

**IN THE SUPREME COURT OF FLORIDA**

**CASE NUMBER SC06-426**  
**Lower Tribunal Case No. 93-CF-3237-A**

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EDWARD T. JAMES,  
Appellant,

v.

STATE OF FLORIDA,  
Appellee.

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ON APPEAL FROM THE CIRCUIT COURT FOR THE EIGHTEENTH  
JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Edward T. James' Motion to Reappoint the Office of Capital Collateral Counsel- Middle Region, Pursuant to Fla. Stat. § 27.7001 to Resume Collateral Legal Proceedings (PCR-Vol. 3, 523) Citations shall be as follows: The post conviction record on this appeal consists of four volumes (1-4) and shall be referred to as PCR.\_\_\_ followed by the appropriate volume and page numbers. All other references will be self-explanatory.

Appellant acknowledges that there is no authority in Florida rule, statute or case law that specifically authorizes Mr. James to resume post-conviction litigation two years after his pending motions were voluntarily dismissed. The issue of whether and under what circumstances a death-sentenced defendant may revoke a waiver and resume post-conviction review in Florida appears to be a question of first impression and the applicable rule of procedure *Fla. R. Crim P. 3.851* does not answer the question. Due to the seriousness of the claims at issue and the stakes involved, Edward T. James, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to acknowledge the fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment that gives rise to a special need for reliability in the determination that death is the appropriate punishment in this capital case by

directing the lower court to conduct an evidentiary hearing on claims previously determined cognizable.

### **STATEMENT REGARDING ORAL ARGUMENT**

This appeal involves legal issues that are adequately addressed by the briefs of the parties. Accordingly, the Appellant defers to this Court with respect to the necessity for oral argument.

### **STATEMENT OF THE CASE**

Mr. James was indicted for two counts of First Degree Murder, and other related offenses. All of the charges that Mr. James was indicted for occurred out of a single ongoing episode. The Circuit Court of the Eighteenth Judicial Circuit, Seminole County, Florida, entered the judgments of convictions and sentences in this case.

On April 5, 1995, Mr. James entered pleas of guilty on all counts and pleas of no contest to two counts of capital sexual battery charged by separate information. A penalty phase was held on May 30, 1995. The jury recommended the death penalty for both of the murder convictions. After a sentencing hearing, the trial court imposed a death sentence for each of the First Degree Murder convictions.

On direct appeal, the Florida Supreme Court affirmed Mr. James' convictions and sentences of death. *James v. State*, 695 So.2d 1229 (1997). Mr. James filed a Petition for Writ of Certiorari with the United States Supreme Court, which was denied on December 1, 1997. *James v. Florida*, 118 S. Ct. 569 (1997).

Mr. James filed an initial motion for relief in this case under Fla. R. Crim. P. 3.850 on May 27, 1998 (PCR, Vol. 1, 28-54, a First Amended 3.850 Motion was filed on November 1, 2001. (PCR, Vol.2, 261-305) The court set an Evidentiary Hearing on Claims Four, Five and Eight of the Defendant's First Amended 3.850 Motion on March 5, 2002. (PCR, Vol. 3, 348-350) Mr. James then filed a Third Amended 3.850 Motion on September 16, 2002, (PCR, Vol. 3, 359-412) asserting that his conviction and death sentence violate the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution and the corresponding provision of the Florida Constitution. The court allowed Claims I, III (only as to paragraphs 1 through 6) and Claims IV, and VI. (PCR., Vol.2, 487-489)

On March 10, 2003, Mr. James filed a Notice of Voluntary Dismissal, pro se. (PCR., Vol. 2, 473-474). The court held a hearing on April 11, 2003<sup>1</sup> to determine whether the defendant actually wanted to discharge counsel and withdraw his post conviction motion. *Shepard v. State*, 391 So. 2d 346 (Fla. 5<sup>th</sup>

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<sup>1</sup>The full transcript of this proceeding is contained in PCR, Vol. 4, p.583-598.



