IN THE SUPREME COURT OF FLORIDA
CASE NO. SC10-2069

JASON PAUL BOUDREAUX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

On Discretionary Review of a Decision from the First District Court of Appeal Rendered in an Appeal from the Circuit Court for Escambia County, Florida

L.T. Case Nos. 1D10-2367, 17-2005-CF-2770

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PRELIMINARY STATEMENT

The record is cited "R __" or "SR __," referring to either the original record volume or the supplemental volume on appeal and the page numbers assigned by the clerk. The clerk, in the copies provided to counsel, did not assign pages numbers to briefs and other documents filed with the district court on appeal, and references to such documents will be by name and court in which they were filed.

The term "Petitioner" refers to Petitioner Jason Paul Boudreaux. The terms "State" and "Respondent" refer to the State of Florida.

A conformed copy of the decision of the district court is attached to this brief as an appendix.

All emphases are supplied by counsel unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

Overview of Nature of Case

In this discretionary conflict review, at issue is whether the district court below should have required the trial court to consider on the merits nine claims that the trial court had determined were facially sufficient when originally asserted in a timely rule 3.850 motion. The trial court instead had summarily struck the entire motion because two other claims in the timely motion were facially insufficient, and it granted leave to file an amended motion. Petitioner filed a new rule 3.850 motion, and then an amended rule 3.850 motion, outside the two-year window for filing such motions and the sixty-day window the trial court had allowed for amendment. The trial court summarily dismissed those motions as untimely and never reached the merits of the nine original, facially sufficient claims included in the earlier, timely motion.

According to the district court, the trial court did not err. Moreover, the district court held that the nine original, timely filed claims were waived because Petitioner did not address them in his initial brief on appeal. Petitioner asserts that the district court's decision on these two points directly conflicts with holdings of this Court and with those of other districts.

Facts and Course of Proceedings

On June 7, 2006, following a trial, the circuit court below adjudicated Petitioner guilty of burglary of a dwelling with assault or battery, and attempted robbery with a deadly weapon. (R 67, 70). The trial court sentenced Petitioner to 40 years on the burglary conviction and 25 years on the attempted robbery conviction, with the two terms to run concurrently. (R 73-78). On direct appeal, the district court affirmed Petitioner's conviction and sentence on August 1, 2007, and the mandate issued August 17, 2007. (R 80-81).

On March 30, 2009, Petitioner filed, *pro se*, a timely, eleven-claim motion seeking postconviction relief. (SR 84-85; App. 1a). In an order dated June 22, 2009, the trial court struck the entire motion because two claims (claims four and seven), asserting ineffective assistance of counsel, were facially insufficient. (SR 84-85; App. 1a-2a). According to the June 22 order, both claims failed to identify with specificity the deficiencies in the performance of Petitioner's counsel and the prejudice that resulted. (SR 84-85). The court's order emphasized that Petitioner's motion was stricken and would "***not be considered on the merits by the Court at this time***." (SR 85) (emphasis in original). In an effort to comply with this Court's holding in *Spera*,[1] the trial court gave Petitioner sixty days "to file an amended, facially sufficient motion." (SR 85; App. 2a).

[1] *Spera v. State*, 971 So. 2d 754 (Fla. 2007).

On or about August 18, 2009, Petitioner attempted to file with the trial court a motion to extend the time in which to amend his motion for relief under rule 3.850. (Mot. for Reh'g, *filed in* Case No. 1D10-2367, Att. 1). The circuit court denied that motion on September 8, 2009. (R 67-68; App. 2a). Petitioner then attempted an appeal to the district court. (App. 2a). Petitioner later filed a motion for postconviction relief, pursuant to rule 3.850, on February 25, 2010, and an amended motion on March 17, 2010. (R 1-32, 33-66; App. 2a).

The trial court dismissed both of the subsequent motions as untimely. (R 67-81). The court's order of dismissal referenced the earlier-filed rule 3.850 motion that the court had stricken with leave to amend. (R 67). Noting the two-year time limitation of rule 3.850, the court found that Petitioner had not demonstrated that any of the three exceptions to that limitation applied. (R 68). In turn, the trial court dismissed both motions, and it attached the judgment and sentence, the district court's per curiam affirmance, and its mandate. (R 68-81). The trial court did not attach any other record excerpts to the summary dismissal order.

