trial court would have admonished the parents for violating court procedure, immediately instructed the jury to focus only upon the evidence, and/or granted the motion for mistrial.

(R-7) (emphasis added). While Petitioner Vathis may not have commented on the "wisdom" of counsel's actions in the pleadings, Petitioner Vathis clearly pled that by *failing to object*, counsel's actions were (1) below the standard of reasonable and effective counsel and (2) that Petitioner Vathis was prejudiced as a result of the ineffectiveness. Accordingly, Petitioner Vathis submits that he raised a facially sufficient postconviction claim.

In *Jacobs v. State*, 29 Fla. L. Weekly S319, S320 (Fla. June 24, 2004), the Court reiterated the procedure that a trial court must follow when considering a postconviction motion filed pursuant to Florida Rule of Criminal Procedure 3.850:

> First, a trial court must determine whether the motion is facially sufficient, i.e., whether it sets out a cognizable claim for relief based upon the legal and factual grounds asserted. It would logically follow that if no valid claim is alleged, the court may deny the motion outright, and the court need not examine the record. Second, if the court determines that the motion is facially sufficient, the court may then review the record. If the

> record conclusively refutes the alleged claim, the claim may be denied. In doing so, the court is required to attach those portions of the record that conclusively refute the claim to its order of denial. Third, if the court determines that the motion is facially sufficient and that there are no files or records conclusively showing that the movant is not entitled to relief, the court may order the state attorney's office to file a response to the defendant's motion. The state attorney must respond to the allegations of the motion, state whether the movant has pursued any other available remedies (including any other postconviction motions), and state whether the defendant received an evidentiary hearing. Fourth, after the state attorney has filed the required response, the trial judge must determine whether the claims alleged in the motion have been denied at a previous stage in the proceedings. Finally, if the claims presented in the motion have not been denied previously, the judge shall then determine whether an evidentiary hearing is required in order to resolve the claims alleged in the motion. Thus, if the trial court finds that the motion is facially sufficient, that the claim is not conclusively refuted by the record, and that the claim is not otherwise procedurally barred, *the trial court should hold an evidentiary hearing to resolve the claim.*

(Emphasis added.) The Court in *Jacobs* clarified that the determination of whether a claim is facially sufficient is separate and distinct from the determination of whether a claim is conclusively refuted by the record:

> Both the trial court and the district court in this case appear to have mixed the first two procedural stages of rule 3.850, i.e., they have combined the issue of a claim's facial sufficiency with the issue of whether the claim is conclusively refuted by the record. In addressing the defendant's claim of ineffective assistance of counsel based on the failure to call alibi witnesses, the trial court expressly denied the motion based on facial insufficiency. In doing so, however, the court relied upon the "overwhelming evidence against the defendant" – a clear indication that the court had reviewed not only facial sufficiency of the claim itself, but also the record of the trial. The court also cited *Cooley v. State*, 642 So. 2d 108 (Fla. 3d DCA 1994), for the proposition that counsel is not ineffective where there is "ample evidence contradicting the testimony the

> witness would have given" – another sign that the court was relying on the contents of the record, rather than the facial sufficiency of the claim, to deny the motion.
>
> The Third District's opinion appears to have repeated the trial court's mistake in its analysis. In holding that the defendant's claim was facially insufficient, the district court stated that "[a]lthough the defendant claims these witnesses would have testified that he was in their home at the time of the crime, other eyewitness testimony placed the defendant at the scene of the crime and there was overwhelming evidence of the defendant's burglary of the unoccupied dwelling." *Jacobs v. State*, 800 So. 2d 322, 323 (Fla. 3d DCA 2001). The court also noted the "abundance of evidence contradicting [the witnesses'] testimony." *Id.* at 324. These statements indicate the district court, too, looked not at the legal sufficiency of the allegations of the motion, but to the record to refute the claim.

Jacobs, 29 Fla. L. Weekly at S320 (footnote omitted).