DCA 1980); *Durocher v. Singletary*, 623 So. 2d 483 (Fla. 1993). A *Faretta* type inquiry of the defendant was conducted, under oath, to determine if the defendant understood the consequences of waiving collateral counsel and withdrawing his post conviction relief motion (Defendant was represented by Capital Collateral Regional Counsel). (PCR, Vol 2, 490-492)

On April 22, 2003, the court entered an Order Allowing Defendant to Withdraw the Third Amended Motion for Post Conviction Relief and Discharging Collateral Counsel, cancelled the evidentiary hearing set for June 11,12 and 13, 2003, notified the defendant that he had 30 days in which to appeal the order and advised that the time for filing relief in the Federal District Court was severely limited or resume state post conviction proceedings. (PCR., Vol. 3, 493-495) There was no appeal of this order. On November 2, 2005, the Chief Judge of the Eighteenth Judicial Circuit signed an order at the request of the Office of Executive Clemency appointing counsel, Luke Newman, to handle clemency proceedings pursuant to *Fla. Stat.* § 925.035. (PCR.,Vol. 3, 496-497)

The appellant contacted undersigned counsel advising that he had freely and voluntarily reconsidered his prior decision to waive post conviction proceedings and requested counsel to promptly notify the Court of his decision to seek reappointment of Capital Collateral Regional Counsel (CCRC). On November 18,

2005 <sup>2</sup>, a motion was filed with the Circuit Court for an order reappointing the Office of Capital Collateral Regional Counsel - Middle pursuant to *Fla. Stat.* §27.7001 to resume collateral legal proceedings to challenge his capital conviction and sentence. (PCR., Vol. 3, 501-507)

On November, 17, 2005, the court appointed counsel for the limited purpose of drafting a Memorandum of Law to respond to specific questions posed by the court and to raise legal arguments that authorized resumption of post conviction proceedings. (PCR, Vol. 3, 498-500) On December 27, 2005, a memorandum of law was filed as directed by the court order. (PCR.,Vol. 3, 508-516) The State's responsive Memorandum of Law was filed on January 5, 2006. (PCR, Vol. 3,517-521)

The court conducted a Status Hearing on January 12, 2006 and heard arguments from respective parties. (PCR., Vol. 4, 599-606) The court denied the Motion to Reappoint The Office of Capital Collateral Counsel, Middle Region on January 17, 2006. (PCR., Vol. 3, 523-526)

Mr. James wrote a pro se letter to the Florida Supreme Court on January 24, 2006. (PCR., Vol. 4, 577) The State of Florida responded pursuant to Supreme Court Order dated November 14, 2006 to this letter. (PCR., Vol. 4, 527-575) On

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<sup>2</sup> The certificate of service shows this document mailed on November 16, 2005 and file stamped by the Clerk of Court on November 18, 2005, however, it is listed with a November 11, 2005 filing date in the PCR, Vol. 3, 501-507.

February 23, 2006, this Court entered an order to treat Mr. James' pro se letter filed on January 30, 2006 as a Notice of Appeal of the denial of the motion to reappoint counsel and resume collateral proceedings issued on January 17, 2006. The Court relinquished jurisdiction to the Circuit Court for appointment of counsel for future proceedings. (PCR., Vol. 4, 576-579) The Circuit Court reappointed The Office of Capital Collateral Counsel, Middle Region to represent Mr. James. (PCR., Vol.4, 580-582)

Counsel with the Office of Capital Collateral Counsel, Middle Region filed a notice of appearance with the Florida Supreme Court on March 7, 2007 and motion to supplement the record and toll time on April 13, 2007. The initial brief has been ordered to be filed on May 7, 2007. This appeal is properly before this Court.

### **STATEMENT OF FACTS**

In the direct appeal opinion following appellant's convictions and sentences, this Court summarized the facts as follows:

On October 19, 1993, the grand jury in and for Seminole County, Florida, returned an indictment charging Edward James with two counts of first-degree murder, one count of aggravated child abuse, one count of attempted sexual battery, one count of kidnapping, one count of grand theft and one count of grand theft of an automobile. On April 5, 1995, James appeared before the Honorable Alan A. Dickey, Circuit Judge, and, pursuant to a written agreement, entered pleas of guilty to all counts of the indictment and pleas of no contest

to two counts of capital sexual battery charged by separate information. The plea did not include an agreement as to sentence. The State sought the death penalty for each of the murders that occurred in this case, and on May 30, 1995, James proceeded to a penalty phase trial before a jury.

