IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1304

THEODORE SPERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

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STATEMENT OF THE CASE

A unanimous *en banc* decision of the Fourth District Court of Appeal affirmed the summary denial of Theodore Spera's Rule 3.850 motion for post-conviction relief, concluding that this Court's decision in *Nelson v. State*, 875 So. 2d 579 (Fla. 2004), precludes an opportunity to amend for a defendant "who *wholly* fails to present sufficient facts as to *any* aspect of a claim of prejudice." *Spera v. State*, 923 So. 2d 543 (Fla. 4th DCA 2006); App. A, p. 3 (emphasis in original). The decision below recognized conflict with *Keevis v. State*, 908 So. 2d 552 (Fla. 2d DCA 2005), which took a defendant friendlier view of *Nelson* and certified this question to the Court:

> SHOULD THE PROCEDURE OF QUASHING THE ORDER OF THE TRIAL COURT DENYING A FACIALLY INSUFFICIENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL, WITH INSTRUCTIONS THAT THE TRIAL COURT GRANT THE APPELLANT LEAVE TO AMEND THE RULE 3.850 POSTCONVICTION MOTION, BE EXTENDED TO INCLUDE CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL THAT ARE INSUFFICIENT AS A RESULT OF A FAILURE TO ALLEGE ONE OR BOTH PRONGS OF THE STANDARD SET

> FORTH IN *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 104 S.CT. 2052, 80 L.ED. 2D 674 (1984)?

Id. at 554. Their seems to be no subsequent history on *Keevis*.

The District Court of Appeal opinion in this case reviewed the trial court's summary denial of Spera's 3.850 motion pursuant to Rule 9.141, Fla.R.App.P. The trial court's order (App. B, pp. 1-2 (Summary Record on Appeal, p. 94)) denied relief for these (pertinent to this appeal) reasons:

> 2. Defendant claims his counsel was not effective because his counsel failed to interview relevant witnesses, to present a case is [sic] chief, and failed to adequately communicate with the Defendant until shortly before trial.
>
> This claim is insufficient on its face in that Defendant has not asserted the names of the witnesses he wanted to be called, has not described the testimony to be elicited, has not described what effect such testimony would have had on the trial, and not asserted that these witnesses were in fact available to testify at trial.
>
> With respect to counsel's failure to present the case in chief, the Defendant fails to make a facially sufficient claim because he failed to state what evidence would have been presented in such a case that would have caused a different result at trial.
>
> 3. Similarly, claiming that his attorney was ineffective because he failed to

> communicate adequately with the Defendant before trial, the Defendant failed to make [a] facially sufficient claim because he does not describe how the failure to communicate prejudiced the Defendant at trial, and in fact does not assert that this would cause any prejudice at trial.

App B, p. 1-2. The court denied the motion as legally insufficient and did not grant leave to amend. The District Court affirmed and receded from its prior opinion in *Frazier v. State*, 912 So. 2d 54 (Fla. 4th DCA 2005), which recognized a right to amend. The court interpreted *Nelson* to require its change of course:

> We conclude that if the supreme court intended to announce a requirement that when any post-conviction motion fails to meet *any* pleading requirement for post-conviction relief, an order denying relief must deny relief with leave to amend, it would certainly have stated such a requirement more explicitly.

App. A, p. 3 (emphasis in original). The court then certified conflict with *Keevis.*

STATEMENT OF THE FACTS

The "facts" are those alleged in Spera's 3.850 motion. Spera was tried and convicted in 2001 of fleeing or attempting to elude a law enforcement officer and burglary. R. Vol. One ("Index to Brief"), p. 5. He received a sentence of 9.3 years, and his conviction and sentence were per curiam affirmed. *Spera v. State*,

833 So. 2d 150 (Fla. 4th DCA 2002) (table).

His Rule 3.850 Motion, filed with the assistance of counsel, contained these relevant allegations:

> Defendant was represented by John Garcia, Esq. at trial and during the subsequent appeal. Despite requests from Defendant, Garcia failed to adequately prepare for the trial, did not interview relevant witnesses, and did not present a case in chief on behalf of Defendant. Garcia failed to adequately communicate with his client until shortly before the trial, and was not adequately prepared for trial. Garcia's incompetence in this regard is exemplified in Volume I, Page 2 of the trial transcript, where Garcia indicates that he "ha[d] not had much luck with all the witnesses called to take the deposition." Garcia's "luck" was in fact a result of his failure to begin preparations for the trial until the weekend before. During the trial, Garcia presented only a cursory attempt at a defense, and did not call witnesses on Defendant's behalf, although he had been instructed to do so.

App. C, p. 2.

It was those allegations that the trial court and the District Court found to be legally insufficient and not subject to the opportunity to amend, leading to review in this Court.