In the case below, in addition to misapplying the standard of review to be applied to a trial court's summary denial of a postconviction motion,[1] the First District Court of Appeal also committed the same mistake that the district court in *Jacobs* committed; the court looked to the record to refute Petitioner Vathis' claim rather than

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[1] As set forth in the Initial Brief, when a trial court denies postconviction relief without conducting an evidentiary hearing, an appellate court "must accept [the defendant's] factual allegations as true to the extent they are not refuted by the record." *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000). A review of the district court's opinion below proves that the court did not "accept [Petitioner Vathis'] factual allegations as true to the extent they are not refuted by the record"; rather, the district court *weighed and rejected* Petitioner Vathis' factual allegations. *See Vathis*, 859 So. 2d at 518-19; Initial Brief at 17-19. Moreover, the district court improperly engaged in "logical deductions" and improperly "presume[d]," "speculate[d]," or "assume[d]" facts to the detriment of Petitioner Vathis, actions that are impermissible without first affording a defendant an evidentiary hearing. *See Vathis*, 859 So. 2d at 518-19, Initial Brief at 19-20.

assessing the legal sufficiency of the claim:

> Even if we were to speculate that the incident caused some jurors to become unduly sympathetic, that would not establish prejudice. As the documents attached to the trial judge's order reveal, the jurors were instructed that "[the] case must not be decided for or against anyone because [they] feel sorry for anyone or are angry at anyone." This instruction was given for a purpose, and we must assume that the jurors followed it in deciding their verdict.

Vathis, 859 So. 2d at 519.

In *Jacobs*, this Court ultimately concluded that the defendant had set forth a facially sufficient postconviction claim of ineffective assistance of counsel (IAC):

> The provisions of rule 3.850 and the decisions discussed above support a conclusion that Jacobs set out a facially sufficient claim here, because, in accord with the provisions of the rule and the holdings of the cases, he specifically identified the alibi witnesses, stated the substance of their exculpatory evidence, and averred that they were known to counsel. We conclude that Jacobs' IAC claim was pled sufficiently in accordance with rule 3.850 because in the motion Jacobs expressly provided (1) the names of the two potential alibi witnesses who had been previously listed in the trial court record as alibi witnesses; (2) the witnesses phone numbers; and (3) a rather specific factual recitation of their proposed alibi testimony supporting his alibi defense. The petitioner's motion contained both a legal claim of ineffective assistance of counsel, i.e., an unexplained failure to present a valid defense, that, if accepted, would have supported a not guilty verdict, and a detailed factual predicate for the claim, i.e., the availability of identified witnesses known to counsel who would have supported the defense. The rule does not require more. Therefore, we find that both the trial court and the Third District erred by finding the instant claim to be facially insufficient.

Jacobs, 29 Fla. L. Weekly at S320-21 (footnote omitted). As in *Jacobs*, Petitioner Vathis' postconviction claim contained both a legal claim of ineffective assistance of

counsel, i.e., an unexplained failure to object to an emotional outburst, that, if accepted, would have supported a mistrial, and a *detailed factual predicate* for the claim, i.e., the type of emotional outburst, the proximity of the outburst to the jurors, and the allegation that the outburst served to bolster the minor victim's testimony (i.e., prejudice).

The opinion of the district court below is contrary to the letter and spirit of the limited pleading requirements set out in rule 3.850, which have always called for a simple, direct statement of a claim and the factual basis supporting the claim. *See Nelson v. State*, 29 Fla. L. Weekly S277, S279 (Fla. June 3, 2004) (Anstead, C.J., dissenting). These limited pleading requirements recognized the reality that the substantial majority of rule 3.850 claims are filed *pro se*, and represented a policy choice that it was far less costly to the State to provide simple pleading requirements for habeas corpus claims than to provide costly lawyers. *See id*. The district court is amending rule 3.850 in an *ad hoc* manner to add very specific and rigid pleading requirements which were never contemplated by the drafters of rule 3.850 or by this Court in adopting the rule. *See id.*

Certainly one can imagine an emotional outburst so egregious that no reasonable attorney would fail to object. Petitioner Vathis submits that the instant proceeding is that case, although he has not been given the opportunity to demonstrate his

contention because he has been denied the opportunity to prove his claim at an evidentiary hearing.