The record reflects that on the evening of Sunday, September 19, 1993, James attended a party at Todd Van Fossen's house. James rented a room from one of the victims in this case, Betty Dick, and lived about two blocks away from the Van Fossens. He arrived at 6 p.m. and stayed until approximately 10:30 p.m. Todd's girlfriend, Tina, noticed that James seemed intoxicated by the end of the evening and asked him if he wanted to spend the night, but James declined. James drank between six and twenty-four cans of beer during the party, as well as some "shotguns"-three beers drunk through a funnel in a very short period of time. Shortly after leaving the party James ran into Jere Pearson who lived nearby and was returning from the Handy Way convenience store. Jere Pearson was interviewed by the assistant state attorney and the assistant public defender before trial. An audio tape of the interview was played for the jury during the trial.[FN1]

Pearson stated that when the two met, James was on his way to visit Tim Dick, the victim's son, and his girlfriend, Nicole, who also lived nearby. They stopped and talked for about ten minutes and Pearson watched James ingest about ten "hits" of LSD on paper. James told Pearson he had been drinking at Todd Van Fossen's party, but he appeared sober to Pearson.

After briefly visiting Tim Dick and Nicole where he drank some gin, James returned to this room at Betty Dick's house. When he entered the house, James noticed that Betty Dick's four grandchildren were asleep in the living room. One of the children, Wendi, awoke briefly when James arrived. She observed that he was laughing and appeared drunk. James went to the kitchen, made himself a sandwich and retired to his room. Eventually, he returned to the living room where he grabbed Betty Dick's eight-year-old granddaughter, Toni Neuner, by the neck and strangled her, hearing the bones pop in her neck. Believing Toni was dead, he removed her clothes and had vaginal and

anal intercourse with her in his room. Toni never screamed or resisted. After raping Toni, he threw her behind his bed. [FN2]

James then went to Betty Dick's bedroom where he intended to have sexual intercourse with her. He hit Betty in the back of the head with a pewter candlestick. She woke up and started screaming, "Why, Eddie, why?" Betty's screaming brought Wendi Neuner to the doorway of her grandmother's bedroom where she saw James stabbing Betty with a small knife. When James saw Wendi he grabbed her, tied her up, and placed her in the bathroom. Thinking that Betty was not dead, James went to the kitchen, grabbed a butcher knife and returned to Betty's room and stabbed her in the back. James removed Betty Dick's pajama bottoms, but did not sexually batter her.

Covered with blood, James took a shower in the bathroom where Wendi remained tied up and then threw together some clothes and belongings. He returned to Betty's room and took her purse and jewelry bag before driving away in her car. James drove across the country, stopping periodically to sell jewelry for money. He finally was arrested on October 6, 1993 in Bakersfield, California, and gave two videotaped confessions to police there. A videotape containing relevant portions of James' statements was played for the jury.

Dr. Shashi Gore, the chief medical examiner for Seminole County, testified that he performed autopsies on Betty Dick and Toni Neuner. Betty Dick suffered twenty-one stab wounds to the back with the knife still embedded. The wounds damaged both lungs, the liver, and the diaphragm and fractured several ribs. Dick also suffered major stab wounds to the left side of the neck, below the left eye, and on the left ear. A knife blade was also discovered in Dick's hair. Dick died of massive bleeding and shock from the multiple stab wounds to her chest and back. Dr. Gore opined that she died within a few minutes of her assailant's attack.

Toni Neuner suffered contusions to her lips and hemorrhaging in her eyes caused by lack of oxygen from strangulation. Gore opined that the extensive force necessary to create the contusions on her neck indicated that a ligature had been used. Dr. Gore also found contusions around the anal and vaginal orifices. The roof of the vaginal wall was completely torn. Although the substantial amount of

blood pooled in the pelvic cavity indicated that Toni Neuner was alive at the time she was sexually assaulted, Dr. Gore could not state that she was conscious when she was raped. Toni Neuner died of asphyxiation due to strangulation.

