IN THE SUPREME COURT OF FLORIDA
CASE NO. SC06-1304

THEODORE SPERA,

Appellant/Petitioner,

v.

THE STATE OF FLORIDA,

Appellee/Respondent.

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION BY THE DISTRICT COURT OF APPEAL, FOURTH DISTRICT, NO. 4D04-4535.

PETITIONER THEODORE SPERA'S AMENDED JURISDICTIONAL BRIEF

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Petitioner/Appellant, *pro se*

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner Theodore Spera ("Spera" or "petitioner") was convicted of burglary. He was represented at trial by a public defender who failed to call four witnesses to testify, each of whom would have provided exculpatory testimony. Specifically, counsel failed to call:

> 1. Donna Spera, who would have refuted state witness Colette Cary's testimony. Ms. Cary testified that she was unaware that the defendant was in her house. In fact, she stood next to Spera as he called Donna Spera to dispatch a truck to his location to pick him up. Ms. Cary then took the telephone from Spera and gave Donna Spera the address. BellSouth phone records for that date should have been subpoenaed as confirmation. They were not.
>
> 2. Christopher Bansley and Steven Janson, employees of the company dispatched by Donna Spera to pick-up the defendant, were available and willing to testify that they received the house location from Donna Spera.
>
> 3. Yet a fourth witness, Harley Blevens, a next door neighbor, would have testified that Spera was being

attacked by two dogs, and that was the reason he entered the residence.

The failure to call these witnesses constituted ineffective assistance of counsel constituting violation of his Sixth Amendment right to a fair trial, and in a *pro se* post-conviction motion, Spera so argued. His motion was denied as insufficient, and the trial court denied leave to amend the motion to conform.

The Fourth District affirmed the refusal to permit Spera to amend the motion. See Petitioner's Appendix ("PA"), generally. In doing so, however, it expressly and directly acknowledged that its decision is in conflict with a Second District opinion, Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005) (which certified the question at issue here). See PA at 3. Accordingly, Spera asks by this brief that the Supreme Court exercise its discretional jurisdiction, overrule the Fourth District, and permit Spera to amend his post-conviction motion to argue ineffective assistance of counsel.

SUMMARY OF ARGUMENT

The Fourth District's decision below is, as the court acknowledges, in express and direct conflict with Keevis v. State, 908 So.2d 552 (Fla. 2d DCA 2005) as to whether it is always proper to allow amendments to a deficient post-conviction motion claiming ineffective assistance of counsel for failure to call witnesses. See PA at 3. Keevis clearly answers that question affirmatively, but the court below carved out an exception, even in the case of a *pro se* movant, for what it called "substantive" deficiencies. See PA at 1 - 3. In addition, the court below receded from its own opinion in Frazier v. State, 912 So. 2d 54 (Fla. 4th DCA 2005), which agreed with Keevis. See PA 1. In short, the appellate court's decision expressly and directly conflicts with its own precedent and that of another district, and operates to deny Spera the opportunity to put forth a defense. The Supreme Court should exercise its jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv). See also Art. V. §3(b)(3), Fla. Const.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A SECOND DISTRICT DECISION, AND THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION

This Court should exercise its discretionary jurisdiction to address the express conflict between districts over the extent to which a trial court must allow a defendant the opportunity to amend a deficient post-conviction motion for ineffective assistance of counsel for failure to call witnesses. The Court should not let stand a decision that conflicts with prior established precedent and fundamental fairness. Otherwise, the decision by the Fourth District here will lead to ambiguity, confusion and uncertainty in what is a very common post-conviction argument that will certainly be frequently revisited.

This issue before the Fourth District was whether Spera should have been allowed the opportunity to amend his post-conviction motion to 1) properly identify the witnesses who would exculpate him, 2) state that the witnesses were available, and 3) state how the witnesses' testimony would support his defense. The Fourth District answered negatively. It expressly noted, however, that its decision conflicted with Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005). "We recognize conflict with *Keevis*," The Fourth Circuit wrote. See PA at 3.