Petitioner then appealed the denial of his request for postconviction relief to the district court below. (R 82). The district court affirmed in a decision published at *Boudreaux v. State*, 45 So. 3d 36 (Fla. 1st DCA 2010). (App. 1a-2a). In its decision, the district court acknowledged that Petitioner originally had "filed a

timely eleven-claim motion pursuant to" rule 3.850. (App. 1a). According to the district court in that decision, "[t]he postconviction court found that two of Appellant's claims were facially insufficient," and since "*Spera* requires that a movant be given a 'reasonable opportunity to amend insufficient claims,'" Petitioner had been permitted by the trial court to file an amended motion within sixty days. (App. at 1a-2a) (quoting *Spera*). The district court highlighted what it considered to be Petitioner's delay in filing an amended motion, even observing that the period for such motions under *Spera* generally does "not exceed 30 days." (App. 2a).

The district court's decision continued by noting that once Petitioner filed his amended motion, "both the two-year window for rule 3.850 motions and the 60-day period given to amend his motion had passed, and the amended motion was therefore untimely filed." (App. 2a). The district court did not specifically assess to what extent any of the nine originally timely claims (found by the trial court to be facially sufficient) had been reasserted in the new, ostensibly amended rule 3.850 motions, but the opinion closed with the following determination: "Furthermore, [Petitioner] waived his arguments concerning his nine claims which were originally timely filed because he failed to specifically address these claims in his Initial Brief." (App. 2a). The district court denied Petitioner's motion for rehearing in an order dated September 28, 2010.

Petitioner sought to invoke this Court's discretionary review based on conflict. This Court accepted jurisdiction and dispensed with oral argument.

SUMMARY OF ARGUMENT

The trial court never addressed Petitioner's nine timely filed, facially sufficient claims on the merits. The district court's decision approved the trial court's failure to address those facially sufficient claims; a failure initially based on the facial insufficiency of two other claims, and later based on the untimeliness of Petitioner's amended rule 3.850 motion filed in response to the trial court's *Spera* order. That same decision deemed any arguments regarding the nine timely filed, facially sufficient claims as waived on appeal because Petitioner failed to address them in his initial brief in the district court.

The district court should have reversed the trial court's order to the extent it summarily dismissed or denied the nine timely filed, facially sufficient claims, and remanded the case so the trial court could address those claims on the merits by reference to record excerpts conclusively refuting their allegations, or by holding an evidentiary hearing. The district court's decision that instead affirmed the trial court's failure to reach the merits of those nine claims—and refused to address the merits of those claims on appeal because Petitioner had not addressed them in his *pro se* initial brief—directly conflicts with prior decisions of this Court and with the application of those decisions by other district courts. Decisions like that of

this Court in *Jacobs v. State*, 880 So. 2d 548 (Fla. 2004), and like those elsewhere amongst the other districts, consistently proscribe summary denials of timely filed, facially sufficient rule 3.850 claims ***except on the merits***. This Court likewise made clear, in *Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995), that a *pro se* appellant cannot waive arguments regarding claims by failing to address them on an appeal of a summary denial of a rule 3.850 motion on procedural grounds.

The district court's decision in turn should be quashed, and the trial court's order, to the extent it denied the nine timely filed, facially sufficient claims without reference to the record or an evidentiary hearing, should be reversed. This case should be remanded for the trial court to address those claims on the merits.

ARGUMENT

I. THE DISTRICT COURT ERRED WHEN, IN DIRECT CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND THOSE OF OTHER DISTRICTS, IT AFFIRMED THE TRIAL COURT'S FAILURE TO ADDRESS ON THE MERITS ANY OF NINE TIMELY, FACIALLY SUFFICIENT RULE 3.850 CLAIMS THAT HAD BEEN SUMMARILY STRICKEN BY THE TRIAL COURT.

Standard of Review

The trial court's decision on Petitioner's rule 3.850 motion was based on written materials before the court, so "its ruling is tantamount to a pure question of law, subject to de novo review." *Franqui v. State*, 36 Fla. L. Weekly S1 (Fla. Jan. 6, 2011); *State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (to the extent rule 3.850 claims "are discernable from the record, they constitute pure questions of law and are subject to de novo review").