Dr. E. Michael Gutman, a psychiatrist, testified as a mental health expert witness on James' behalf. He conducted neuropsychological tests on James in August of 1994. Dr. Gutman learned that James' father and grandfather had been alcoholics and James used crack cocaine, LSD, cocaine, marijuana, alcohol, and pills. In Dr. Gutman's opinion, James suffers from alcohol dependence and has an addictive craving for alcohol which he is unable to break. James has above average intelligence and his performance IQ is in the superior range.

James told Dr. Gutman that on the day of the offense, he had been drinking, had used crack cocaine, and cannabis, and had taken some pills. He could not remember if he had taken LSD in the hours preceding the offense. Dr. Gutman determined that James has a passive aggressive or an addictive personality. In his opinion, James suffers from poly-substance dependence and abuse, as well as severe dysthymia, a chronic depressive disorder. James also has unresolved conflicts associated with being abandoned by his father.

Dr. Daniel E. Buffington, a clinical pharmacologist at the University of South Florida, testified for the defense about the effects of alcohol and drug addictions. He explained that if a person like James has an underlying psychological problem, LSD ingestion will most likely unmask it and allow it to come to the surface. The acute phase of affectation due to LSD ingestion is two to twelve hours after ingestion. Possible reactions to LSD include, among others: a psychotic adverse reaction which is accompanied by hallucinations; a psycho-dynamic/psychedelic experience which results in a slow emergence of the subconscious idea or psychological condition; and a cognitive psychedelic reaction which overcomes an individual's ability to control himself.

Dr. Buffington opined that James most likely had a blood alcohol level of more than three times the legal limit. If James ingested ten hits of LSD in conjunction with the alcohol use, the peak effect would

have occurred between 12:30 a.m. and 1 a.m. The description of the crimes is consistent with the effects that the LSD and alcohol would have had on James. Dr. Buffington explained that such a large dose of LSD could have caused a physical or mental breakdown and a sudden release of aggressive action in someone like James, who suffers from a passive aggressive personality. Dr. Buffington concluded that James was most probably under the influence of extreme mental or emotional disturbance due to his psychotic reaction and psychodynamic/psychedelic reaction to LSD .

Betty and John Hoffpauir testified that they had known James for years. That he had made their grandson golf clubs out of kindness and worked from time to time in their lawn business and would not take money for helping. Betty Lee testified that she would often see James playing in front yard with Toni and Wendi Neuner and was always willing to aid her daughter who lived next door to Betty Dick. Anthony Mancuso, a volunteer at the Seminole County Correctional Facility described James as well liked by jail personnel and known as not being a trouble maker.

James also testified at his penalty phase. He testified that his father had abandoned him as an infant, and when he went to live with him at age fourteen discovered that his father was a drug dealer who introduced him to marijuana. James testified that he started experimenting with drugs including marijuana and PCP, and eventually dropped out of school. He later obtained a GED and entered the army at age seventeen. Due to his drug use, James testified that he was discharged under honorable conditions. James testified that he took custody of his son, born in 1983 but was not able to continue caring for him due to his drug and alcohol abuse. James testified that he was steadily intoxicated between August 4 and September 19, 1993(the date of the crime). James testified that he felt ashamed of what he had done, especially because he loved Betty and her grandchildren as though they were his own family.

Following deliberations, the jury returned an advisory recommendation of death for each of the murder convictions. A sentencing hearing was held on August 18, 1995, and the court confirmed the adjudications of guilt and sentenced James to life in

prison with a mandatory minimum of twenty-five years before parole eligibility on each of the capital sexual battery convictions to run concurrent with each other. James was sentence to life in prison on the kidnapping charge, fifteen years on each count of aggravated child abuse and attempted sexual battery, and five years on each count of grand theft - all to run concurrent with each other, but consecutive to the sentences on the capital sexual batteries.

The trial court followed the jury's recommendation and imposed a sentence of death for each of the first-degree murder convictions and filed a sentencing order in support of the death penalty. The trial court found that: (1) each murder was heinous, atrocious or cruel; (2) James was contemporaneously convicted of another violent felony; and (3) each murder was committed during the course of a felony.

