IN THE SUPREME COURT OF FLORIDA

JASON PAUL BOUDREAUX,

Appellant/Petitioner,

v. CASE NO. SC10-2069

STATE OF FLORIDA,

Appellee/Respondent.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR ESCAMBIA COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF THE APPELLEE/RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, JASON BOUDREAUX, petitions this Court on conflict review. References to petitioner will be to "Boudreaux" or "Petitioner" and references to respondent will be to "the State" or "Respondent." The record in this case consists of one record volume, one supplemental record, and two attachments to the record. This Court should also have Boudreaux's brief in Case #1D10-2367. The State did not file an answer brief in that case.

The attachments to the record came about when, on May 23, 2011, this Court granted Appellee's unopposed motion to supplement the record with documents that Appellee attached to the motion. This Court directed the First District to supplement the record. Some six weeks later, the First District returned the same attachments with a single cover page (index) that labeled them Attachment I and Attachment II. The Clerk did not bind or paginate them into a second supplemental volume or serve them on the parties. The one volume record will be referred to as "R" followed by the appropriate page number. The one volume supplemental volume will be referred to as "RS" followed by the appropriate page number. The attachments to the records will be referred to as "Attachment" followed by the appropriate attachment and page number. References to Boudreaux's initial brief will be to "IB" followed by the page number.

STATEMENT OF THE CASE AND FACTS

On June 7, 2006, Petitioner was convicted, after jury trial, of burglary of a dwelling with assault or battery and attempted robbery with a deadly weapon. In a second case, Petitioner was convicted, pursuant to his plea of *nolo contendre* of one count of selling, manufacturing, delivering, or possessing with intent to sell or deliver a controlled substance (hereinafter "the drug count").

Boudreaux was sentenced on both cases on June 7, 2006. Boudreaux was sentenced to 40 years in prison on the burglary count, 25 years in prison on the attempted robbery count, and five years in prison on the drug count. (R 73-78). The court ordered Boudreaux's sentence on the drug count to run consecutive to his sentence on the other two charges. (R 73-78).

Boudreaux appealed. On August 1, 2007, the First District Court affirmed without written opinion. Boudreaux v. State, 961 So.2d 935 (Fla. 1st DCA 2007). Boudreaux's conviction became final when mandate issued on August 17, 2007. Beaty v. State, 701 So.2d 856, 857 (Fla. 1997) (holding that the two-year period for filing a motion for post-conviction relief begins to run upon issuance of District Court of Appeal's mandate on direct appeal).

On March 30, 2009, with about four and one-half (4½) months left of his two-year filing period; Boudreaux filed an initial *pro se* motion for post-conviction relief.[1] On June 24, 2009, the collateral court determined that two of Boudreaux's claims were insufficiently pled (Claim 4 and Claim 7).[2]

Citing to this Court's decision in Spera v. State, 971 So.2d 754 (Fla. 2007), the collateral court struck Boudreaux's motion in its entirety and granted Boudreaux leave to file an amended motion within 60 days. (Attachment II 45-46). This order meant that Boudreaux's amended motion was due on or before August 24, 2009. In granting Boudreaux sixty days to file an amended motion, the collateral court granted Boudreaux twice the time this Court found to be a reasonable window of opportunity to amend. Spera v. State, 971 So.2d 754, 761 (Fla. 2007) (ruling that when a defendant's initial rule 3.850 motion for post-conviction relief is determined to be legally insufficient, the proper procedure is to strike the motion with leave to amend within a reasonable period and noting that "[w]e do not envision

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[1] Between the time Boudreaux's conviction became final and the time he filed his initial motion for post-conviction relief, Boudreaux filed a motion pursuant to Rule 3.853 seeking DNA testing. (R 3). The trial court denied the motion and Boudreaux appealed. (R 3). On December 29, 2008, the First District Court of Appeal affirmed. Boudreaux v. State, 961 So.2d 935 (Fla. 1st DCA 2007). This motion is not at issue in this appeal.

[2] The order was signed on June 22, 2009 but rendered on June 24, 2011. (Attachment II 45).

that window of opportunity [to amend] would exceed thirty days and may be less.").

Boudreaux did not file an amended motion within sixty days. Instead, on Friday, August 21, 2009, with three calendar days left in the amendment period (but only one work day), Boudreaux asked for an additional 60 days to file his amended motion. (Attachment II 47-48). In his motion, Boudreaux alleged he was still waiting for telephone records from Bell South. Boudreaux claimed the records were needed to support claim four, one of the two claims the trial court found were insufficiently pled. (Attachment II 47-48). Boudreaux did not allege when he had requested the records or whether Bell South had agreed to provide the records within the extension period Boudreaux asked for. Additionally, Boudreaux made no claim he was unable to amend claim seven within the original 60 day period amendment time granted by the trial court. (Attachment II 47-48).