Law and Analysis

The trial court only found that two of Petitioner's eleven claims were facially insufficient. (SR 84-85). As the district court acknowledged on the face of its decision, the other nine were timely filed. (App. 1a). The trial court erred when it failed to address those nine claims on the merits. The district court's decision affirming that error (even deeming Petitioner's arguments regarding those claims as waived on appeal) put it in conflict with this Court's decisions and those of other district courts. Timely filed, facially sufficient claims asserted in a rule 3.850 motion must be addressed on the merits. The district court's decision below,

on its face, conflicts with this well-established principle. The decision, in turn, should be quashed; the trial court's order should be reversed; and this case should be remanded to the trial court for a merits consideration of the nine timely filed, facially sufficient claims.

Florida Criminal Rule 3.850 allows a noncapital defendant to collaterally attack his judgment and sentence; but, with only a few exceptions, the motion must be filed within two years of the judgment and sentence becoming final. *See* Fla. R. Crim. P. 3.850(b). This Court set out the steps a trial court should follow when it considers a motion under rule 3.850. *See Jacobs v. State*, 880 So. 2d 548, 550-51 (Fla. 2004).

First, the 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." *Id.* at 550. Second, if there are claims that are facially sufficient, the trial court reviews the record. *See id.* "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." *Id.* (emphasis in original). Ultimately, "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." *Id.* at 551.

This Court emphasized the distinction made in rule 3.850 "between claims that are facially insufficient and those that are facially sufficient but are also conclusively refuted by the record." *Id.* at 551. The trial court first will determine the facial sufficiency of a claim by examining the contents of the postconviction motion; then, "***after*** a claim is found to be facially sufficient," the court will examine the record "solely to determine whether the record conclusively refutes the claim." *Id.* (emphasis in original). The only way a claim can be "resolved without a hearing" is if "the record evidence [] ***conclusively*** rebut[s] the claim." *Id.* at 555 (emphasis in original).

In the case below, once the trial court determined that nine of the Petitioner's claims in his timely rule 3.850 motion were facially sufficient, it could not summarily deny those claims without determining whether each claim was refuted by the record and attaching portions of the record that conclusively established Petitioner was not entitled to relief. *Cf. Rosa v. State*, 27 So. 3d 230, 231 (Fla. 2d DCA 2010) (reversing dismissal of facially insufficient claim in rule 3.850 motion, remanding for trial court to strike claim with leave to amend, and instructing court it may summarily deny amended claim if it is facially insufficient or if portions of the record are attached conclusively refuting allegations); *Gatlin v. State*, 24 So. 3d 743, 746 (Fla. 2d DCA 2009) (reversing and remanding to trial court for determination of whether individual claims were facially insufficient or

refuted by record); *Ross v. State*, 26 So. 3d 83, 84 (Fla. 3d DCA 2010) ("We must reverse because, on appeal from a summary denial, this court must reverse unless the postconviction record shows conclusively that the appellant is entitled to no relief" on otherwise facially sufficient claims); *Gonzalez v. State*, 13 So. 3d 1114, 1116 (Fla. 3d DCA 2009) (reversing summary denial of facially sufficient claims and remanding for consideration of whether record conclusively refutes claims or for evidentiary hearing); *Jensen v. State*, 964 So. 2d 812, 812 (Fla. 4th DCA 2007) (reversing erroneous summary denial and remanding "for an evidentiary hearing or attachment of portions of the record that conclusively refute" two otherwise facially sufficient claims); *Spellers v. State*, 993 So. 2d 1117, 1118-19 (Fla. 5th DCA 2008) (following *Jacobs* and reversing summary denial of facially sufficient claim that was not conclusively refuted by the record).

The trial court below simply utilized the wrong procedure to handle the two facially insufficient claims pursuant to *Spera*. In application, the holding in *Spera* was not intended to foreclose consideration of otherwise facially sufficient claims on the merits. Instead of striking the entire rule 3.850 motion—which had the effect of denying the facially sufficient claims as well—the trial court should have stricken, with leave to amend, ***only those claims*** it determined to be facially insufficient; it in turn should have addressed the remaining, facially sufficient

claims on the merits, either by reviewing the record to determine whether the claims' allegations were conclusively refuted or by holding an evidentiary hearing.