The trial court also considered sixteen mitigating circumstances applicable to this case, to include the statutory mitigator that James' ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired due to drug and alcohol abuse; and that James was under the influence of moderate mental or emotional disturbance at the time of the offense. The trial court gave both of these mental mitigators "significant weight". The trial court attributed "some weight" to James' past acts of kindness and helpfulness to friends; and his genuine shame and remorse for his offenses. The trial court attributed "substantial weight" to James' full cooperation with authorities in confession to the crimes and entering pleas of guilty to the offenses he remembered and "no contest" to those he "truly [did] not remember." Additionally, the trial court attributed "some weight" to James' good conduct while incarcerated. In that regard, the trial court finally noted in mitigation that James is capable of offering assistance to others while in custody and serving as an example to others about the negative consequences of illicit drug use.

*James v. State*, 695 So. 2d 1229 (Fla.1997)(footnotes omitted).



## SUMMARY OF THE ARGUMENT

The Florida Supreme Court and the Third Judicial Circuit has previously considered a death sentenced inmate's multiple waivers of post-conviction counsel and proceedings that occurred over a three year period before final resolution and permitted that inmate to resume post conviction proceedings. Mr. James' requests this court to give his request to resume post conviction litigation similar treatment.

Mr. James' Motion for post conviction relief was accepted by the Circuit Court as properly filed in accordance with *Fla. R. Crim P. 3.851* containing lawful grounds for seeking relief from his judgment of conviction and sentence. Claim III (as to paragraphs 1 through 6) , IV, and VI in the Third Amended Motion To Vacate Judgment of Conviction and Sentence with Request for Leave to Amend were granted evidentiary hearing. (PCR.,Vol. 3, 487-489) No court has heard evidence or ruled upon the merits of these cognizable claims for relief.

There is nothing contained in language of *Fla. R. Crim. P. 3.851*(Collateral Relief After Death Sentence Has Been Imposed And Affirmed on Direct Appeal) or in *FRAP 9.142 (Procedures for Review in Death Penalty Cases)* that prohibits this Court from allowing Appellant to reinstate his Third Amended post-conviction motion or alternatively permitting him to re-submit these claims in a successive motion pursuant to *Fla. R. Crim. P. 3.851(e)(2)* for adjudication on the merits. The

Eighth Amendment to the U.S. Constitution gives rise to a special need for reliability in determining that death is the appropriate punishment in any capital case. Reliability in Mr. James' sentence cannot be assured if he is denied ability to present evidence on claims deemed cognizable by the trial court.

### **STANDARD OF REVIEW**

**There is no authority in Florida rule, statute or case law that specifically authorizes Mr. James to resume post-conviction litigation two years after his pending motions were voluntarily dismissed.**

*Fla. R. Crim. P. 3.851 (d)* specifies the time limitations for filing motions to vacate a judgment of conviction and sentence after a death sentence has been imposed in Florida. Mr. James filed an initial post-conviction 3.850 Motion and Amended Motion that was properly pending before the court at the time that he elected to waive further post-conviction proceedings.

The issue of whether and under what circumstances a death-sentenced defendant may revoke a waiver and resume post-conviction review in Florida appears to be a question of first impression and the applicable rule of procedure *Fla. R. Crim P. 3.851* does not answer the question.

Although counsel has found no authority in Florida rule, statute or case law that specifically authorizes Mr. James to resume post-conviction litigation two years after his pending motions were voluntarily dismissed but nothing in this rule

prohibits this Court from granting his request due to the irrevocable sentence involved.

## ARGUMENT I

**The issue of whether and under what circumstances a death sentenced defendant may revoke a waiver and resume post-conviction review in Florida appears to be a question of first impression and the applicable rule of procedure *Fla. R. Crim P. 3.851* does not answer the question.**

In *Pike v. Tennessee*, 164 S.W.3d 257,267 (2005), the Defendant filed a motion seeking to vacate the order dismissing the petition on the twenty-ninth day after the trial court found her competent and granted her request to withdraw her post-conviction Petition. The Supreme Court of Tennessee in a limited holding found that a death sentenced inmate whose request to waive post-conviction has been granted must be allowed thirty days from the trial court's order dismissing the petition to revoke the waiver. The Tennessee court reached this conclusion after taking into account existing statutory limitations on post-conviction remedies, which likely would bar a second post-conviction petition by a death-sentenced inmate who has sought and obtained dismissal of an initial post-conviction petition and the unique nature of the death sentence.