On September 8, 2009, the collateral court denied Boudreaux's motion for an extension of time. (Attachment II 54). The order contained no language advising Boudreaux he could appeal the order to the First District Court of Appeal. (Attachment II 54). Boudreaux appealed anyway.

Boudreaux listed the nature of the order appealed from as a "final order denying ineffective assistance of counsel/3.850 without conducting an evidentiary hearing." (Attachment II 50).

In his initial brief, Boudreaux did not challenge the order striking his initial motion with leave to amend.[3] Nor did Boudreaux challenge the order denying his motion for an additional 60 days to file an amended motion. Instead, Boudreaux raised seven substantive claims of ineffective assistance of counsel. (Attachment I).

This presented the First District Court of Appeal with a problem. The collateral court had not ruled on any of Boudreaux's claims of ineffective assistance of counsel. As such, there were no rulings for the First District to review.

The absence of a ruling on the merits was understandable, of course, because the collateral court had stricken Boudreaux's original motion pursuant to this Court's decision in Spera and Boudreaux never filed an amended motion. No motion before the collateral court meant there were no claims for the collateral court to rule upon and in turn, no final order for the First District to review on appeal.

Apparently, the First District Court decided to solve the problem by treating Boudreaux's appeal as a challenge to the order striking Boudreaux's original motion with leave to amend or alternatively as a challenge to the collateral court's order denying Boudreaux's motion for an extension of time to file an

[3] Of course, this was a non-final order that if challenged on appeal would have been properly dismissed.

amended motion. Because both of these were non-final orders, the First District Court of Appeal dismissed Boudreaux's appeal in a one word decision (Dismissed). Boudreaux v. State, 27 So.3d 662 (Fla. 1st DCA 2009).

On January 14, 2010, Boudreaux filed a motion for rehearing. On February 5, 2010, the First District denied Boudreaux's motion for rehearing. Mandate issued on February 23, 2010.

On February 25, 2010, some two and one-half (2½) years after Boudreaux's conviction became final; Boudreaux filed another motion for post-conviction relief in the collateral court. Boudreaux raised five claims. (R 1-32). On March 17, 2010, Boudreaux filed an amended motion raising eleven claims. (R 33-66).

On April 14, 2010, the collateral court dismissed Boudreaux's motion and amended motion as untimely. (R 67-68). Boudreaux appealed. On August 12, 2010, the First District Court affirmed. The Court ruled that:

> We affirm the order dismissing Appellant's motion for postconviction relief and amended motion for postconviction relief as untimely. Appellant filed a timely eleven-claim motion pursuant to Florida Rule of Criminal Procedure 3.850. The postconviction court found that two of Appellant's claims were facially insufficient and, pursuant to Spera v. State, 971 So.2d 754 (Fla.2007), permitted Appellant to file an amended motion within 60 days. Spera requires that a movant be given a "reasonable opportunity to amend insufficient claims" and implies that the period not exceed 30 days. In the instant case, instead of filing

> a timely amended motion, Appellant moved for an extension of time to file his amendment, which was denied, and caused further delay by appealing to this court. When Appellant did file 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. Furthermore, Appellant waived his arguments concerning his nine claims which were originally timely filed because he failed to specifically address these claims in his Initial Brief. Boudreaux v. State, 45 So.3d 36 (Fla. 1st DCA 201).

On March 17, 2011, this Court agreed to review Boudreaux's case. On May 13, 2011, Boudreaux filed his initial brief. On May 18, 2011, Boudreaux filed an amended initial brief. This is the State's answer brief.

SUMMARY OF THE ARGUMENT

Respondent suggests there is no conflict in this case. None of the cases to which Boudreaux cites actually conflict with the First District's decisions in this case. [4] Indeed, the collateral court's actions in this case, and in turn, the First District's decisions, comport with this Court's decision in Spera v. State, 971 So.2d 754 (Fla. 2007). However, to the extent that this case presents an issue of concern by this Court, that is the fact that collateral courts in this State, while ostensibly following Spera, are handling "mixed motions"

[4] Respondent's says "decisions" because any conflict in this case runs across both of the decisions of the First District, first dismissing his appeal and then affirming the collateral court's order dismissing Boudreux's 2010 motions as time barred.

differently, Respondent suggests it can be fixed.[5] Collateral courts, in the face of a mixed motion, should dismiss the insufficiently pled claims with leave to amend within a reasonable time (30 days), table the remaining sufficiently pled claims until the end of the amendment period, and then rule on all sufficiently pled claims (summarily or after an evidentiary hearing) in one single final order.

