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

JASON PAUL BOUDREAUX,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S REPLY BRIEF

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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RESPONSE TO STATE'S STATEMENT OF THE CASE AND FACTS

This Court does not need to go beyond the four corners of the First District's decision to find the conflict that needs to be corrected. Still, based on the supplemental record, the State makes some characterizations with its statement of the proceedings that require some clarification out of fairness to Mr. Boudreaux. Indeed, the State intimates in its statement of the case and elsewhere that Mr. Boudreaux is at fault for the procedural confusion in this case. (AB 3-4, 7-9, 16, 22). A closer look at some of the procedural details reveals that Mr. Boudreaux was doing his level best to seek merits consideration of his postconviction claims by any court that would listen.

On March 26, 2009,[1] Mr. Boudreaux filed a timely, 44-page, handwritten, *pro se* motion for post-conviction relief. (Att. II 1-44). Mr. Boudreaux asserted seven claims of ineffective assistance of counsel (Att. II 6-32). The trial court struck Mr. Boudreaux's entire motion after determining that two of Mr. Boudreaux's seven claims were facially insufficient. (Att. II 45-46). The order

[1] Pursuant to the mailbox rule, an incarcerated *pro se* litigant has filed a document "at the moment in time when the inmate loses control over the document by entrusting its further delivery or processing to agents of the state." *Haag v. State*, 591 So. 2d 614, 617 (Fla. 1992); *Thompson v. State*, 761 So. 2d 324, 326 (Fla. 2000) ("The important date for purposes of the mailbox rule is the date when the inmate hands over his or her documents to prison officials for mailing."); *see generally Griffin v. Sistuenck*, 816 So. 2d 600, 602 (Fla. 2002) ("Our decision in *Thompson* was intended to reduce the hurdles inmates encounter in gaining access to the courts.").

stated that the motion would "***not be considered on the merits by the Court at this time***" and granted 60 days leave to amend. (Att. II 46) (emphasis in original).

Mr. Boudreaux later filed a *pro se* motion for extension of time to amend his motion for post-conviction relief because he had not yet been able to obtain the phone records that he needed to amend one of the facially insufficient claims. (Att. II 47-48). The trial court denied Mr. Boudreaux's motion for extension of time. (Att. II 49). Neither the order striking his entire timely rule 3.850 motion nor the order denying his request for extension of time stated that he did ***not*** have the right to appeal. (Att. II 45-46, 49).

Mr. Boudreaux—who at the time was still operating *pro se*—took a premature appeal to the First District. (Att. II 50). He filed his handwritten initial brief. (Att. I). In his introductory paragraph, Mr. Boudreaux explained, "Appellant comes, 'pro se' to this Court without any legal experience, and without the benefit of an Attorney. I am asking this Court to please take this into consideration. I know that this system is all I have, and I am doing the best I can with what I have…." (Att. I 6A). He then provided an identical version of his March 30, 2009, seven-claim motion for post-conviction relief. (Att. I).

The District Court simply dismissed Mr. Boudreaux's appeal without explanation or direction. *See Boudreaux v. State*, 27 So. 3d 662 (Fla. 1st DCA 2009). Two days after issuance of the mandate—but outside both the two-year

limitations period of rule 3.850 and the 60-day amendment period established by the trial court—Mr. Boudreaux filed another *pro se* motion for postconviction relief. (R 1-32). That motion contained the first five of his originally filed seven claims. (R 6-20). In fact, Mr. Boudreaux had scratched out the numbers from the original motion and renumbered the pages for the new motion. (R 1-32). Notably, even in its abbreviated form, this motion contained three of the timely filed claims that the trial court implicitly determined were facially sufficient.

Several weeks later, Mr. Boudreaux filed another *pro se* postconviction motion, denominated "amended," which contained the original seven timely filed claims as well as four additional claims of ineffective assistance of counsel. (R 33-66). The trial court summarily denied both of these later postconviction motions as untimely. (R 67-81). The trial court, however, never entered a ***final*** order disposing of the seven timely claims asserted in Mr. Boudreaux's original motion.