With respect to rule 3.851 motions, this Court found that "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." *Bryant v. State*, 901 So. 2d 810, 819 (Fla. 2005). This Court later extended this demand to rule 3.850 motions. *See Spera v. State*, 971 So. 2d 754, 761 (Fla. 2007) (holding that defendant must be given "at least one opportunity to amend" his rule 3.850 motion for postconviction relief that initially fails to meet pleading requirements).

In *Spera* this Court reasoned as follows:

> [A] gap in rule 3.850 remains, so that defendants whose initial postconviction ***claims*** are dismissed after the deadline expires currently cannot file either an amended motion or a successive one. We conclude that we should close that gap and allow all defendants an opportunity to amend facially insufficient postconviction ***claims***.

Spera, 971 So. 2d at 761.

According to the Second District, in turn, "the goal of *Spera* is to limit most defendants to a single postconviction proceeding under rule 3.850." *Lawrence v. State*, 987 So. 2d 157, 158 (Fla. 2d DCA 2008). "Instead of permitting defendants to file multiple motions that are denied or dismissed without reaching the merits," *Spera* gives "the defendant the opportunity to amend prior to the entry of a final

order" and "the final order can be a disposition on the merits for all claims that were or could have been raised in that motion…." *Lawrence*, 987 So. 2d at 158-59. Following this policy, the Second District held that the trial court in the case before it initially should have stricken ***the individual claims deemed to be facially insufficient***, with leave to amend; and after the time had passed for amendments, the court should have addressed the remaining claims it intended to reach on the merits in a final order that addressed all facially sufficient claims, including those the defendant chose to amend. *See id.* at 159.

In other words, where a trial court finds that some claims are facially sufficient and some not, the trial court must reach the merits of the facially sufficient claims, even if summarily, and strike the facially insufficient claims with leave to amend. *Cf. Watson v. State*, 34 So. 3d 806, 807 (Fla. 2d DCA 2010) ("The postconviction court may only summarily dispose of a claim in a rule 3.850 motion if it has determined either that the claim is facially insufficient or that it is refuted by the record as supported by record attachments."); *Koszegi v. State*, 993 So. 2d 133, 134 (Fla. 2d DCA 2008) (trial court that denied ground three of the rule 3.850 motion on the merits "should have issued a nonfinal order striking grounds one, two, and four of the motion with leave to amend within a reasonable time" and then addressed any amended claims and the claim already denied on the merits in one final order); *Trujillo v. State*, 991 So. 2d 1006, 1007 (Fla. 2d DCA 2008)

(affirming summary denial of one claim on merits and reversing summary dismissal of facially insufficient claim "with instructions to strike the ***claim***, with leave to amend within a specific, reasonable amount of time"); *Hempstead v. State*, 980 So. 2d 1254, 1258 (Fla. 2d DCA 2008) ("With respect to various ***claims*** that were dismissed or denied as facially insufficient, however, the postconviction court should have stricken ***those claims*** with leave to amend within a reasonable time.").

Indeed, the Second District in *Watson* addressed circumstances analogous to those before the district court below, and it reached the opposite conclusion. In *Watson*, petitioner filed five timely claims. *See Watson*, 34 So. 3d at 807. The trial court granted petitioner thirty days leave to amend his motion. *See id.* Thereafter, petitioner informed the trial court that he no longer wished to amend his motion. *See id.* The trial court "summarily denied the entire motion without any discussion or reference to any portions of the record" and without addressing "any of the allegations in [the] claims." *Id*. The Second District reversed the order of the trial court, holding that the lower court had erred in summarily dismissing the defendant's entire motion after he failed to file an amendment. *Id*. at 808. The Second District remanded "for consideration of each previously unaddressed claim." *Id*.