ARGUMENT

ISSUE I

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN AFFIRMING THE COLLATERAL COURT'S ORDER DISMISSING BOUDREAUX'S FEBRUARY 25, 2010 MOTION FOR POST-CONVICTION RELIEF and BOUDREAUX'S MARCH 17, 2010 AMENDED MOTION FOR POST-CONVICTION RELIEF AS UNTIMELY WHEN THE TRIAL COURT STRUCK, IN ACCORD WITH THIS COURT'S DECISION IN SPERA V. STATE, BOUDREAUX'S INITIAL MOTION FILED ON MARCH 30, 2009 WITH LEAVE TO AMEND IN SIXTY DAYS AND BOUDREAUX FAILED TO FILE AN AMENDED MOTION WITHIN THE TIME ALOTTED. (Restated)

In this claim, Boudreaux avers the First District Court of Appeal erred when it affirmed the collateral court's order dismissing Boudreaux's motion and amended motion for post-conviction relief as untimely filed. A few key points are important as this Court attempts to untangle the threads of this case. These are:[6]

[5] As noted in the argument section of Respondent's brief, a "mixed motion" is one that contains one or more sufficiently pled claims and one or more insufficiently pled claims.

[6] These events are set forth in Appellee's statement of the case and facts along with appropriate record citations. Appellee lays them out in the argument section of its brief to

(1) On August 17, 2007, Boudreaux's convictions became final when this Court issued mandate from Boudreaux's direct appeal.

(2) On March 30, 2009, Boudreaux filed a timely motion for post-conviction relief raising eleven (11) claims. The circuit court determined that two of the eleven (Claims 4 and 7) were insufficiently pled.

(3) On June 24, 2009, the collateral court struck the motion in its entirety citing to this Court's decision in Spera v. State, 971 So.2d 754 (Fla. 2007).

(4) In its order striking Boudreaux's motion, the collateral court gave Boudreaux sixty (60) days, or until August 24, 2009, to file an amended motion.

(5) Boudreaux did not file his amended motion in the allotted sixty days. Instead, on Friday August 21, 2009, with three calendar days (one work day) remaining of the sixty allotted days, Boudreaux filed a bare bones motion requesting an additional sixty (60) days to file an amended motion.

(6) On September 8, 2009, the trial judge denied the request for additional time to file an amended motion. The order did not contain any language advising Boudreaux he had the right to appeal the order.

(7) Boudreaux did not immediately, thereafter, file an amended motion reasserting the nine original sufficiently pled claims. Instead, Boudreaux filed a notice of appeal and an initial brief.

(8) In his brief, Boudreaux raised seven claims of ineffective assistance of counsel. None of these claims had been addressed by the collateral court because the collateral court struck Boudreaux's motion with leave to amend and Boudreaux did not file an amended motion. As such, there were no claims for the circuit court to rule upon and no final order for the District Court to review.

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allow the court to see the sequence of events in, what will hopefully be, easier to read bullet points.

(9) The First District Court of Appeal dismissed the appeal without comment. Boudreaux v. State, 27 So.3d 662 (Fla. 1st DCA 2009).

(10) On February 23, 2010, mandate issued from the dismissal of Boudreaux's appeal.

(11) On February 25, 2010, Boudreaux filed a post-conviction motion in the circuit court. On March 17, 2010, Boudreaux filed an amended motion. In his March 17, 2010 amended motion, Boudreaux raised the same eleven claims he raised in his March 30, 2009 motion.

(12) Both of these motions were filed outside the two year time limitation set forth in Rule 3.850(b), Florida Rules of Criminal Procedure.

(13) The collateral court dismissed Boudreaux's February 25, 2010 and March 17, 2010 motions as untimely.

(14) Boudreaux appealed. In his brief, Boudreaux did not argue that the collateral court erred in striking his original motion in its entirety (as opposed to striking only the two insufficiently pled claims). Nor did Boudreaux argue the collateral court erred in dismissing his March 17, 2010 amended motion as untimely because nine of the claims raised in his amended motion "related back" to the same nine sufficiently pled and timely claims raised in his original motion stricken by the collateral court. [7]

[7] Boudreaux spends some time in his brief arguing that a collateral court, faced with timely post-conviction claims, may not summarily deny them unless they are refuted by the record. Boudreaux notes that the court must attach those portions of the record that conclusively establish that the petitioner is entitled to no relief. (IB 9-10). Although Boudreaux is correct, the collateral court did not summarily deny any of Boudreaux's claims. Instead, the court dismissed his motion with leave to amend and Boudreaux did not re-file within the amendment period. Accordingly, none of the cases that Boudreaux cites for this general principle are really relevant to this appeal.

