IN THE SUPREME COURT OF FLORIDA

ANTHONY FARINA, JR.,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. SC15-1697

RESPONSE TO PETITION SEEKING REVIEW OF NONFINAL ORDER

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PRELIMINARY STATEMENT

This case presents a Petition Seeking Review of a Nonfinal Order (hereinafter "Petition"). The order for which Petitioner seeks review dismissed Petitioner's Successive Rule 3.851 Motion to Vacate Judgment of Conviction and Sentences (hereinafter "Motion"). Circuit Court Judge Margaret W. Hudson in and for the Seventh Judicial Circuit, Volusia County, Florida rendered the Order Dismissing Defendant's Successive Rule 3.851 Motion to Vacate Judgment of Conviction and Sentences as Premature (hereinafter "Order"). This Response will refer to Petitioner as such, Defendant, or by proper name, e.g., "Farina." Respondent, the State of Florida, was the prosecution below. This brief will refer to Respondent as such, the prosecution, or the State.

Unless indicated otherwise, bold-typeface emphasis is supplied. Cases cited in the text of this brief and not within quotations are italicized. Other emphases are contained within the original quotations.

STATEMENT REGARDING JURISDICTION

Petitioner is seeking this Court's review of a nonfinal Circuit Court Order that dismissed without prejudice Petitioner's Motion to Vacate Judgment of Convictions and Sentences. At all times relevant to the instant action, Petitioner has stood convicted of a capital offense but not as a death-sentenced defendant because his previously-imposed death sentence was vacated by the Eleventh

Circuit Court of Appeals and his new penalty phase remains pending. Because Petitioner is not appealing a final order from a court that has imposed a death sentence, Petitioner contends this Court has original jurisdiction pursuant to *Fla.R.App.P* 9.030(a)(3). However, under the circumstances of the instant case, this Court's jurisdiction is discretionary:

> Although we have original jurisdiction to issue writs of habeas corpus, prohibition, mandamus, and quo warranto, our jurisdiction is discretionary. *See* art. V, § 3(b)(7),(8), (9), Fla. Const. Our jurisdiction is also concurrent with the jurisdiction of the district courts of appeal and the circuit courts. *See* art. V, §§ 4(b)(3), 5(b); *see generally State ex rel. Scaldeferri v. Sandstrom,* 285 So.2d 409, 411 (Fla.1973).

Harvard v. Singletary, 733 So. 2d 1020, 1021 (Fla. 1999).

In *Harvard*, this Court explained the factors it considers when determining whether to exercise its original jurisdiction:

> we will likewise decline jurisdiction and transfer or dismiss writ petitions which, like the present one, raise substantial issues of fact or present individualized issues that do not require immediate resolution by *this* Court, or are not the type of case in which an opinion from this Court would provide important guiding principles for the other courts of this State. If, however, we are able to determine on the face of the petition that the claim is successive or procedurally barred, we will continue our practice of denying those petitions.

Harvard v. Singletary, 733 So. 2d at 1022. (emphasis in original). Respondent acknowledges that the instant Petition seeking review of the lower court's dismissal without prejudice of Respondent's Motion does not raise substantial issues of fact, but respectfully contend the issue presented does not need immediate

resolution from this Court because the Order Petitioner seeks to overturn grants Petitioner the right to re-file his Motion once he has been sentenced. At that time, Petitioner's procedural options to pursue his postconviction claims will be apparent and will remain available to him. Respondent otherwise defers to this Court's findings as to whether it should exercise jurisdiction to provide guiding principles for other courts of the State regarding the procedures to be followed when a defendant who has been convicted of a capital offense presents postconviction claims at a time when said defendant is awaiting penalty phase proceedings and has not yet received a death or a life sentence.

FACTUAL AND PROCEDURAL HISTORY

The Honorable Circuit Court Judge Blount of the Seventh Judicial Circuit, in and for Volusia County, Florida, entered Petitioner's judgment for first-degree murder and Petitioner's judgments and consecutive life sentences for armed robbery, burglary, conspiracy to commit murder, and three counts of attempted first-degree murder on December 16, 1992. On direct appeal, this Court affirmed Petitioner's convictions but set aside his death sentence because the trial court had erroneously excused a prospective juror for cause. *See Farina (Anthony) v. State*, 679 So. 2d 1151, 1157 (Fla. 1996) (*Farina I*). This Court also vacated the death sentence of Petitioner's co-defendant and brother, Jeffrey Farina and remanded the

Farina brothers' respective cases for new sentencing proceedings. *See Farina (Jeffrey) v. State,* 680 So. 2d 392, 396–99 (Fla. 1996).