The trial court's original order striking Petitioner's entire, timely filed rule 3.850 motion, which contained nine facially sufficient claims, effectively was a

dismissal without reaching the merits of those claims. *Cf. Gatlin v. State*, 940 So. 2d 1274, 1275 n.1 (Fla. 2d DCA 2006) ("It is noteworthy that an order denying a ground in such a motion based on record attachments is a disposition on the merits, whereas a denial or dismissal based on the insufficiency of the pleading is not.") (citing *McCrae v. State*, 437 So. 2d 1388 (Fla. 1983)). The trial court summarily denied those facially sufficient claims, then, without addressing whether the record conclusively refutes their allegations, which runs directly counter to what this Court and other district courts require. The final order that later dismissed those same claims as being untimely was entered in error, and it should be reversed.

Even if the trial court acted properly in initially striking the entire timely filed rule 3.850 motion with leave to amend, when Petitioner did file a new, ostensibly amended motion—albeit out of time—at a minimum the trial court should have compared the claims asserted in the subsequently filed rule 3.850 motion and amended motion with the nine original claims that it acknowledged were both timely and facially sufficient; and to the extent the nine originally well-pled claims were restated in the later motions, they should have related back and been considered as timely.

This Court has held that "the two-year limitation [in rule 3.850] does not preclude the enlargement of issues raised in a timely-filed first motion for postconviction relief." *Brown v. State*, 596 So. 2d 1026, 1027 (Fla. 1992). This

Court applied this holding in a subsequent case by comparing an amended rule 3.850 motion that contained claims outside the two-year limitation period with an earlier-filed motion with timely claims. *See Rogers v. State*, 782 So. 2d 373, 376 n.7 (Fla. 2001). It found that the later, amended motion "simply expanded the *Brady* claim asserted in the [earlier] motion and both motions advanced the same factual allegations." *Id.* This Court in turn rejected an argument that the choice to proceed only on the amended rule 3.850 motion waived all matters raised in the earlier, timely filed motion to the extent that the *Brady* claim raised in both motions became time-barred. *Id.*; *accord Graham v. State*, 846 So. 2d 617, 618 (Fla. 2d DCA 2003) ("A timely-filed rule 3.850 motion, prior to the trial court's disposition of the motion, may be amended with sworn allegations relevant to the issue or issues raised in the motion, even after the two-year time period for filing a timely 3.850 motion has expired.").

The Third District applied this Court's *Brown* decision to reverse the denial of a claim about counsel misfeasance in connection with a plea that was asserted in a timely rule 3.850 motion, and expanded upon in an untimely, amended motion. *See Aguilar v. State*, 756 So. 2d 257, 258 (Fla. 3d DCA 2000). Following *Brown*'s holding that rule 3.850's two-year limitation does not bar enlargement of an issue raised in a timely motion, the Third District concluded that since the amended

motion, filed out of time, addressed "an already raised issue, the point should be considered timely raised." *Id.* at 258.

The Second District later followed *Aguilar* to reach the same conclusion and reversed a denial of a rule 3.850 motion on timeliness grounds. *See Denmark v. State*, 800 So. 2d 655, 655 (Fla. 2d DCA 2001). In *Denmark* the trial court struck a timely filed, but facially insufficient, memorandum of law supporting a rule 3.850 motion, and it allowed the defendant to refile within thirty days. The defendant refiled his motion outside the "two-year window for relief," and the trial court "denied the motion as untimely." *Id.* at 656. The Second District remanded the matter to the trial court with instructions to consider the merits of the motion, since an "amended [rule 3.850] motion, so long as it related back to an issue already raised, ***gained the benefit of the date of the original motion and was not time barred***." *Id.*

The trial court erred when it failed to address Petitioner's timely filed, facially sufficient rule 3.850 claims on their merits. It could have reached those claims in one of two ways while still complying with *Spera*. First, it could have stricken only the two facially insufficient claims, with leave to amend, and gone on to address the remaining claims on their merits without entering a final order on all the claims until the time for amending had passed. Second, after the time for amending had passed, and Petitioner did file another rule 3.850 motion in an effort

to amend, the trial court could have addressed on the merits those claims in the latter motion that related back to the originally, timely filed, facially sufficient claims.

At all events, this Court and other district courts have held unequivocally that timely filed, facially sufficient rule 3.850 claims ***must*** be addressed on the merits. The decision of the district court below, affirming the summary dismissal of those timely filed, facially sufficient claims—without reaching their merits—directly conflicts with those other holdings, and it should be quashed. The trial court's order should be reversed as to the nine facially sufficient claims, and the case should be remanded for the trial court to review those claims to determine whether the record conclusively refutes the claims' respective allegations. *Cf. Parker v. Dugger*, 660 So. 2d 1386, 1389 (Fla. 1995) (declining to review merits of claims when trial court "never reached the merits below"; the "trial court is the appropriate place for the initial evaluation of the merits" of postconviction claims).