Boudreaux avers before this Court that the First District should have, *sua sponte*, directed the collateral court to resurrect the nine timely and sufficiently pled claims in Boudreaux's original motion. Alternatively, according to Boudreaux, the First District should have directed the collateral court to consider nine claims raised in his March 17, 2010 amended motion under the "relation-back" doctrine. Boudreaux made none of these arguments to the First District Court of Appeal (or the collateral court for that matter).

Boudreaux, first, argues the collateral court erred in striking Boudreaux's March 30, 2009 motion for post-conviction relief, albeit with leave to amend. Boudreaux suggests the trial court should have stricken only the two insufficiently pled claims and left the other nine claims on the table. (IB 10). Boudreaux posits that the collateral court should have simply held the remaining nine claims in abeyance for sixty days until Boudreaux either filed his amendment or put the court on notice he would not re-file the stricken claims (by actually notifying the court or simply not fixing and re-filing the claims). (IB 10).

In support of his argument, Boudreaux cites to several cases from the Second District Court of Appeal. (IB 12-13).[8]

[8] Boudreaux cites to these cases (Lawrence, Watson, Koszegi, Truijillo, Hemsptead) and alleges they stand for the notion that

Boudreaux alleges these cases stand for the notion that a collateral court errs in striking the entire motion with leave to amend when the motion contains some claims that are sufficiently pled and some claims that are insufficiently pled (hereinafter a "mixed motion'). (IB 13). Boudreaux is mistaken.

For instance in Trujillo v. State, 991 So.2d 1006 (Fla. 2d DCA 2008), the District Court did not even address the issue of whether a collateral court should, in the face of a "mixed motion", dismiss the entire motion or dismiss only the insufficiently pled claims, with leave to amend. Instead, the issue in Trujillo was whether the collateral court erred in failing to give Trujillo an opportunity to amend one insufficiently pled claim in a two claim motion, after the court denied claim one on the merits.

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the collateral court errs in striking the entire motion with leave to amend when the motion contains insufficiently pled claims. None of these cases actually do stand for that proposition, however. If this Court were to believe they did, however, then these cases would arguably be in conflict with this Court's decision in Spera v. State, 971 So.2d 754, 761 (Fla. 2007) in which this Court ruled that the proper approach is to strike the motion with leave to file an amended motion. Spera v. State, 971 So.2d at 761. The fact that these Second District cases arguably conflict with Spera does not establish conflict in this case. Even so, Boudreaux never made these same arguments in his initial brief before the First District Court of Appeal and the First District's opinion, on its face, does not conflict with any of these cases. Respectfully, Respondent suggests this Court does not really have conflict jurisdiction on this issue.

Mr. Trujillo filed a two-claim motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The post-conviction court summarily denied claim one on its merits and summarily dismissed claim two as facially insufficient. The court did not grant Mr. Trujillo any opportunity to amend claim two. The Second District affirmed as to claim one but reversed as to claim two ruling that pursuant to Spera v. State, 971 So.2d 754 (Fla. 2007), Mr. Trujillo must be given at least one opportunity to amend his second claim.

In Watson v. State, 34 So.3d 806 (Fla. 2d DCA 2010), like in Trujillo, the District Court did not address the issue of whether a collateral court should, in the face of a "mixed motion", dismiss the entire motion or dismiss only the insufficiently pled claims, with leave to amend. Instead, in Watson, the issue was whether the collateral court erred in summarily denying Watson's four substantive post-conviction claims when Watson requested an opportunity to amend his motion and then, once granted, decided not to do so.

In Watson, the defendant filed a sworn motion for post-conviction relief, ostensibly containing five claims. Watson raised four substantive claims in Claims two through five on his motion. Watson's first claim did not, however, collaterally attack his judgment of conviction and sentence at all. Instead, Watson averred state agencies were wrongfully withholding public

records that he needed to pursue post-conviction relief. Watson asked for an opportunity to amend his motion once he received certain public records he was seeking. The collateral court judge granted Watson's request. The collateral court did not dismiss Watson's motion, in part or in whole. Subsequently, when Watson advised the collateral court he would not amend after all, the collateral court denied Watson's motion in its entirety without any discussion or reference to any portions of the record.