ARGUMENT IN REPLY

I. THE FIRST DISTRICT'S DECISION APPROVES A MISAPPLICATION OF *SPERA* TO RULE 3.850 "MIXED MOTIONS" THAT DENIES MERITS CONSIDERATION OF FACIALLY SUFFICIENT CLAIMS AND THAT CONFLICTS WITH THE SECOND DISTRICT'S APPLICATION OF *SPERA* UNDER THE SAME CIRCUMSTANCES.

Mr. Boudreaux demonstrated in his opening brief that the First District's decision approves a procedure that misapplies this Court's holding in *Spera v. State,'* 971 So. 2d 754 (Fla. 2007), and effectively operates as a derogation of this

Court's decision in *Jacobs v. State*, 880 So.2d 548 (Fla. 2004), for handling timely filed, rule 3.850 claims. In fact, Mr. Boudreaux showed in his initial brief that the Second District has established a procedure for applying *Spera* to situations where less than the entire postconviction motion is facially insufficient. (IB 10-13).

The State concedes that "collateral courts in this State, while ostensibly following *Spera*, are handling 'mixed motions' [containing both facially sufficient and insufficient claims] differently." (AB at 6-7 & n.5, 24-25) (citing First and Second District decisions). Indeed, the State acknowledges that "it is not difficult to be commiserative of Boudreaux's situation, as a *pro se* litigant," and it claims it wants to avoid "imposing a procedural 'gotcha' on *pro se* litigants." (AB 22, 25). However, it maintains that this lack of uniformity does not constitute a conflict, but rather presents a potential "issue of concern." (AB at 6).

In its answer brief, the State misapprehends Mr. Boudreaux's statement that "where a trial court finds that some claims are facially sufficient and some are 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." (IB 12; *see* AB 10-11 & n.8). The State seems to interpret this statement as meaning that the trial court ***must*** strike only the facially sufficient claims and not the entire "mixed motion" with leave to amend. Though both Mr. Boudreaux and the State agree that this would be the best procedure going forward (*see* AB 25-26),

currently it is the procedure put in place by the Second District to apply *Spera* to mixed motions and not yet one compelled by this Court.

Mr. Boudreaux's citation to the Second District cases was to support, by analogy, the principle that, regardless of how the trial court addresses the insufficient claims within a mixed motion, the facially sufficient claims must be addressed on their merits—with the insufficient claims if unamended—***at some point*** in one final order, and not simply ignored if a defendant chooses not to amend his facially insufficient claims. (IB 12-14). The First District approved a procedure applying *Spera* that ran directly counter to the Second District's approach based on this principle and denying Mr. Boudreaux any judicial consideration of his timely filed, facially sufficient claims.

For instance, in the one Second District case that the State does not try to distinguish in the text of its answer, the appellate court reaffirmed its procedure for ensuring "the entry of a single, final appealable order" on a timely postconviction motion that asserts some facially sufficient and some facially insufficient claims. *See Lawrence v. State*, 987 So. 2d 157, 158 (Fla. 2d DCA 2008). The *Lawrence* Court reversed an order that ***denied*** six grounds on the merits, ***struck*** the remaining eight grounds as facially insufficient without prejudice to the filing of facially sufficient claims, and advised the defendant he had 30 days to appeal. *See id.* According to the district court, the trial court "misunderstood the procedures

mandated by [*Spera*]. *Id.* "By giving the defendant the opportunity to amend prior to the entry of a final order, the final order can be a disposition on the merits of all claims that were or could have been raised in that motion, thereby limiting most defendants to one appeal and to the right to a successive motion only in extraordinary cases." *Id.* at 158-59.