SUMMARY OF THE ARGUMENT

This Court's decision in *Nelson v. State*, 875 So. 2d 579 (Fla. 2004) held that a legally insufficient Rule 3.850 motion alleging ineffective assistance of counsel must not be summarily dismissed with prejudice, but must allow for an amendment within a reasonable period of time. The decision below took a narrow and cramped view of *Nelson*, a view not supported by the case or by a subsequent case following *Nelson – Bryant v. State*, 901 So. 2d 810 (Fla. 2005). Moreover, at the time Spera filed his motion, it was amendable pursuant to *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999) and so, at the least, Spera is entitled to an opportunity to amend no matter what view of *Nelson* prevails.

ARGUMENT

NEITHER *NELSON v. STATE* NOR *BRYANT v. STATE* SUPPORT THE DISTRICT COURT OF APPEAL'S HOLDING THAT A RULE 3.850 MOVANT SHOULD NOT BE GIVEN LEAVE TO AMEND A DEFICIENT 3.850 MOTION

A. AMENDMENT IS THE NORM UNDER *NELSON*

Rule 3.850(c)(6), Fla.R.Crim.P., requires only that the substantive part of the motion under the rule contain "a brief statement of the facts (and other conditions) relied on in support of the motion." The Court has stated what an ineffective assistance of counsel collateral attack should plead to be legally sufficient:

> [A] defendant alleging an ineffective assistance of counsel claim must set out in his or her motion sufficient alleged facts which, if proven, would establish the two prongs necessary for relief based upon ineffectiveness as outlined in *Strickland*. *See Freeman v. State*, 761 So. 2d 1055, 1061-62 (Fla. 2000). In a rule 3.850 motion, a defendant must therefore assert facts that support his or her claim that counsel's performance was deficient and that the defendant was prejudiced by counsel's deficient performance. Under the circumstances of this case, a defendant would be required to allege what testimony defense counsel could have elicited from witnesses and how defense counsel's failure to call, interview, or present the witnesses who would have so testified prejudiced the case. *Reaves v. State*, 826 So. 2d 932, 940 (Fla. 2002); *see also Patton v. State*, 784 So. 2d 380 (Fla. 2000)(holding that defendant's motion was insufficiently pled because, among other reasons, the defendant failed to allege that there were persons available to corroborate the allegations made in his motion.).

Nelson v. State, 875 So. 2d 579, 583 (Fla. 2004).

There is no doubt that Spera's motion failed to plead a satisfactory ineffective of counsel claim under that standard. But he did provide "a brief statement of the facts (and other conditions) relied on in support of the motion." Rule 3.850(c)(6).

The question is: should Spera have been granted leave to amend? Nelson alleged that his counsel was ineffective "for failing to call, interview, or investigate certain witnesses," and named them. *Id.* at 581, n.1. But he "failed to allege that any of the witnesses were available for trial" (*Id.* at 581) and the Court said that without that proof he could not make out a case for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed 2d 674 (1984):

> That a witness would have been available to testify at trial is integral to the prejudice allegations. If a witness would not have been available to testify at trial, then the defendant will not be able to establish deficient performance or prejudice from counsel's failure to call, interview, or investigate that witness.

Nelson, 875 So. 2d at 583. However, the Court was protective of the right of collateral attack and decried the notion of precipitously denying relief:

> We do not, however, 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. Therefore, when a defendant fails to allege that a witness would have been available, the defendant should be granted leave to amend the motion within a specified time period. If no amendment is filed within the time allowed, then the denial can be with prejudice.
>
> * * *
>
> The trial court should have permitted Nelson leave to amend for a specified period of time.

Id. at 583-84.

The decision in *Bryant v. State*, 901 So. 2d 810 (Fla. 2005), did not deviate from *Nelson*; it reaffirmed its core principle:

> While defendants should not be given an unlimited opportunity to amend, due process demands that some reasonable opportunity be given to defendants who make good faith efforts to file their claims in a timely manner and whose failure to comply with the rule is more a matter of form than substance.
>
> * * *
>
> In the civil context, courts customarily grant anywhere from ten to thirty days to amend a complaint that does not state a cause of action.
>
> * * *

> Extending the same courtesy to defendants filing postconviction motions will not unduly delay the proceedings. Therefore, we hold that when a defendant's initial postconviction motion fails to comply with the requirements of rule 3.851, the proper procedure is to strike the motion with leave to amend within a reasonable period. Normally that will be between ten and thirty days, although special circumstances may dictate an extension greater than thirty days. The striking of further amendments is subject to an abuse of discretion standard that depends on the circumstances of each case.