The Second District reversed finding the collateral court was obligated to address Watson's four substantive claims on the merits. Id. at 808.[9] Like was the case in Trujillo, the Watson court was not presented with an allegation, nor did it decide, that a collateral court errs in dismissing a mixed motion in its entirety with leave to amend.

Although none of the cases to which Boudreaux cites actually support the notion that a collateral court errs in striking a mixed motion in its entirety with leave to amend, this Court has at least twice ruled that the proper procedure is to strike the motion with at least one opportunity to amend. First in Bryant v. State, 901 So.2d 810, 819 (Fla. 2005) and

[9] The Second DCA noted that had postconviction court's prior order dismissed claims two through five as facially insufficient, the failure to file an amendment would have justified the summary denial of the motion. Watson v. State, 34 So.3d at 808 n. 3.

again in Spera v. State, 971 So.2d 754, 761 (Fla. 2007), this Court held that when a defendant's post-conviction motion is legally insufficient; the proper procedure is to strike the motion (emphasis mine) with leave to amend within a reasonable period. Pursuant to the language in Bryant and Spera, the circuit court followed the proper procedure when it struck Boudreaux's motion with leave to amend within a reasonable period. The collateral court committed no error in striking Boudreaux's motion with leave to amend.

Boudreaux also claims that, even if the collateral court properly struck his timely motion in its entirety with leave to amend, the collateral court erred in dismissing Boudreaux's 2010 motions as untimely because the collateral court should have "compared the claims asserted in the subsequently filed 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 be related back and considered as timely." (IB 14).[10]

[10] In presenting this argument, Boudreaux tacitly acknowledges that the collateral court would not abuse his discretion in refusing to consider the two facially insufficient claims that Boudreaux failed to amend within the two year filing window provided for in Rule 3.850.

This Court's decision in Bryant v. State, 901 So.2d 810, 819 (Fla. 2005) lends some authority to this proposition. In Bryant, the defendant filed a timely motion for post-conviction relief, raising multiple claims. The collateral court struck the motion as legally insufficient. In its order, the collateral court did not explicitly grant Bryant leave to amend his stricken motion.

Subsequently, Bryant filed a motion asking the collateral court to allow him to file an amended motion. The collateral court granted his request. When Bryant filed the amended motion some three to four months after his original motion was stricken, however, the collateral court ruled that it did not have subject matter jurisdiction because Bryant filed his amended motion outside the one year period set forth in Rule 3.851, Florida Rules of Criminal Procedure. Bryant v. State, 901 So.2d at 817.

This Court reversed. This Court found that a collateral court abuses its discretion if it strikes a timely, but insufficiently pled, motion for post-conviction relief without giving the defendant at least one opportunity to amend. This Court also noted that, had the circuit court stricken the motion with leave to amend in the first place, the amended motion

Bryant filed in March 2003 would have been timely because it would have related back to the original filing. Id. at 818.[11]

Although at first blush, Bryant seems to suggest the collateral court should have applied the "relation back" doctrine to a portion of Boudreaux's March 17, 2010 motion, there is one key difference between Bryant and the instant case. Bryant apparently filed his amended motion within the parameters of the circuit court's order granting leave to amend. Boudreaux didn't. While Boudreaux could have re-filed his nine original, sufficiently pled claims within the 60 day amendment period granted by the collateral court to file an amended motion, Boudreaux failed to do so. Instead, he filed a bare bones motion for an extension of time and when that was denied, filed a notice of appeal.[12]

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[11] This of course would only be true if Bryant raised the same claims in his untimely amended motion that he did in the timely motion stricken by the collateral court. Bryant would not be able to rely on the relation back doctrine if he attempted to raise entirely new claims in an amended motion filed outside the one year limitations period set forth in Rule 3.851(d). As a side note, this Court affirmed the denial of Bryant's motion for post-conviction relief because the collateral court ruled on Bryant's claims on the merits anyway. Bryant v. State, 901 So.2d 810, 830 (Fla. 2005)

[12] This is not a case where the order striking his motion misled Boudreaux into believing it was a final order. Nor did it inform him he had thirty days to appeal thereby creating confusion about whether he should appeal or amend. *Compare* Christner v. State, 984 So.2d 561 (Fla. 2d DCA 2008)(noting that Christner cannot be entirely blamed for appealing a non-final order striking a post-conviction claim with leave to amend when

After the First District Court of Appeal dismissed his appeal, Boudreaux filed a motion and amended motion some eight months after the collateral court struck his original motion, some six months after his 60 day amendment period expired and some 2½ years after Boudreaux's conviction became final. Boudreaux never offered any compelling reason why the collateral court should consider his untimely motions or excuse his failure to file an amended motion within the time allowed. Nor did Boudreaux present any argument to the collateral court suggesting it should apply the relation back doctrine to resurrect his nine original claims. This Court should decline Boudreaux's invitation to find the collateral court erred when it dismissed Boudreaux's 2010 motions as untimely.