II. THE DISTRICT COURT ERRED BY DECIDING, IN DIRECT CONFLICT WITH THIS COURT'S PRECEDENT, THAT PETITIONER WAIVED CONSIDERATION OF HIS NINE TIMELY FILED, FACIALLY SUFFICIENT CLAIMS BY FAILING TO ADDRESS THE MERITS OF THOSE CLAIMS IN HIS VOLUNTARY, *PRO SE* BRIEF FILED IN THE APPEAL OF THE SUMMARY DISMISSAL OF HIS RULE 3.850 MOTION.

Standard of Review

Rulings consisting of pure questions of law—like the decision of the district court below that Petitioner waived his arguments on his facially sufficient claims by not addressing them in his brief—are subject to de novo review. *See State v. Glatzmayer*, 789 So. 2d 297, 301 n.7 (Fla. 2001); *cf. State v. Coney*, 845 So. 2d 120, 137 (Fla. 2003) (to the extent rule 3.850 claims are "discernable from the record, they constitute pure questions of law and are subject to de novo review").

Law and Analysis

In affirming the circuit court's dismissal of Petitioner's eleven postconviction relief claims as untimely filed, the district court below held that it could not consider Petitioner's nine timely filed, facially sufficient claims because Petitioner "failed to specifically address these claims in his Initial Brief." (App. 2a). According to district court, Petitioner "waived his arguments concerning his nine claims." (App. 2a). This decision was error and directly conflicts with a decision of this Court, and it should be quashed.

In *Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995), this Court, on analogous facts, reached a contrary conclusion. This Court held that a claimant whose

postconviction claims were summarily denied for procedural reasons (e.g., untimely filing) did not waive those claims by filing a brief that failed to address the merits of the claims.

The circuit court in *Parker* summarily denied the claimant's 3.850 motion as an "untimely" and "improper successive" petition. *Id.* at 1388. It never reached the merits of the claims. This Court, reviewing the denial of *Parker*'s death-row inmate's postconviction relief on a direct appeal, determined that the claims were not time-barred. The Court then confronted the State's argument that, even if timely filed, "Parker's claims have been waived because his initial brief includes only conclusory statements that the matter should be remanded to the trial court for a review of the merits of the claims and does not present argument in support of overturning the trial court's ruling." *Id.* at 1388. The Court rejected this argument, distinguished *Duest v. Dugger*, 555 So. 2d 849 (Fla. 1990) (holding that postconviction claims denied after an evidentiary hearing are waived if not adequately briefed), and held that:

> [T]he trial court in the instant case specifically stated that it would 'not rule on the merits of any of Mr. Parker's claims' because it found his petition to be 'untimely and otherwise procedurally barred.' . . . The propriety of that ruling is the pertinent issue presented to this Court on appeal. Parker's appellate brief presents several arguments to refute the trial court's determination that his 3.850 motion was procedurally barred. ***The claims raised in Parker's postconviction motion are not deemed waived in this case where the trial court***

never reached the merits and based its denial entirely on a procedural bar.

Parker, 660 So. 2d at 1389. The Court reversed the denial of postconviction relief and remanded to the trial court for reconsideration.

As in *Parker*, the trial court in the instant case never reached the merits of the Petitioner's claims. Rather, the trial court struck the Petitioner's original, timely 3.850 motion in its entirety due to two facially insufficient claims and granted leave to amend. (SR 84-85). The court then dismissed Petitioner's subsequently filed motion and amended motion for postconviction relief as untimely. (R 67-81). The nine timely filed, facially sufficient claims were never addressed on their merits. The district court below recognized, on the face of its opinion, that the dismissal was solely due to the motion being untimely.