The issue of whether and under what circumstances a death-sentenced defendant may revoke a waiver and resume post-conviction review in Florida

appears to be a question of first impression and the applicable rule of procedure *Fla. R. Crim P. 3.851* does not answer the question. Mr. James did not appeal the lower court's ruling within a thirty day time periods, however, the unique nature of the death penalty is a factor that must be weighed by this Court when reviewing his request to resume post conviction litigation.

In the Order Allowing Defendant To Withdraw Third Amended Motion For Post Conviction Relief and Discharging Collateral Counsel issued on April 21, 2003, the court stated "the time for filing an appeal from this order is thirty days from the date hereof". However, Mr. James' first communication that he wished to vacate his waiver and reinstate his post-conviction petition was received on November 4, 2005, at the Office of Capital Collateral Regional Counsel, Middle and postmarked November 2, 2005, over two years later.

In this respect Mr. James' case is analogous to *Commonwealth v. Saranchak*, 570 Pa. 521,810 A.2d. 1197,1200 (2002) where the Pennsylvania Supreme Court permitted a death-sentenced inmate to retract his waiver and to reinstate his petition for post-conviction relief. In that case the Federal Defender in contravention of Saranchak's record wishes timely filed a petition that was later dismissed by Mr. Saranchak, himself. Like Mr. James, however, Saranchak never appealed the order within the thirty day period.

## ARGUMENT II

**Mr. James' Motion filed a timely post conviction motion in accordance with Fla. R. Crim P. 3.851 that contained lawful grounds for relief and certain issues were granted evidentiary hearing. Failure to permit Mr. James an opportunity to present evidence on these issues that were granted a hearing undermine confidence in the reliability of the sentence of death.**

Mr. James' Motion for post conviction relief was accepted by the court as properly filed in accordance with *Fla. R. Crim P. 3.851* containing lawful grounds for seeking relief from his judgment of conviction and sentence. An Evidentiary Hearing on Claims I, III (as to paragraphs 1 through 6) , IV, and VI were allowed in the Third Amended Motion To Vacate Judgment of Conviction and Sentence with Request for Leave to Amend. (See: *Circuit Court Order, 18<sup>TH</sup> Judicial Circuit, Judge O.H. Eaton, Jr., dated April 21, 2003*) (PCR., Vol. 3, 487-489)

No State court has heard any evidence on these issues or ruled upon the merits of these cognizable claims for relief. As a result, confidence in the reliability of Mr. James' death sentence is undermined.

## ARGUMENT III

**The Eighth Amendment to the U.S. Constitution gives rise to a special need for reliability in determining that death is the appropriate punishment in any capital case. Reliability in Mr. James' sentence cannot be assured if he is denied ability to present evidence on claims deemed cognizable by the trial court.**

In *Saranchak*, a competent claimant was permitted to reinstate his first Post Conviction Relief Act (PCRA) petition outside the time requirements of the PCRA in the unique context of a capital case. The court acknowledged the fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment gives rise to a special “need for reliability in the determination that death is the appropriate punishment” in any capital case. (*Johnson v. Mississippi*, 486 U.S. 578,585 (1988), *Gardner v. Florida*, 430 U.S. 349, 363-364(1997)(White, J. Concurring in judgment) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, (1976) and recognized a guiding preference for merits review in capital cases.

Mr. Edward James has similarly expressed a desire to retract his waiver and exercise his right to challenge his conviction and death sentence through any appropriate legal means, and to be represented in this effort by the Office of Capital Collateral Regional Counsel - Middle. Other than automatic review on direct appeal, the reliability of his death sentence has not been subject to post-conviction review.

#### **ARGUMENT IV**

**The Florida Supreme Court and the Third Judicial Circuit have previously considered a death sentenced inmate’s multiple waivers of post-conviction counsel and proceedings that occurred over a three year period before final resolution and permitted resumption of post conviction proceedings.**

The Florida Supreme Court and the Third Judicial Circuit has previously considered a death sentenced inmate's multiple waivers of post-conviction counsel and proceedings that occurred over a three year period before final resolution. The inmate twice waived counsel after formal hearings and competency determination. The case is distinguishable in that the inmate raised confusion and his counsel raised competency as issues regarding the two waivers of counsel. Nevertheless, the period of July 12, 1996, to June 30, 1999, was consumed with the inmate's changing positions on waivers of counsel with the Circuit Court ultimately and again appointing counsel for the resumption of post-conviction proceedings.