Finally, Boudreaux argues that the First District Court was obligated to reverse the circuit court even though Boudreaux never raised the arguments before the First District Court of Appeal that Boudreaux raises now before this Court. This argument is contrary to cases in which this Court has consistently held that the failure to present an argument on appeal waives appellate review. *See* Shere v. State, 742 So.2d 215 (Fla. 1999)(because Shere did not present any argument or allege on what grounds the trial court erred in summarily

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the order pronounced that it was a final order and advising Christner he had 30 days to appeal).

denying some of his post-conviction claims, we find that these claims are insufficiently presented for review). *See also* Watson v. State, 975 So.2d 572 (Fla. 1st DCA 2008)(citing to this Court's decisions in Cooper v. State, 856 So.2d 969, 977 n. 7 (Fla. 2003) and Marshall v. State, 854 So.2d 1235, 1252 (Fla. 2003) and finding that a defendant fails to address the applicability of Spera in his appellate brief or supplemental authority to preserve such arguments for review, he waives any claim he may have had concerning Spera).

Before the First District Court of Appeal, Boudreaux failed to present an argument that the collateral court erred in striking his original timely motion in its entirety. Likewise, Boudreaux failed to argue that the collateral court erred because it failed to apply the relation back doctrine to nine claims in his March 17, 2010 amended motion for post-conviction relief. As such, he waived this claim on appeal. Shere v. State, 742 So.2d 215 (Fla. 1999). Before this Court, Boudreaux has failed to point to a single case that actually and directly conflicts with the First District's decision in his case. This Court should discharge jurisdiction or, alternatively, deny Boudreaux's first claim on appeal.

ISSUE II

WHETHER THE FIRST DISTRICT COURT OF APPEAL ERRED IN FINDING BOUDREAUX WAIVED HIS ARGUMENTS CONCERNING HIS NINE CLAIMS WHICH WERE ORIGINALLY TIMELY FILED BECAUSE HE FAILED TO SPECIFICALLY ADDRESS THESE CLAIMS IN HIS INITIAL BRIEF ON APPEAL FROM THE DISMISSAL OF HIS MOTIONS FOR POST-CONVICTION RELIEF FILED ON FEBRUARY 25, 2010 AND MARCH 17, 2010 AS UNTIMELY. (Restated)

In this claim, Boudreaux alleges the First District Court of Appeal erred in finding Boudreaux waived his arguments concerning his nine claims which were originally timely filed because he failed to specifically address these claims in his initial brief. Boudreaux claims the First District's decision conflicts with this Court's decision in Parker v. Dugger, 660 So.2d 1386 (Fla. 1995). Respondent disagrees.

In Parker, as a result of some unusual circumstances surrounding Parker's first Rule 3.850 motion, this Court issued an order permitting Parker to "file any motions or petitions for any type of post-conviction or collateral relief." Parker v. Dugger, 660 So.2d at 1388. Parker filed a second 3.850 motion within the four-month time limit set by this Court. Nonetheless, the collateral court summarily denied Parker's second 3.850 motion as "untimely" and "an improper, successive petition." Having denied Parker's motion on procedural grounds, the collateral court did not reach the merits of Parker's claims.

On appeal, the State claimed that Parker waived any consideration of the substantive claims presented in Parker's second motion for post-conviction relief 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. In making this argument, it appears the State believed Parker should have to show his post-conviction claims had substantive merit before he was entitled to a remand.

This Court rejected the State's argument. This Court observed that Parker's brief presented several arguments in support of his allegation that the collateral court erred in finding his second Rule 3.851 motion untimely. As such, the Court found Parker did not waive claims in his post-conviction motion by failing to make any arguments about the substantive merits of his claims because the collateral court never reached the merits and based its denial entirely on a procedural bar. Parker v. State, 660 So.2d at 1389.

However, this is not what happened in this case. In the final sentence of its opinion in Boudreaux, the First District ruled "[f]urthermore, Appellant waived his arguments concerning his nine claims which were originally timely filed because he failed to specifically address these claims in his Initial

Brief." Boudreaux v. State, 45 So.3d 36 (Fla. 1st DCA 2010).