The *Lawrence* Court observed that the trial court should have issued an order striking those grounds that were facially insufficient with leave to amend. *See id.* at 159. It continued as follows: "Although the circuit court was free to indicate in such a nondispositive order that the other grounds would ultimately be denied without leave to amend, it should not have entered a partial final order in this regard." *Id.* Ultimately, the Second District remanded "for the entry of a nonfinal order that gives Mr. Lawrence a reasonable time to attempt to amend his motion. ***If he does not amend his motion***, the circuit court may enter a ***final order*** that is a disposition on the merits of all of Mr. Lawrence's claims." *Id.* (emphasis supplied).

Watson stands for the same proposition; that is, at some point the trial court must enter one final order addressing the merits of any timely, facially sufficient claims asserted in the original motion, along with any other claims, even where the defendant ultimately does not amend. *See Watson v. State*, 34 So. 3d 806 (Fla. 2d DCA 2010). The court noted that a "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." *Watson*, 34 So. 3d at 807. According to the district court, the trial court must first consider the facial sufficiency of the claims and dismiss those claims that are insufficient. *See id.* at 800 n.2. A dismissal of facially insufficient claims and a failure to amend ***then*** "would have justified the summary denial of the claims." *Id.* at 808 n.3.

In *Koszegi* the Second District reversed because the trial court must give a defendant at least one opportunity "to correct facially deficient postconviction claims." *Koszegi v. State*, 993 So. 2d 133, 134 (Fla. 2d DCA 2008). The district court explained the best procedure for compliance with this Court's decision in *Spera*, as follows: "The postconviction court should have issued a nonfinal order ***striking grounds one, two, and four*** of the motion with leave to amend within a reasonable period." *Id.* (emphasis supplied). Notably, the order would not address ground three, which had been addressed on the merits. *See id.* "If [the defendant] does not amend his motion, the court may enter a final order that is a disposition on the merits of ***all claims***. If he files an amendment, the court should consider the amended claims and rule on them in the final order." *Id.* (emphasis supplied).

Finally, in *Trujillo* the Second District affirmed the trial court's denial of one claim on the merits, but it reversed the dismissal of the other claim because the

trial court should have allowed the defendant an opportunity to amend his facially insufficient claim. *See Trujillo v. State*, 991 So. 2d 1006, 1007 (Fla. 2d DCA 2008). It remanded "with instructions to strike the [facially insufficient] claim, with leave to amend within a specific, reasonable amount of time." Again, the Second District makes a distinction between how facially sufficient and facially insufficient claims in the same motion should be handled in order to comply with *Spera*. *See also 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.").

Despite the State's suggestion to the contrary, the Second District's approach does not conflict with this Court's holding in *Spera*. (*See* AB 11 n.8, 13-14). *Spera* only addressed a situation where the entire motion "is determined to be legally insufficient for failure to meet either the rule's or other pleading requirements" and the movant had "***wholly*** fail[ed] to present sufficient facts as to ***any*** aspect of a claim of prejudice…." *Spera v. State*, 923 So. 2d 543, 544, 545 (Fla. 4th DCA 2006) (en banc) (emphasis in original); *Spera*, 971 So. 2d at 761. As the State acknowledges, in *Spera* the "collateral court was presented with a legally insufficient motion, rather than a mixed motion," so it did not have to "determine what a collateral court should do in the face of a mixed motion." (AB

23, 24). Of course, where the whole motion is facially insufficient, though, "the proper procedure is to strike the motion with leave to amend within a reasonable period." *Spera*, 971 So. 2d at 761.

Notably, this Court suggested a distinction between a wholly insufficient motion and one that is partially insufficient—A trial court receiving a rule 3.850 motion must first review it for facial sufficiency and "[o]nly after the trial court deems the motion ***(or the particular claims within it)*** facially sufficient does it review the record for evidence refuting the claim." *Spera*, 971 So. 2d at 758 (emphasis supplied).

All *Spera* did, then, ***as a matter of due process***, was to "allow all defendants an opportunity to amend facially insufficient postconviction claims" that otherwise would be precluded from filing by amendment because the two-year deadline had run by the time the insufficient claim had been dismissed. *Id.* at 761. There was no indication by this Court that it was altering the essentials of the process set out in *Jacobs* (and implicitly acknowledged in the highlighted *Spera* language quoted above)—the intent of which was to ensure consideration of all rule 3.850 claims on the merits.