At the trial level, Victor Marcus Farr pleaded guilty to first degree murder and related offenses on April 2, 1991, in the Third Judicial Circuit Court for Columbia County, Florida (Case No. 91-002). In his written plea, Mr. Farr asked that the state recommend the death penalty and that the court sentence him to death. The trial court accepted Mr. Farr's guilty plea and imposed a sentence of death on Mr. Farr.

On direct appeal, the Florida Supreme Court affirmed Mr. Farr's convictions and sentences on the non-capital felonies but vacated the death sentence and remanded for a new sentencing hearing. *Farr v. State*, 621 So. 2d 1368 (Fla. 1993). On December 8, 1993, a new sentencing hearing was conducted

and Mr. Farr was again sentenced to death for first degree murder. The Florida Supreme Court affirmed. *Farr v. State*, 656 So. 2d 448 (Fla. 1995).

After post-conviction representation had been initiated, Mr. Farr wrote a letter to Assistant Attorney General Richard Martell on July 12, 1996, indicating that he wanted to waive his post-conviction appeals. The Florida Supreme Court ordered that a waiver hearing be held. After a October 17, 1996, waiver hearing, an order was entered finding that Mr. Farr had knowingly, intelligently and voluntarily waived collateral counsel and subsequent collateral appeals.

On November 18, 1996, Mr. Michael Minerva, the former Capital Collateral Representative (CCR), sent a letter to Sid White, Clerk of the Florida Supreme Court, enclosing a letter from Mr. Farr. In his letter, Mr. Farr requested that he be appointed an attorney to pursue his post conviction appeals. The Florida Supreme Court granted Mr. Farr's request and ordered the former CCR to assign counsel. Thereafter, Mr. Farr again requested that he be allowed to waive his collateral counsel and appeals.

On October 3, 1997, another waiver hearing was held and the lower court judge ruled that Mr. Farr had knowingly, intelligently and voluntarily waived collateral counsel and subsequent collateral proceedings. An appeal challenging the competency of Mr. Farr was pursued with the Florida Supreme Court (Case



No. SC60-91682).

Briefs were submitted and oral argument was heard on October 6, 1998. Before the Florida Supreme Court issued an opinion regarding Mr. Farr's 1997 waiver, the Capital Collateral Regional Counsel for the Middle Region (CCRC-M) received a letter from Mr. Farr requesting representation in pursuing his post-conviction appeals. That letter was received by CCRC-M on December 10, 1998.

CCRC-M moved the Florida Supreme Court to relinquish jurisdiction and to dismiss the appeal of the 1997 waiver. CCRC-M informed the court that Mr. Farr stated: "I write to say, I wish to file a 3.850 motion challenging convictions and sentences. ... I now want to pursue legal efforts on my behalf so I am willing to be represented by your office... ." CCRC-M also noted that Mr. Farr had apologized for his confusion, had requested that CCRC-M make the Florida Supreme Court aware of his request to reinstate his appeals and that Mr. Farr felt his previous waiver was not knowingly, voluntarily and intelligently made.

CCRC-M cited only to *Fla. Stat.* § 27.7001 (1998) in its motion to dismiss the 1997 waiver appeal. The Florida Supreme Court dismissed the appeal on June 30, 1999, after receiving the trial court's record on the relinquishment proceedings. Mr. Farr presently continues his post-conviction proceedings with registry counsel. Mr. Farr's case illustrates a willingness by this Court to grant a death sentenced

Defendant's request to litigate post-conviction issues through evidentiary hearing.

The Defendant, Edward James waived counsel only once and moves this court to give him the same opportunity that was afforded to Farr by allowing him to resume post-conviction litigation. Mr. James sought to reinstate the abandoned post-conviction motion because the appropriateness of the death sentence in his case has never been subject to a true adversarial testing.