As noted by then-Chief Justice Anstead in *Nelson*, the legal reality is that ineffectiveness claims under *Strickland v. Washington*, 466 U.S. 668 (1984), come in a "veritable laundry list" of forms that a court could never hope to completely categorize. *See Nelson*, 29 Fla. L. Weekly at S279. "[O]ther than recognizing the standard of *Strickland*, Florida courts could never come close to identifying the proper elements of all ineffectiveness claims." *Id.* Therefore, courts "should avoid this pleading quagmire and stick with the simple pleading requirements of rule 3.850 and *Strickland*, and the essential values underlying the preservation of the writ of habeas corpus in the Florida Constitution that were considered when the rule was adopted." *Id.* "It is far more consistent with the traditional purpose of The Great Writ of Habeas Corpus to catch and remedy serious injustices whenever they are called to a court's attention." *Id*.

Petitioner Vathis submits that in order to avoid the needless expenditure of judicial resources, the better policy is one that favors an evidentiary hearing for facially sufficient postconviction claims.[2] This Court has adopted a similar policy in capital

[2] Petitioner Vathis suggests that rule 3.850 should be referred to the Florida Criminal Procedure Rules Committee for the consideration and adoption of more specific and detailed rules of procedure for postconviction motions. For example, the Supreme Court of the United States has adopted and Congress has approved a

cases. *See Floyd v. State*, 808 So. 2d 175, 183 (Fla. 2002) ("Indeed, we have strongly urged trial courts to err on the side of granting evidentiary hearings in cases involving initial claims for ineffective assistance of counsel in capital cases."); *Gaskin v. State*, 737 So. 2d 509, 516 n.17 (Fla. 1999) ("Based on the important policy concerns in creating a simplified yet complete rule of procedure in postconviction proceedings and the emphasis within the rule favoring evidentiary hearings unless conclusively demonstrated otherwise, we strongly urge trial courts to err on the side of granting evidentiary hearings in cases involving initial claims for ineffective assistance of counsel in capital cases."); *Mordenti v. State*, 711 So. 2d 30, 33 (Fla. 1998) (Wells, J., concurring) (advocating mandatory evidentiary hearing for all initial rule 3.850 motions asserting ineffective assistance of counsel claims in capital cases); *Ragsdale v. State*, 720 So. 2d 203, 207 (Fla. 1998) (recognizing that the Court has encouraged trial courts to hold evidentiary hearings on postconviction motions). Every week, at least one case is released by the district courts of this state reversing a summary denial of a postconviction motion. In the month of March 2004 alone, there were at least

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separate set of rules dealing specifically with postconviction/habeas petitions, including rules for discovery and evidentiary hearings. *See* "Rules Governing Section 2254 Cases in the United States District Courts"; "Rules Governing Section 2255 Proceedings for the United States District Courts."

nine reversals. *See Reese v. State*, 869 So. 2d 1225 (Fla. 2d DCA 2004);[3] *House v. State*, 869 So. 2d 1229 (Fla. 2d DCA 2004); *Murphy v. State*, 869 So. 2d 1228 (Fla. 2d DCA 2004); *Wade v. State*, 870 So. 2d 231 (Fla. 2d DCA 2004); *Vickery v. State*, 869 So. 2d 623 (Fla. 5th DCA 2004); *Wilson v. State*, 868 So. 2d 654 (Fla. 2d DCA 2004); *Dessin v. State*, 868 So. 2d 613 (Fla. 2d DCA 2004); *Adams v. State*, 866 So. 2d 1290 (Fla. 4th DCA 2004); *Medeiros v. State*, 866 So. 2d 778 (Fla. 4th DCA 2004). Petitioner Vathis submits that in all cases, whether capital or noncapital, trial courts should err on the side of granting an evidentiary hearing. From an economic standpoint, based on the number of reversals, needless appellate resources would be saved if trial courts would routinely grant postconviction defendants the hour or two that it would take to conduct an evidentiary hearing. From a public confidence standpoint, all parties will have more faith in the outcome of a proceeding if a defendant is first given an opportunity to be heard in court through an evidentiary hearing.