Boudreaux interprets this sentence as a tacit finding by the First District that Boudreaux should have argued, but didn't, the substantive merit of his nine original ineffective assistance of counsel claims in his initial brief. Of course, Boudreaux could not have argued the substantive merits of these nine original sufficiently pled claims, on appeal, because the collateral court never ruled on the merits of his claims. As such, Respondent does not believe the First District thought he should have.

Instead, the only logical interpretation of this last sentence of the opinion, is that the First District found Boudreaux waived any arguments concerning the nine claims which were originally timely filed because Boudreaux never argued, as he does here, that the collateral court erred in failing to consider his nine sufficiently pled claims. Boudreaux never argued the trial court was wrong to strike the entire motion in the first place and should have instead, only stricken the two legally insufficient claims. Nor did Boudreaux argue that the collateral court was obligated to apply the "relation back" doctrine and review the merits of at least nine of the claims presented in his March 17, 2010 motion.

Viewed this way, Parker does not control the disposition of this case. Nor is it in conflict with the First District's decision in Boudreaux.

Although Respondent does not believe there is a basis for this Court to find actual conflict or legal error in this case, it is not difficult to be commiserative of Boudreaux's situation, as a *pro se* litigant, even though Boudreaux contributed to the problem. For Boudreaux, this whole situation probably could have been resolved had the state collateral court, in its order denying Boudreaux's motion for an extension of time, directed Boudreaux to file his amended motion within three days from the date of the order.[13] Had the collateral court done so, Boudreaux would have likely not appealed the non-final order in the first place and could have, instead, promptly placed into the hands of prison officials, for mailing, an

[13] The trial court did not err in failing to insert this language in his order. At least in this district, if the First District Court of Appeal denies a request for an extension of time to file a brief, the court will usually direct the brief to be filed by a date certain. If, for some reason, it does not, the requester will still have any time that remained of the briefing period when the motion for an extension of time was filed because a motion for an extension of time tolls the briefing schedule. Rule 3.850 provides no such tolling. Accordingly, the collateral court was under no legal obligation to treat Boudreaux's motion for an extension of time as a tolling motion and give Boudreaux the remaining three days to file his amended motion. Respondent suggests only that the trial judge could have in his discretion treated Boudreaux's extension motion as a "tolling motion" and given Boudreaux some direction as what he needed to do next.

amended motion containing the nine original sufficiently pled claims. If his motion would have been ultimately denied and he appealed, Boudreaux could have challenged the collateral court's rulings on his substantive claims, as well as the collateral court's order denying his request for additional amendment time.

Alternatively, the First District might have "fixed it" when it dismissed Boudreaux's first premature appeal by remanding with directions that Boudreaux be allowed to file his amended motion not later than 30 days of the mandate. This, however, is a bad idea. Imposing such a requirement on the district courts, or even allowing such a "fix," would encourage delay. A defendant, faced with a 30 day deadline to amend in the collateral court, under Spera, would simply ask for an extension and if denied, file a notice of appeal. Such a scenario will give him a "de facto" extension of time to re-plead his legally insufficient claims and unnecessarily burden the appellate court with premature appeals of non-final orders.

Although the undersigned counsel does not pretend to know the mind of this Court, perhaps this Court accepted this case to clarify its decision in Bryant and Spera. In neither Bryant nor Spera was this Court called on directly to determine what a collateral court should do in the face of a mixed motion. The post-conviction motion in Bryant was originally dismissed without any claim-by-claim analysis for legal sufficiency.

Spera's post-conviction motion contained two claims, both of which were insufficiently pled. Spera v. State, 923 So.2d 543 (Fla. 4th DCA 2006) (en banc) *reversed* Spera v. State, 971 So.2d 754 (Fla.2007).

Accordingly, in both Bryant and Spera, it appears the collateral court was presented with a legally insufficient motion, rather than a mixed motion. Although in both cases, this Court opined that the proper procedure in the face of a legally insufficient motion is to dismiss the motion with leave to amend, collateral courts presented with a true "mixed motion" appear to be doing it several different ways: some dismissing only the insufficiently pled claims and tabling the other claims for the amendment period; some ruling on sufficiently pled claims but dismissing others with leave to amend, and others following Spera to the letter and dismissing a mixed motion in its entirety with leave to amend. *See e.g*. Lawrence v. State, 987 So.2d 157 (Fla. 2d DCA 2008)(in the face of a fourteen claim motion with eight insufficiently pled claims the collateral court should have stricken the eight insufficiently pled claims with leave to amend in probably 30 days); Trujillo v. State, 991 So.2d 1006 (Fla. 2d DCA 2008)(trial court ruled on the one sufficiently pled claim and dismissed the other claim with leave to amend); Nelson v. State, 977 So.2d 710 (Fla. 1st DCA 2008)(The trial court, upon receipt of a rule 3.850 motion, but prior to

ruling on the merits of the entire motion, should review the motion to determine whether any claims are facially or legally insufficient. If any claims are insufficient, the trial court should strike the motion with leave to amend the insufficient claims unless the deficiencies cannot be cured.).