### **ARGUMENT V**

**The trial court has authority to allow Mr. James to file a Successive 3.851 Motion due to the fact that the claims raised have never been adjudicated on the merits.**

Mr. James sought to reinstate his timely filed Third Amended post - conviction motion for the purpose of litigating those issues that were granted an evidentiary hearing, however, he also asked that if the trial court determined that it lacked jurisdiction to grant his request for permission to reinstate the abandoned 3.850 motion the court should consider the issues granted hearing as a Successive 3.851 Post Conviction Motion. In denying relief, the trial judge did not address Mr. James' request that Claims I, III (as to paragraphs 1 through 6) , IV, and VI allowed in his Third Amended Motion To Vacate Judgment of Conviction and Sentence with Request for Leave to Amend be viewed as a Successive Motion for post conviction relief. (See: *Circuit Court Order, 18<sup>TH</sup> Judicial Circuit, Judge O.H.*

*Eaton, Jr., dated April 1, 2003) (PCR., Vol. 3, 525)*

A successive post-conviction motion 3.851(e)(2) that raises the same ground as prior motion may not be dismissed if those grounds were not previously adjudicated on their merits. *Fla. R. Crim. P. 3.850 (f), Wright v. State, 741 So. 2d 1186 (1999)*. Since no evidentiary hearing has ever been held on any of the claims raised by Mr. James in his post conviction 3.850 motions, the claims that were granted hearing were dismissed but have never been adjudicated on the merits. Therefore, if there is no authority to permit James ability to restore his Third Amended 3.850 Motion the trial court did possess authority to grant James' request to file a successive post conviction motion as requested in his Memorandum of Law.(PCR, Vol. 3, 508-516)

## ARGUMENT VI

**There is nothing in *Fla. R. Crim. P. 3.851(Collateral Relief After Death Sentence Has Been Imposed And Affirmed on Direct Appeal)* or in *FRAP 9.142 (Procedures for Review in Death Penalty Cases)* that prohibits this Court from allowing Mr. James to reinstate his Third Amended post-conviction motion or alternatively permitting him to submit these claims in a successive motion pursuant to *Fla. R. Crim. P. 3.851(e)(2)*.**

There is nothing contained in the language contained in *Fla. R. Crim. P. 3.851(Collateral Relief After Death Sentence Has Been Imposed And Affirmed on Direct Appeal)* or in *FRAP 9.142 (Procedures for Review in Death Penalty Cases)*

that prevents this court from allowing Mr. James to reinstate his 3<sup>rd</sup> Amended post-conviction motion or alternatively allowing him to submit these claims in a successive motion filed pursuant to *Fla. R. Crim. P. 3.851(e)(2)* because there has been no ruling on the merits. Circuit courts have inherent power “to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid, existing laws and constitutional provision.” *Rose v. Palm Beach County*, 361 So. 2d 135,137 (Fla. 1978).

### **CONCLUSION**

There has been no death warrant signed in Mr. James’ case since dismissal of his post conviction matters on April 21, 2003. Therefore, this case remains in the same procedural posture that it was in at the time his Third Amended 3.850 Motion was dismissed. Most of the preparation for Evidentiary Hearing has been completed by counsel, therefore, reinstatement of James’ 3.850 Motion or permission to proceed via a Successor Motion on this limited issues would not result in protracted litigation warranting undue delay. No Florida court has heard any evidence or ruled upon the merits of post conviction claims found cognizable by the trial court and raised by James in 3.850 motions. As a result, confidence in the reliability of Mr. James’ death sentence is undermined.

Mr. James asks that this court acknowledge the fundamental respect for humanity underlying the Eighth Amendment’s prohibition against cruel and unusual punishment that gives rise to a special need for reliability in the

determination that death is the appropriate punishment in this capital case and direct the lower court to conduct an evidentiary hearing on claims previously determined cognizable. (PCR- Vol. 2, 314,348-350)(PCR- Vol. 3, 475-480)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Motion To Supplement and Correct the Record has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Assistant Attorney General, Office of the Attorney General, 444 Seabreeze Boulevard, 5<sup>th</sup> Floor, Daytona Beach, Florida 32118-3958 on this \_\_\_\_\_ day of May, 2007.

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing  
was generated in Times New Roman 14-point font.

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