Id. at 819-820.[1] The District Court acknowledged "that *Bryant* could be read as endorsing an expanded view of allowing amendments" (App. A), but it parsed *Bryant's* words to suggest that *Bryant* meant only to grant leeway "solely where the 'failure to comply with the rule is more a matter of form than substance."' App. A, quoting *Bryant* at 819. The District Court focused on that phrase in *Bryant* rather than on the holding: "*we hold* that when a defendant's initial post-conviction motion fails to comply with the requirements of rule 3.851, the proper procedure is to strike the motion with leave to amend . . . ." *Id.* at 820 (emphasis added).

The court below also sought to avoid the holding of *Milton v. State*, 897 So.

[1] Rule 3.851 applies to death cases, but the procedural differences

2d 1268 (Fla. 2005), quashing the Fifth District's affirmance of a summary Rule 3.850 denial. This Court, citing *Nelson v. State*, wrote: "we remand the case to the district court and direct that the case be remanded to the trial court so that petitioner may be permitted to amend his claim for relief within a reasonable time to be specified by the trial court." *Id.* at 1268. A plain reading of *Nelson* and *Milton* (and *Bryant* too) supports the conclusion that amendment is the norm, but the court below read something else into the cases – a distinction tied to triviality – and wrote:

> The concurring opinion in *Milton* [of Justice Lewis] also recognizes that a trivial omission was at issue and that the better remedy is to grant leave to amend when the summary denial was based on the imposition of unnecessary artificial "technical words of pleading." *Id.* at 1269 (Lewis, J. concurring in result only). Surely if the error or omission was as extensive as in the present case (where Spera failed to describe at all how he was prejudiced), Justice Lewis would not have declared the mistake in that case was merely due to an omission of "technical words of pleading."

App. A. Justice Lewis recognized that *Nelson* "establishes the decisional authority

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between it and Rule 3.850 are not relevant to the issue presented here.

that amended pleadings and additional delays will be the preferred method of seeking a just result." *Id.* at 586. His view that "four 'magic words"' should not "defeat an otherwise valid claim" (*id.*) does not mean that the *Nelson* majority tied its right to amend view to "technical" or "trivial" failures. The District Court of Appeal read too much into Justice Lewis' dissent and too little into the *Nelson* decision.

Therefore, a fair reading of *Nelson* supports the conclusion that leave to amend is the norm, not the exception. The narrow view taken below is inconsistent with *Nelson's* language, inconsistent with the notion that pro-se pleadings (which are the overwhelming majority of 3.850 motions) should be given liberal construction (*see Haines v. Kerner*, 404 U.S. 519, 520, 92 S. Ct. 594, 596, 30 L. Ed. 2d 562 (1972); *Stokes v. Fla. Dept. of Corrections*, 2007 WL 120003, 2 (Fla. 1st DCA 2007); *Tribble v. State*, 936 So. 2d 788, 788 (Fla. 4th DCA 2006); *Martinez v. Fraxedas*, 678 So. 2d 489, 491 (Fla. 3d DCA 1996); *Tillman v. State*, 287 So. 2d 693, 694 (Fla. 2d DCA 1973); *Thomas v. State*, 164 So. 2d 857, 857 (Fla. 2d DCA 1964)) and inconsistent with the "values underlying the preservation of the writ of habeas corpus in our constitution that were considered when the rule was adopted." *Nelson*, 875 So. 2d at 585 (Anstead, C.J., dissenting). Justice Breyer has commented on the importance of the patience,

diligence and respect with which habeas petitions must be treated. Addressing the practice used by eight Supreme Court Justices of picking their law clerks so that each clerk has the responsibility for writing memos on five or so petitions for writ of certiorari each week, relieving the justices of reading all the petitions, Justice Breyer explained why the process is protective of prisoners' constitutional rights:

> Consider, for example handwritten pro se petitions, many of which are extremely difficult to decipher. It is tempting when reading such a petition to throw up one's hands and dismiss the petition as ridiculous. But not all of those petitions are ridiculous. Indeed, some pro se petitions raise important issues the Supreme Court should resolve. Using the pool system, we have in fact located that needle in the haystack . . . .

Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, The Journal of Appellate Practice and Process, Vol. 8, No. 1 (Spring 2006), p. 92.

Granting leave to amend an insufficient ineffective assistance of counsel 3.850 motion is consistent with caring for the protection of constitutional rights, and *Nelson* and *Bryant* are evidence of that concern. But no matter how this Court rules on the meaning of *Nelson*, Spera's right to amend in this case must be protected.

B. SPERA MUST HAVE A RIGHT TO AMEND BASED ON *GASKIN*

Spera's Rule 3.850 Motion was mailed to the Clerk of the Civil Court Felony Division on October 30, 2003, received on November 2, 2003 and "Sent to Judge Brown on 11/4/03." App. C, pp. 1-3. It was captioned "REFILED" because the original version could not be located by the Clerk's office.[2] The State received numerous extensions (Summ.R., p.1) and did not respond until September 2004. *Id.* "Response to Defendant's Motion for Post Conviction Relief." The Order Denying Relief was entered on October 26, 2004. App. B.