The First District's decision here instead approved a procedure that applies *Spera* in a way that permits a trial court to avoid merits consideration of any timely filed, facially sufficient claim and to avoid appellate review facial insufficiency

determinations, provided the defendant chooses not to amend. Within the four corners of that decision, the First District admits that Mr. Boudreaux did file a timely rule 3.850 motion that was only partially insufficient, *i.e.*, two claims out of eleven.[2] Applying *Spera* the First District noted that Mr. Boudreaux was entitled to have a "reasonable opportunity to amend insufficient claims." By the time Mr. Boudreaux had filed his amended motion, though, "both the two-year window for rule 3.850 motions and the 60-day period given to amend his motion had passed." According to the First District, then, his amended motion was "untimely filed" and it affirmed "the order dismissing [his] motion for postconviction relief and amended motion for postconviction relief."

The procedure approved by the First District in this case for compliance with *Spera* fails to require entry of a final order once the amendment period is closed, unlike what the Second District requires when a "mixed motion" is involved. The First District, then, necessarily allowed the nonfinal order striking Mr. Boudreaux's timely, facially sufficient claims in the original motion to finally dispose of those claims without reaching their merits, contrary to the thrust of *Jacobs*. The district court approved a procedure that misapplies *Spera* and conflicts directly with the procedure followed by the Second District. There is conflict and jurisdiction, and the Court should quash the First District decision and

[2] According to the supplemental record, the original motion only asserted seven claims. The difference is of no moment to this review.

follow the procedures set out in detail by the Second District. *See Knowles v. State*, 848 So. 2d 1055, 1056, 1058-59 (Fla. 2003) (finding conflict jurisdiction to clarify misapplication of this Court's holding based on misunderstanding of parenthetical); *Robertson v. State*, 829 So. 2d 901, 904 (Fla. 2002) (noting that misapplication of holding of this Court provides a basis for conflict).

II. CONTRARY TO THE STATE'S CONTENTIONS, MR. BOUDREAUX HAS NOT WAIVED ANY ARGUMENTS FOR REVIEW BY FAILING TO BRIEF THEM TO THE FIRST DISTRICT.

The State, having conceded that error occurred in the review of Mr. Boudreaux's timely filed, facially sufficient claims (*See* AB at 22), nonetheless seeks to avoid having this Court remand Mr. Boudreaux's case for proper evaluation by contending that Mr. Boudreaux's various arguments have been waived. According to the State, Mr. Boudreaux waived review of his timely, sufficient claims by not raising before the First District the arguments that he now raises before this Court. (AB at 17). This includes not arguing to the First District that: (1) the collateral court erred in striking the original timely motion in its entirety; (2) the collateral court erred in failing to apply the relation back doctrine; and (3) the collateral court erred in failing to consider the sufficiently pled claims. (AB at 18-22). The State is incorrect. Mr. Boudreaux has not waived anything.

If the State's position is extrapolated to its conclusion, it becomes evident that it is illogical. As explained in Mr. Boudreaux's initial brief, under Florida

Appellate Rule 9.141(b)(2)(C), Mr. Boudreaux did not need to file any brief with the First District to obtain a ***complete*** review of his appeal. Mr. Boudreaux, of course, cannot obtain any review before this Court without filing a merit brief. Thus, if Boudreaux had not filed anything with the First District, but then filed his identical brief with this Court upon the grant of this Court's discretionary review, there could be no waiver. Yet, because Mr. Boudreaux attempted to explain to the First District—in a succinct two-page brief—why he believed his motion was improperly dismissed as untimely, (*In. Br.* in 2D10-2367), the State now contends waiver. This is an improper attempt to use Mr. Boudreaux's optional brief to his disadvantage.

Because it is an illogical position, the State can provide no applicable legal support for its position. All of the cases relied upon by the State are readily distinguishable. Likewise, the State's attempt to overcome Mr. Boudreaux's argument of no waiver by attempting to distinguish the applicable case of *Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995), fails.