Since the circuit court summarily denied the Petitioner's claims on a procedural ground without an evidentiary hearing, Petitioner did not need to file an appellate brief with the First District. *See* Fla. R. App. P. 9.141(b)(2)(C). Petitioner, acting *pro se*, nonetheless filed a brief. He argued the sole pertinent issue on appeal—that the trial court erred in dismissing his motion for postconviction relief as untimely. On these facts, *Parker* applies, and Petitioner did not waive his claims by not arguing their merits to the district court below. The district court erred by holding these nine claims waived for failure to brief

them, and its decision stands in direct conflict with this Court's decision on the same issue.

As discussed above, Florida Rule of Appellate Procedure 9.141(b)(2)(C) provides that if postconviction relief motions are summarily denied without an evidentiary hearing, then "[n]o briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal." This rule is limited to summary denials; where claims are denied after an evidentiary hearing, briefing is mandatory. *See* Fla. R. App. P. 9.141(b)(3)(C). To extend the idea, in the context of a Rule 9.141(b)(2)(C) optional briefing, that a claimant can waive arguments that he fails to adequately argue in his brief, works an injustice on *pro se* claimants and should be clarified as an improper extension of this Court's precedent.

This Court has not extended *Duest* to situations falling under Rule 9.141(b)(2)(C), in which all claims are summarily denied and briefing is optional. Rather, at least in the context of summary denials on procedural grounds, this Court has rejected *Duest*. *See Parker*, discussed *supra*. Extending *Duest*'s waiver principle to cases in which all claims have been summarily denied would be illogical as the rule for these situations is that briefing is optional. Rule 9.141(b)(2)(C) gives no indication to *pro se* defendants that by opting to file a brief to perhaps explain one or two issues, they waive review of their other claims. To

expect *pro se* defendants to read this into the seemingly clear language of Rule 9.141(b)(2)(C) contravenes the well-established principle that *pro se* defendants should be afforded some leniency and should not be held to the same standards as attorneys. As the Second District noted in a different context, "[a]lthough it is a well established principle that *pro se* motions, petitions and letters seeking relief should be accorded liberal interpretation, the principle should be applied to effect justice and afford the indigent the advantage denied him by his lack of legal training ***and should not be invoked to create further disadvantage***." *Thomas v. State*, 164 So. 2d 857, 857 n.1 (Fla. 2d DCA 1964).

At all events, the district court, rather than addressing the merits of the nine facially sufficient claims—which it acknowledged as being "originally timely filed" (App. 2a)—should only have reviewed the trial court's denial for its procedural validity, based on that court's attachment of records relating only to the procedural bar. (R 69-80). Any attempt to reach the substance of the Petitioner's claims would have required reversal, as no records were attached supporting denial of the claims on the merits. The merits, at all events, could not have been reached on appeal as the trial court never reached the merits, conducted an evidentiary hearing, or attached record excerpts conclusively showing that Petitioner is not entitled to relief. *See Parker*, 660 So. 2d at 1389; *see also Schultheis v. State*, 12 So. 3d 811, 812 (Fla. 1st DCA 2009) (reversing and remanding for attachment of

supportive record excerpts or for an evidentiary hearing); *Mason v. State*, 949 So. 2d 1127, 1128 (Fla. 3d DCA 2007) (same).

Therefore, *Parker* requires that the district court's decision as to the nine timely filed claims be quashed. Consideration was not waived. Yet, because the trial court never have reached the merits of these claims, the district court must remand the case to the trial court for evaluation of the claims on their merits.

CONCLUSION

For the foregoing reasons, the decision of the district court below should be quashed, and the trial court's order should be reversed. This Court in turn should remand the case for the trial court to consider and address the nine timely, facially sufficient claims asserted by Petitioner in his original rule 3.850 motion on their merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of May, 2011, true copies of the foregoing brief and the attached appendix have been served by first-class mail to Meredith Charbula, Assistant Attorney General, **Counsel for Respondent**, Office of the Attorney General, PL-01, The Capitol, Tallahassee, Florida 32399-1050; and Jason Paul Boudreaux, **Petitioner**, South Bay Correctional Facility, 600 U.S. Highway 27 South, South Bay, Florida 33493-2233.

CERTIFICATE OF FONT AND TYPE-SIZE

I hereby certify that the foregoing brief was generated by computer using Microsoft Word with Times New Roman 14-point font, in compliance with Fla. R. App. P. 9.210(a)(2).

/s/_____
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