The State has no interest in imposing a procedural "gotcha" on *pro se* litigants. On the other hand, the State does have an interest in avoiding piecemeal post-conviction litigation and undue delay. If this Court wishes to use this case to provide guidance to collateral courts faced with a mixed motion (which might very well be a significant number of the post-conviction motions filed by *pro se* litigants), this Court should consider directing that, in the face of a timely mixed motion, the collateral court should:

(1) dismiss any insufficiently pled claims with leave to amend within a reasonable time (normally 30 days pursuant to Spera), and,[14]

(2) table all the remaining sufficiently pled claims for the amendment period time, and then

[14] This order could also contain specific language that this is NOT an appealable order. See e.g. Lawrence v. State, 987 So.2d 157 (Fla. 2d DCA 2008)(Observing that the non-final order contained language that incorrectly advised the defendant he had 30 days to appeal).

(3) rule on all of the tabled sufficiently pled claims in a single final order if the defendant fails to file within the amendment period or notifies the court he will not amend, or

(4) rule on all of the sufficiently pled claims presented in the defendant's amended motion for post-conviction relief in one final order if the defendant sufficiently re-pleads some or all of the dismissed claims within the amendment period.

Respondent makes this suggestion because the other ways in which collateral courts are applying Spera can prove problematic. Ruling on some claims and dismissing others with leave to amend results in piecemeal litigation. Additionally, such an approach invites *pro se* litigants, concerned that their appellate rights might be lost, to file a premature appeal of the initial non-final order. *See e.g.* Lawrence v. State, 987 So.2d 157 (Fla. 2d DCA 2008).[15] This in turn causes a needless waste of appellate resources as well as undue delay in adjudicating a defendant's post-conviction motion to its conclusion.

[15] This sometimes occurs as well when the collateral court summarily denies some claims and grants an evidentiary hearing on others. Respectfully, Respondent suggests that to avoid this scenario, a better way might be to simply order an evidentiary hearing on the claims for which an evidentiary hearing is required, without ruling on any of the claims in the motion, and then after the evidentiary hearing rule on all of the defendant's claims in one final order.

Dismissing the entire motion in accord with the plain language of Spera, however, can cause difficulty for a *pro se* litigant if the defendant discovers he cannot, in good faith, amend his insufficiently pled claims within the amendment period. As in Boudreaux's case, it may not be obvious to a *pro se* litigant that if he cannot "fix" his insufficiently pled claims, he must re-file his claims that were sufficiently pled, within the amendment period, so that the collateral court judge has a motion before him. Refining Spera to require collateral courts to "table" sufficiently pled claims and dismiss the insufficiently pled claims with leave to amend assures a defendant his timely and sufficiently pled post-conviction claims will be reviewed pursuant to Rule 3.850 and reduces delay for the litigant, the collateral court, and the appeals courts. Once the amendment period expires, a collateral court will be free to dispose of all sufficiently pled claims in one final appealable order. [16]

[16] This case is a non-capital case that, if jurisdiction is not discharged, should specifically be limited in its holding to non-capital cases filed pursuant to Rule 3.850. Rule 3.851 sets forth specific procedures in capital cases (including procedures for amending a timely motion and a prohibition against shell motions) none of which should be disturbed by any decision in this case.

CONCLUSION

Based upon the foregoing, the State requests respectfully that this Court discharge jurisdiction or, if it wishes, clarify Spera to guide state collateral courts in the handling of mixed motions. [17]

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing had been provided by U.S. Mail, postage pre-paid to Adam S. Tanenbaum, Esq., Carlton Fields P.A., P.O. Box 3239, Tampa, Florida 33601-3239, this 10th day of August 2011.

_____

Meredith Charbula
Counsel for Appellee/Respondent

[17] This Court accepted this case without oral argument. Respondents would have no objection, however, if this Court wants to discuss this matter at an oral argument.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

_____
Meredith Charbula
Counsel for Appellee/Respondent