The State begins its waiver argument under its first point in its answer brief by relying on this Court's decision in *Shere v. State*, 742 So. 2d 215 (Fla. 1999), for the proposition that "this Court has consistently held that the failure to present an argument on appeal waives appellate review." (AB at 17). *Shere*, however, is completely inapplicable to the instant case. In *Shere*, the petitioner failed to

present any arguments—beyond a heading—***in his brief to the Supreme Court*** as to why the trial court erred in summarily denying 19 of his 23 claims. *See id.* at 218 & n.6. The State does not allege here that Mr. Boudreaux has not properly briefed his arguments before this Court. Rather, the State argues that Mr. Boudreaux did not properly brief his arguments before the First District, where he was not required to brief anything at all. Moreover, in *Shere*, an evidentiary hearing was held on certain claims. Therefore, briefing before the District Court was mandatory under the appellate rules. *See* Fla. R. App. P. 9.141(b)(3)(C).

The State further attempts to derive support for its waiver argument in its first point from *Watson v. State*, 975 So. 2d 572 (Fla. 1st DCA 2008), based on the First District's reliance on this Court's statements in *Cooper v. State*, 856 So. 2d 969, 977 n.7 (Fla. 2003) and *Marshall v. State*, 854 So. 2d 1235, 1252 (Fla. 2003). The proposition for which *Marshall* is cited, however, derives its support from *Shere*. *See* 854 So. 2d at 1252. Also, like *Shere*, *Marshall* is a case in which an evidentiary hearing was held on certain claims. *See* 854 So. 2d at 1239. The language in *Cooper* likewise suggests that some claims were denied after an evidentiary hearing while others were summarily denied. *See* 856 So. 2d at 977. Thus, for the same reasons that *Shere* is distinguishable, so are *Cooper* and *Marshall*.

Cooper is further distinguishable from the instant case because it relies on *Duest v. Dugger*, 555 So. 2d 849, 852 (Fla. 1990). *See* 856 So. 2d at 977 n.7. The sufficiently pled claims in *Cooper* that were summarily denied were denied ***on their merits.*** As this Court held in *Parker v. Dugger*, the waiver principles of *Duest* do not apply when the trial court summarily denies postconviction claims on procedural grounds without reaching their merits. *See* 660 So. 2d at 1388-89.

Finally, the State's attempt in its second point to distinguish the instant case from *Parker v. Dugger*, 660 So. 2d 1386 (Fla. 1995) is inapposite. The basic issue in both this case and in *Parker* is that the trial court summarily denied all claims on procedural grounds without conducting a substantive review of facially sufficient claims. In *Parker*, this Court held that claims that are raised in a postconviction relief motion are not waived where the trial court bases its denial solely on procedural grounds. *Id.* at 1389. In such a situation, the trial court must conduct an evaluation of the claims on their merits.

Under *Parker* and Florida Appellate Rule 9.141(b)(2)(c), Mr. Boudreaux could not—and did not—waive any argument concerning the review of his facially sufficient claims. Boudreaux, like Parker, put forth arguments on appeal to the First District relating solely to the procedural denial of review. (*In. Br.* in 2D10-2367). As the State concedes, Mr. Boudreaux could not have argued the substantive merits of these claims to the First District, as the trial court never made

a substantive ruling. (AB at 21). Boudreaux did make a procedural argument, in a situation in which he did not need to make any argument, and as such did not waive the argument that the trial court procedurally erred in failing to consider his timely, sufficient claims. This case falls squarely under *Parker*, and the State's waiver arguments simply do not apply.

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 facially sufficient claims asserted by Mr. Boudreaux in his original rule 3.850 motion on their merits, and include its ruling in one final order that incorporates its denial of the two facially insufficient claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this sixth day of September, 2011, a true copy of the foregoing brief has 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, **Mr. Boudreaux**, 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 Florida Appellate Rule 9.210(a)(2).

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