In *Jacobs*, the Court recently reiterated that an evidentiary hearing is favored once a defendant has presented a facially sufficient postconviction claim. The Court relied on its recent opinion in *Ford v. State*, 825 So. 2d 358 (Fla. 2002), wherein the Court quashed the Fifth District Court of Appeal's refusal to grant an evidentiary

[3] The cases are listed in chronological order, beginning with the most recent decision.

hearing:

> Without an evidentiary hearing or any record attachments refuting petitioner's allegations, the trial court was bound to assume that the allegations in petitioner's 3.850 motion were true. We conclude that the Fifth District, by affirming the trial court's order on the basis that "defense counsel could have well decided that calling them would not have been beneficial," *Ford* [*v. State*], 776 So. 2d [373,] 374 [(Fla. 5th DCA 2001)], erroneously allowed the trial court to deviate from this rule. The Fifth District's statement in *Ford* resolved, without either a clear trial record basis identified by the trial court or an evidentiary hearing, the factual issue involving the reason why counsel did not call the witnesses identified by the petitioner. We conclude that, in the instant case, to determine the reason why trial counsel did not call the witnesses it was necessary to grant petitioner an opportunity to present evidence.

Jacobs, 29 Fla. L. Weekly at S321 (citations omitted).

The district court's statement in *Vathis* that "[s]ome lawyers might conclude that the jurors would see the parents' emotional display for what it is, and that an objection would be out of place," 859 So. 2d at 518, is indistinguishable from the district court's statement in *Ford* that "defense counsel could have well decided that calling them would not have been beneficial." *Ford*, 776 So. 2d at 374. The First District's statement in *Vathis* "resolved, without either a clear trial record basis identified by the trial court or an evidentiary hearing, the factual issue involving the reason why counsel" did not object to the emotional outburst. *See Jacobs*, 29 Fla. L. Weekly at S321. To determine the reason why trial counsel did not object to the emotional outburst, it was necessary to grant Petitioner Vathis the opportunity to

present evidence at an evidentiary hearing.

At the evidentiary hearing, Petitioner Vathis understands that the burden will rest on him "to demonstrate a valid claim of ineffective assistance of counsel under the two-pronged analysis contained in *Strickland*." *Jacobs*, 29 Fla. L. Weekly at S321. However, it is only after an evidentiary hearing is conducted that a reviewing court can access the true extent of the emotional outburst in Petitioner Vathis' case and the prejudice caused by the outburst. It will be incumbent upon Petitioner Vathis to call witnesses who will testify concerning what they saw in the courtroom and whether the jury was present during the emotional outburst. And Petitioner Vathis' trial counsel will be given an opportunity to explain why he did not object to the outburst. But it is only after Petitioner Vathis is afforded this opportunity that his claim of ineffectiveness can be properly reviewed and decided.

In the Answer Brief, the State claims that Petitioner Vathis "previously raised this issue on direct appeal." Answer Brief at 14. For all of the reasons set forth in footnote 7 of the Initial Brief, Petitioner Vathis submits that this postconviction claim has not been previously decided on the merits and therefore it is properly raised in a postconviction motion. Moreover, Petitioner Vathis notes that the State's assertion was not the basis upon which the district court below relied to affirm the denial of Petitioner Vathis' postconviction motion. The State contends in its Answer Brief that

"Petitioner never challenge[d] the adequacy of the attachment below." Answer Brief at 14. Contrary to the State's argument, a review of the briefs filed in the district court demonstrates that Petitioner Vathis did, in fact, raise all of these issues in the district court, which is precisely the reason the district court did not find that Petitioner Vathis' claim was procedurally barred.

The State further contends in its Answer Brief that Petitioner Vathis "is attempting to assert that jurisdiction exists in this Court so that he may challenge the verdict of the jury, something that he may not properly do." Answer Brief at 14. Petitioner Vathis is not challenging the jury's verdict. Petitioner Vathis is simply claiming that counsel was ineffective for failing to object to an emotional outburst by the complaining witness and that Petitioner Vathis was prejudiced by counsel's ineffectiveness. Petitioner Vathis' claim is both proper and timely pursuant to rule 3.850.