On remand, the Farina brothers were again sentenced to death and both defendants subsequently appealed to this Court. This Court vacated Jeffrey Farina's death sentence and imposed a life sentence on the basis of *Brennan v. State,* 754 So. 2d 1 (Fla. 1999). *See Farina (Jeffery) v. State,* 763 So. 2d 302 (Fla. 2000). However, this Court denied Petitioner's appeal and affirmed his death sentence. *Farina v. State,* 801 So.2d 44 (2001).

On April 3, 2003, Petitioner filed a motion to vacate his convictions and sentences pursuant to Rule 3.851. The trial court denied Petitioner's motion. Petitioner next appealed the trial court's denial of the 3.851 motion and filed a petition for state habeas corpus relief alleging ineffective assistance of counsel. Upon review, this Court denied Petitioner's appeal and habeas petition. *See Farina v. State,* 937 So. 2d 612 (Fla. 2006).

Petitioner subsequently filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. The federal district court denied Petitioner's petition for writ of habeas corpus and Petitioner appealed to the United States Court of Appeals for the Eleventh Circuit. Upon review, the Eleventh Circuit granted Petitioner's habeas corpus petition concluding that the prosecutor's injection of religious authority during argument diminished the jury's

sense of responsibility in a way that undermined the reliability of its death recommendation and counsel's failure to raise the prosecutorial misconduct claim fell below the standard of competence required by the Constitution. *Farina v. Sec'y, Fla. Dep't of Corr.*, 536 F. App'x 966, 968, 984 (11th Cir. 2013). The Eleventh Circuit set aside Petitioner's death sentence and remanded Petitioner's case to the trial court for a new penalty phase. *Id*. at 985. The State filed a petition for writ of *certiorari* and the Supreme Court denied the State's petition. *See Crews v. Farina*, 135 S. Ct. 475 (Nov. 10, 2014). Petitioner's penalty phase is currently pending before the trial court where the State continues to seek a death sentence.

In January 31, 2014, Capital Collateral Regional Counsel moved to withdraw after Petitioner was granted a new Penalty Phase, and Attorney Garry Wood was appointed to represent Petitioner. Petitioner subsequently moved to allow the appearance of co-counsel and on May 6, 2014, the trial court granted Petitioner's motion, and on May 15, 2014, attorney Marie-Louse Samuels Parmer appeared as co-counsel. On May 11, 2015, Petitioner, through said counsel, filed a Successive Motion to Vacate Judgment of Conviction and Sentences ("Motion"). Petitioner's Motion is attached as Exhibit C of the Appendix to the instant Petition.

Petitioner's Motion claims that he has newly discovered evidence that would show that Juror Campbell worked as a survey crew chief for Sliger and Associates and failed to disclose that Sliger and Associates had made financial and in-kind

contributions to prosecutor John Tanner's campaigns in the past. Petitioner's Motion claimed that Mr. Campbell's and Mr. Tanner's failure to disclose this alleged political relationship violated Petitioner's due process and other rights.

On July 1, 2015, the trial court summarily dismissed Petitioner's Motion without prejudice as premature granting Petitioner leave to re-file his newly discovered evidence claim once his sentences become final. The trial court's Order is attached as Exhibit A of the Appendix to the instant Petition. Petitioner filed a timely Motion for Rehearing and the trial court denied rehearing on August 13, 2015. The Order denying Petitioner's motion for rehearing is attached as Exhibit B of the Appendix to the instant Petition. The instant Petition followed.

