

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-1304

THEODORE SPERA,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

BRUCE S. ROGOW
CYNTHIA E. GUNTHER
BRUCE S. ROGOW, P.A.
Broward Financial Centre
Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
(954) 767-8909

Counsel for Petitioner

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ARGUMENT

RULE 3.850 AMENDMENT IS THE NORM UNDER *NELSON v. STATE*, 875 So. 2d 579 (Fla. 2004) AND *BRYANT v. STATE*, 901 So. 2d 810 (Fla. 2005), REGARDLESS OF THE PLEADING DEFICIENCY

The State makes two arguments in the Answer Brief. First, that Spera's Rule 3.850 motion was inadequately pled under *Nelson v. State*, 875 So. 2d 579 (Fla. 2004), and does not trigger leave to amend because it contains a substantial omission. Second, even though *Gaskin v. State*, 737 So. 2d 509 (Fla. 1999) governed at the time of Spera's motion, the State says the motion did not meet its requirements. Alternatively, the State argues, if the motion did meet the *Gaskin* standard, Spera should have amended his motion on his own or filed a successive motion based on the change in law.

The State's Brief fails to address the issues presented in our Initial Brief. The Initial Brief recognized that Spera's Rule 3.850 motion was inadequately pled under the new standard imposed by *Nelson*. Nonetheless, under *Nelson*, any good faith motion is entitled to leave to amend if there is a deficiency in the pleading. That conclusion is supported by *Bryant v. State*, 901 So.2d 801 (Fla. 2005).

Instead of responding, the State turns to the quality of Spera's Rule 3.850 motion to draw a distinction between the deficiencies in the *Nelson* and *Spera*

motions. But that distinction has no relevance to the issue of granting leave to amend. *Nelson* should not be read to mean that courts' granting of leave to amend should depend on how significantly the pleading deficiency relates to the claim. The State's discussion of *Nelson*, *Bryant* and *Gaskin* do not support its approach to this case.

In *Gaskin* the right to an evidentiary hearing was at stake. This Court stated,

[R]ule 3.850 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. See Fla. R. Crim. P 3.850(c).

Gaskin v. State, 737 So. 2d at 514, n.10 (Fla. 1999) (emphasis in original). Clearly Spera met the *Gaskin* standard.

Nelson receded from *Gaskin*'s relaxed requirements for a successful ineffective assistance claim, but it included a careful safeguard to protect Rule 3.850 claimants.

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 v. State, 875 So.2d at 583 (Fla. 2004). The notion that the nature of an omission in a claim of ineffective assistance should dictate whether leave to amend should be granted was not the holding in *Nelson*.

Likewise, *Bryant* reinforces the conclusion that *Nelson* is protective of granting leave to amend: “[W]e 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.” *Bryant v. State*, 901 So.2d at 819 (Fla. 2005) (emphasis added). Any possible ambiguity in *Nelson* was resolved in favor of granting leave to amend.

GASKIN GOVERNS SPERA’S MOTION

The State cites *Lawrence v. State*, 831 So.2d 121 (Fla. 2002) to bolster its argument that Spera did not meet the requirements under *Gaskin*. *Lawrence* is inapplicable for several reasons. One difference is the relief at issue. Spera seeks leave to amend his Rule 3.850 motion. *Lawrence* involved the review

of fourteen claims asserted in an *amended* Rule 3.850 motion: “On April 22, 1999, Lawrence filed an amended motion for postconviction relief pursuant to Florida Rules of Criminal Procedure 3.850. . . and a request to amend his postconviction motion.” *Id.* at 126 (footnote omitted).

If *Lawrence* is of any help, it is to reinforce the necessity for both leave to amend and an evidentiary hearing on Spera’s Rule 3.850 claim. This Court, reviewing Lawrence’s amended Rule 3.850 motion, disposed of Lawrence’s hopeless claims which had no basis in the factual record. *Lawrence*, 831 So.2d at 127. But three of the ineffective assistance claims among Lawrence’s fourteen were entertained at an evidentiary hearing. *Id.* at 129. Those were the claims for ineffective assistance where the factual bases, however slim, were not conclusively refuted by the record. *Id.* at 129. In *Lawrence*, this Court reiterated that the standard for bypassing an evidentiary hearing is that the allegations must be conclusively rebutted by the record so as to demonstrate that the defendant is not entitled to relief. *Id.* at 127. *Lawrence* did not preclude amending a deficient pleading, and while *Lawrence* does speak of a “facially invalid” claim (*id.*), it does not suggest that such a claim cannot be amended.

The State also contends that Spera should not be entitled to amend his

motion because he had an opportunity to do so under Rule 3.850. *See* State's Brief, p.11, citing *Gaskin*, 737 So. 2d at 517-518. But a reasonable reading of *Nelson* is that amendment should be granted *sua sponte* in lieu of summary dismissal, and once Spera's motion was ruled on, Spera no longer had the right to amend or supplement his motion, despite the two weeks remaining on the two-year period.

Finally, the State contends that Spera should have filed a successive motion based on *Nelson's* change in the law. However, there was no basis for a successive motion. Spera did not seek to allege a new or different ground for relief. He needed to expand the allegations of his previous ground for relief. The filing of a successive motion is not the avenue for providing more detailed allegations. An amendment to the previously filed motion was the only way to accomplish that result and *Nelson* (and *Gaskin*) required the court to have granted that relief.

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*, the law at the time, must be accorded the right to amend his motion.

Respectfully submitted,

BRUCE S. ROGOW
Florida Bar No. 067999
CYNTHIA E. GUNTHER
Florida Bar No. 0554812
BRUCE S. ROGOW, P.A.
Broward Financial Centre, Suite 1930
500 East Broward Blvd.
Fort Lauderdale, FL 33394
Ph: (954) 767-8909
Fax: (954) 764-1530
e-mail: guntherc@rogowlaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
was furnished via U.S. Mail this 3rd day of April, 2007 to the following persons:

JAMES J. CARNEY
MARK J. HAMEL
OFFICE OF THE ATTORNEY
GEN.
1515 N. Flagler Dr. – FL 9
West Palm Beach, FL 33402-3428

BRUCE S. ROGOW

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Reply 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