At the time the Motion was filed in 2003 the governing law was *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999), which reversed a decision dismissing, as insufficiently pled, a Rule 3.850 ineffective assistance of counsel claim:

> ***Contrary to the trial court's finding, however, there is no requirement under rule 3.850 that a movant must allege the names and identities of witnesses in addition to the nature of their testimony in a postconviction motion***. Rather, rule 3.850

[2] Nothing in the record reflects that fact, but undersigned court appointed counsel spoke to Spera's counsel who explained why "REFILED" was in the caption.

> merely requires the motion to state the judgment or sentence under attack, whether there was an appeal from the judgment and the disposition thereof, whether a previous postconviction motion was filed, and, if so, the reason the claims in the present motion were not filed in the former motion, the nature of the relief sought, and a brief statement of the facts relied upon in support of the motion. . . ***[N]othing in the rule states that a movant must allege the identities of the witnesses , the nature of their testimony, or their availability to testify. It is during the evidentiary hearing that [the movant] must come forward with witnesses to substantiate the allegations raised in the postconviction motion.***

Gaskin, 737 So. 2d at 514 n.10 (emphasis added).

In June, 2004, the *Nelson* court explicitly receded from that footnote statement. *Nelson*, 875 So. 2d at 582-83. But at the time that Spera filed his motion, *Gaskin* was the governing law; he *did not* have to "allege the identities of the witnesses, the nature of their testimony, or their availability to testify." 737 So. 2d at 514, n.10.

Thus, even if this Court were to agree with the Fourth District Court of Appeal's view that the *Nelson* right to amend applies only to a "technical omission," Spera's case requires that he be granted leave to amend because at the time he filed, his pleading met the *Gaskin* standard which was later neutered by

Nelson. *See Dixon v. State*, 730 So. 2d 265, 267 (Fla. 1999), holding that new court decisions are to be applied prospectively except in the rare instances where the decision meets the stringent criteria of *Witt v. State*, 387 So. 2d 922, 928-29 (Fla. 1980); *State v. Callaway*, 658 So. 2d 983, 986 (Fla. 1995) (citing *Witt*), so presumptively, a change in law is to be administered prospectively. Indeed, allowing amendment in this case, would not only comport with the principle of prospective application, but would keep the faith with *Nelson's* concerns about precipitous dismissals:

> We do not, however, 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. Therefore, when a defendant fails to allege that a witness would have been available, the defendant should be granted leave to amend the motion within a specified time period. If no amendment is filed within the time allowed, then the denial can be with prejudice.

Nelson, 875 So. 2d at 583-84.

Spera's district court appellate brief asked for that relief: "Even if this Court were to find that *Nelson* is inapplicable, however, it should still reverse and remand with instructions to permit an appropriate amendment of the Motion for Post Conviction Relief." R.Vol. One ("Index to Brief"), p. 7. The court below did not

respond to that request, choosing instead to deny all relief and to recede from its own panel decision in *Frazier v. State*, 912 So. 2d 54 (Fla. 4th DCA 2005), which took a friendlier view of *Nelson*:

> We have recently interpreted *Nelson* to require the trial court to grant leave to the defendant to amend the motion if it does not contain all of the necessary allegations. *See Mulvaney v. State*, 885 So. 2d 1001 (Fla. 4th DCA 2004); *See also Barthel v. State*, 882 So. 2d 1054 (Fla. 2d DCA 2004); *Chamberlain v. State*, 880 So. 2d 796 (Fla. 5th DCA 2004).
>
> Because Frazier failed to include any of the key allegations mentioned above, the trial court was required to deny her rule 3.850 motion without prejudice to her re-filling a legally adequate claim. The trial court erred in summarily denying this claim without providing her the opportunity to amend her motion.

Id. at 56.

The *en banc* opinion below should have either followed *Nelson*, its own *Mulvaney/Frazier* view of *Nelson*, or at the least, given *Spera* the benefit of the *Gaskin* law that would have permitted him to amend his 2003 motion.

CONCLUSION

The decision below should be reversed. This Court should make clear that leave to amend must be accorded to an insufficiently pled ineffective assistance of counsel Rule 3.850 motion. In the alternative, the Court should declare that Spera , whose motion was sufficiently pled under *Gaskin*, must be accorded the right to amend his motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished via U.S. Mail this ___ day of February , 2007 to the following persons:

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BRUCE S. ROGOW

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief is in compliance with Rule 9.210, Fla.R.App.P., and is prepared in Times New Roman 14 point font.

BRUCE S. ROGOW