ARGUMENT

Respondent agrees with Petitioner's statement regarding the applicable standard of review. In order for Petitioner to obtain relief, Petitioner must demonstrate that the trial court departed from the essential requirements of the law and that such created a material injury for which there is no adequate remedy on appeal. *See Petition* at 9 (citing *Trepal v. State*, 754 So. 2d 702, 707 (Fla. 2000); Fl. R. App. P. 9.412(3)(F)). Petitioner contends the trial court's Order "is a departure from the essential requirements of the law as it renders Mr. Farina's rights under 3.851 meaningless." *Petition* at 10. However, Farina's argument seeks support from a procedural rule that is not available to him and case law that

is clearly distinguishable based upon the same undeniable fact: Petitioner is not a death-sentenced defendant whose death sentence has been affirmed on direct appeal. And this fact is by no means trivial. It is the sole fact that distinguishes the procedures set forth in *Fla.R.Crim.P*. 3.850 from those set forth in *Fla.R.Crim.P*. 3.851:

> Rule 3.851. Collateral Relief After Death Sentence has Been Imposed and Affirmed on Direct Appeal
>
> (a) Scope. **This rule shall apply to all postconviction proceedings that commence upon issuance of the appellate mandate affirming the death sentence to include all motions and petitions for any type of postconviction or collateral relief brought by a defendant in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal**. It shall apply to all postconviction motions filed on or after January 1, 2015, by defendants who are under sentence of death.

Fla. R. Crim. P. 3.851 (emphasis added).

Despite this indisputable fact, Petitioner nonetheless asks this Court to apply the provisions set forth in Rule 3.851 to his postconviction Motion. For instance, Petitioner asks this Court to find that the trial court below erred by ruling on his Motion without requiring the State to respond and without conducting a case management conference as required by Rule 3.851. *Petition* at 12. Petitioner even asks this Court to avail the procedures set forth in Rule 3.851 to his non-capital offenses arguing, "[b]ecause Mr. Farina does not face resentencing for these additional [non-capital] convictions, these convictions are "final" for purposes of a

successive post-conviction motion. Mr. Farina's challenges to these convictions were thus timely presented under Rule 3.851 and should be addressed now." *See Petition* at 16. However, since Rule 3.851 by its clear terms does not apply to Petitioner whatsoever, and because Farina alternatively filed his Motion pursuant to Rule 3.850,[1] the trial court was required to apply Rule 3.850 to his Motion and therefore had the proper authority to summarily deny Petitioner's Motion pursuant to Rule 3.850.

While Rule 3.851 does strictly require a response from the State and case management conference, as the following excerpt explains, Rule 3.850 does not require a response from the State or a case management hearing if the motion, files, and records in the case show that defendant is entitled to no relief:

> (f) Procedure; Evidentiary Hearing; Disposition. On filing of a motion under this rule, the clerk shall forward the motion and file to the court. Disposition of the motion shall be in accordance with the following procedures, which are intended to result in a single, final, appealable order that disposes of all claims raised in the motion.
>
> (1) *Untimely and Insufficient Motions.* **If the motion is insufficient on its face**, and the time to file a motion under this rule has expired prior to the filing of the motion, **the court shall enter a final appealable order summarily denying the motion with prejudice**.
> . . .
> (6) *Motions Requiring a Response from the State Attorney.* **Unless the motion, files, and records in the case conclusively show that the defendant is entitled to no relief, the court shall order the state**

[1] *See Motion* at 7, FN1.

> **attorney to file, within the time fixed by the court, an answer to the motion. . .**

Fla.R.Crim.P 3.850.

Not only was the trial court well within its procedural authority to summarily deny Petitioner's Motion, it was also correct in finding that his Motion was premature as a matter of the law and the record. As the trial court noted:

> Rule 3.851 applies "to all postconviction proceedings that commence upon the issuance of the appellate mandate affirming that death sentence to include all motions and petitions for any type of postconviction or collateral relief brought by a defendant in state custody who has been sentenced to death and whose conviction and death sentence have been affirmed on direct appeal." *Fla.R.Crim.P.* 3.851(a). A motion for postconviction relief under rule 3.851 **must be filed** within one (1) year **after the date the judgment and sentence become final**. *Fla.R.Crim*.P. 3.851(d)(1); *Mills v. State*, 84 So. 2d 801 (Fla.1996). **Similarly, implicit in a Rule 3.850 motion is the requirement that the judgment and sentence be final prior to the motion being filed.** *Brigham v. State*, 950 So. 2d 1274, 1275 (Fla 2d DCA 2007); see also *Haber v. State*, 961 So.2d 1098, 1099 (Fla.2d DCA 2007) ("Because Mr. Haber's judgment and sentence apparently never became final, Mr. Haber's rule 3.850 motion was premature.")