Here, on a charge of burglary, defense counsel failed to speak to Spera or to call several witnesses that would have offered exculpatory testimony. That level of representation was below even minimal standards, and thus essentially left Spera unrepresented, and prejudiced his defense be denying him exculpatory testimony that likely would have resulted in an acquittal, depriving him of a fair trial. Strickland v. Washington, 466 U.S. 668 (1984). The testimony of those witnesses showing that Spera was lawfully on the property where the offense allegedly occurred, and the fact that they were available, but not called, is set forth in more detail above.

The injustice here, therefore, is undeniable, and was compounded by the lower court's refusal to permit a simple amendment to the motion to include the specific information set forth herein. To be clear, Spera is not challenging the showing required to sustain a motion for a new trial based on ineffective assistance of trial counsel for failure to call witnesses – he is merely challenging the lower court's refusal to permit an amendment to make the required showing.

In affirming the lower court's decision in that regard, the Fourth District acknowledged that it was in conflict with Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005). There, the Second District applied Nelson v. State, 875 So. 2d 579 (Fla. 2004) to conclude that any omission in pleading justifies the grant of leave to amend when arguing ineffective assistance of counsel. Indeed, neither the Nelson

matter, nor any other precedent, concludes otherwise. Moreover, in Nelson, this Court concluded that, when the post-conviction motion fails to allege whether the missing witnesses were available to testify at trial, leave should be given to amend. That happened here, and Nelson does not, as the Fourth District suggests, conclude that other deficiencies should not merit leave to amend.

In fact, Milton v. State, 897 So.2d 1268 (Fla. 2005) is in agreement with Nelson, and the Fourth District *itself* agreed with Nelson in a case on point with this matter, Frazier v. State, 912 So. 2d 54 (Fla 4th DCA 2005) (accord, Mulvaney v. State, 885 So. 2d 1001 (Fla 4th DCA 2004).

We respectfully submit that the Fourth District did not plausibly distinguish any of this abundantly-clear case law in concluding as it did here. It relies in doing so only on Bryant v. State, 901 So. 2d 810, 821 (Fla. 2005), but readily concedes that this issue was not explicitly addressed there. Bryant does not in any sense support the Fourth District's decision, and in fact deals with a situation where a criminal defendant had, in fact, been given leave to amend, but even in the amendment failed to allege proper support for a claim of failure by counsel to call witnesses. Relying in Bryant in that fashion entirely ignores Nelson's admonishment that this Court does not "want postconviction relief to be denied simply because of a pleading defect if that pleading defect could be remedied by a good faith amendment to the motion." Nelson, supra.

The decision below is entirely inconsistent with precedent and expressly and directly inconsistent with Keevis. At the very least, the law in Florida on this issue is now inconsistent, and the Supreme Court should exercise its discretion and overturn the Fourth District's decision.

CONCLUSION

The Supreme Court should exercise its jurisdiction to resolve the conflicts addressed in this Brief, to clarify the law with respect to amending motions for post-conviction relief, and to permit Spera to amend his motion in the trial court to conform with the applicable requirements.

Spera, an inmate at a correctional institution, appreciates the Supreme Court's July 24, 2006 notice permitting him to file this amended jurisdictional brief and appendix. He respectfully invokes Article V, section 2(a), of the Florida Constitution, and Florida R.App.P. 9.040(c) and requests this Honorable Court to further indulge his pro se pleadings as may be appropriate.

Respectfully submitted,

Theodore Spera
Petitioner, pro se

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the forgoing amended jurisdictional brief and appendix was furnished to prison officials for the purposes of mailing by U.S. Mail to State Attorney Barry Krischer, Esq., 401 N. Dixie Highway, W. Palm Beach, FL 33401, and that an original and five copies of this amended jurisdictional brief and appendix were simultaneously provided to prison officials for the purposes of mailing by U.S. Mail to the Supreme Court of Florida, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927 on this day of August, 2006.

_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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Theodore Spera