Finally, the State continues to argue in its Answer Brief that the Court does not have jurisdiction to review this case. As set forth in Petitioner Vathis' Jurisdictional Brief, the decision below is in conflict with other Florida appellate decisions in at least four ways. First, the decision below is in conflict with *Rose v. State*, 774 So. 2d 629, 632 (Fla. 2000), regarding the proper standard of review to be applied to a trial court's summary denial of a postconviction motion. *See also Jacobs*, 29 Fla. L. Weekly at

S320. Second, the decision below is in conflict with *Reaves v. State*, 826 So. 2d 932, 938 (Fla. 2002), concerning whether a finding that some action or inaction by defense counsel was "tactical" is appropriate without affording the defendant an evidentiary hearing. Third, the decision below is in conflict with *Beasley v. State*, 774 So. 2d 649, 669 (Fla. 2000), concerning whether prejudice caused by emotional displays in the courtroom is a proper subject of objection and instruction by the trial court. Finally, the decision below is in conflict with *Seminole Shell Co. v. Clearwater Flying Co.*, 156 So. 2d 543 (Fla. App. 1963), concerning whether a trial court should immediately instruct a jury in order to cure potential prejudice caused by improper conduct or evidence.

For all of the reasons set forth in this brief and the Initial Brief, the district court's affirmance of the trial court's summary denial of Petitioner Vathis' postconviction claim was erroneous. Petitioner Vathis respectfully requests the Court to remand this case to the district court with directions that the district court instruct the trial court to hold an evidentiary hearing on this claim.

2. The district court erred by affirming the summary denial of Petitioner Vathis' claim that trial counsel was ineffective for advising Petitioner Vathis to take a polygraph examination and entering a stipulation that the results of the examination would be admissible at trial.

In its Answer Brief, the State, recognizing that there is no Florida case on point, cites to a number of cases from other jurisdictions to support its argument. *See*

Answer Brief at 19-20. Petitioner Vathis submits that the fact that there are no Florida cases on point is justification for this Court to address this very important issue. Moreover, in at least two of the out-of state cases cited in the Answer Brief, a record was developed regarding the circumstances of the stipulated polygraph examination, thereby giving the reviewing court an adequate opportunity to review whether counsel's actions were ineffective. *See People v. Reeder*, 65 Cal. App. 3d 235, 239-40 (Cal. Ct. App. 1976) ("Beyond that, the idea to submit to a polygraph test originated with the defendant and was suggested by him to his attorney."); *Davidson v. State*, 558 N.E.2d 1077, 1087 (Ind. 1990) (indicating that a suppression hearing was held concerning the introduction of the results of the polygraph examination, wherein the defendant was afforded the opportunity to present witnesses and evidence). The trial court in the instant case denied Petitioner Vathis' claim by reasoning: "After discussion with Defendant, who affirmatively asserted his innocence, *there was no reason for Defendant's attorney to advise his client not to take the stipulated polygraph examination to exonerate himself*." (R-66) (emphasis added). However, Petitioner Vathis was not afforded the opportunity to develop this claim at an evidentiary hearing. An evidentiary hearing is necessary to ascertain the conversations between Petitioner Vathis and defense counsel regarding the taking of the polygraph examination. A hearing is also required to determine the effect that Petitioner Vathis'

medical condition and medication had on the polygraph examination, and whether counsel should have inquired into these concerns prior to advising Petitioner Vathis to take the polygraph examination. As set forth in Claim 1, the better policy in these types of cases is to err on the side of granting an evidentiary hearing, thereby affording the criminal defendant his or her day in court. *See Jacobs*, 29 Fla. L. Weekly at S321.

Based on the reasons set forth in this brief and the Initial Brief, the district court's affirmance of the trial court's summary denial of Petitioner Vathis' polygraph claim was erroneous. Petitioner Vathis respectfully requests the Court to remand this case to the district court with directions that the district court instruct the trial court to hold an evidentiary hearing on this claim.

D. CONCLUSION

Petitioner Vathis' respectfully requests that the First District's decision in *Vathis* be quashed and that this case be remanded to the district court with directions that the district court instruct the trial court to hold an evidentiary hearing on the two claims set forth in this brief. All appropriate relief is respectfully requested.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

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by hand/mail delivery this _____ day of July, 2004.

Respectfully submitted,

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F. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Reply Brief of Petitioner complies with the type-font limitation.

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