Order Dismissing Successive Motion to Vacate at 3, Exhibit A, Appendix to Petition (emphasis added). Furthermore, because the trial court dismissed Petitioner's Motion with leave to amend within thirty days of his capital conviction and sentence becoming final, Petitioner has not been injured whatsoever, let alone materially. Petitioner can re-file his Motion as long as he complies with the time restraints set forth in the trial court's Order.

Petitioner compares his situation with that of death-sentenced defendants who have obtained interlocutory review during postconviction proceedings, but the cases he cites in support of his claim are clearly distinguishable. The State agrees that this Court has historically granted interlocutory review to death-sentenced defendants:

> The current practice for this Court is to occasionally grant review of interlocutory orders in cases involving death-sentenced defendants, but we have been less than precise in defining our authority to grant such review. Our authority to review imposition of the death sentence speaks in terms of final orders and judgments: The Court "[s]hall hear appeals from final judgments of trial courts imposing the death penalty." Art. V, § (3)(b) 1, Fla. Const.; *Fla. R.App. P.* 9.030(a)(1)(A)(i) (this Court shall review "final orders" of courts imposing the death sentence); *see* Philip J. Padovano, *Florida Appellate Practice* § 3.2, at 46–47 (2d ed.1997). However, this Court in fact reviews interlocutory discovery orders in capital collateral proceedings. *See Sims v. State*, 750 So.2d 622, 623 n. 3 (Fla.1999)("Following the signing of the warrant ... [t]he trial court denied Sims' motion to compel production of public records, which this Court affirmed by order ...."), *cert. denied*, 528 U.S. 1183, 120 S.Ct. 1233, 145 L.Ed.2d 1122 (2000); *Fourth Dist. Court of Appeal*, 697 So.2d at 71; *see also Lewis*, 656 So.2d at 1249 (under section 3(b)(1) this Court reviewed two nonfinal orders, from different trial courts, that denied the State's respective motions to quash witness subpoenas issued to trial court judges); *LeCroy v. State*, 641 So.2d 853, 853 (Fla.1994)("We have before us an interlocutory appeal of a disclosure order in a post-conviction capital proceeding under Florida Rule of Criminal Procedure 3.850. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const."); *State v. Kokal*, 562 So.2d 324, 325 (Fla.1990)(this Court reviewed a discovery order under section 3(b)(1) that had been issued by a trial court hearing a postconviction claim, where the defendant had been sentenced to death).

Trepal v. State, 754 So. 2d 702, 705-06 (Fla. 2000). However, this Court also

clearly limited its review of interlocutory orders to those of death-sentenced defendants pursuing postconviction proceedings. *See Trepal v. State*, 754 So. 2d at 707 ("**We emphasize that our review of interlocutory orders is limited to postconviction proceedings following imposition of the death penalty**.") (emphasis added).

Furthermore, a review of the applicability of other facets of Rule 3.851 and Rule 3.850 to the facts of this case reveals another defect in the filing of Petitioner's Motion and his appellate claim of trial court error. Publicly-afforded counsel represented Petitioner with regard to the preparation of the instant Motion and continues to represent Petitioner with regard to the instant appellate action. However, the court below appointed said counsel for the purpose of preparing for and conducting Petitioner's future penalty phase proceedings, which is different than these proceedings. This distinction may seem trivial, but its importance becomes apparent when considering the fact that Petitioner was not entitled to an automatic appointment of publicly-funded counsel for the purpose of pursuing the matters currently pending before this Court.

Rule 3.851 clearly provides death-sentenced defendants an automatic right to postconviction counsel pursuant to the following procedures:

> (b) Appointment of Postconviction Counsel.
> (1) Upon the issuance of the mandate affirming a judgment and sentence of death on direct appeal, the Supreme Court of Florida shall

> at the same time issue an order appointing the appropriate office of the Capital Collateral Regional Counsel or directing the trial court to immediately appoint counsel from the Registry of Attorneys maintained by the Justice Administrative Commission. The name of Registry Counsel shall be filed with the Supreme Court of Florida. . . .
> (4) In every capital postconviction case, one lawyer shall be designated as lead counsel for the defendant. The lead counsel shall be the defendant's primary lawyer in all state court litigation. No lead counsel shall be permitted to appear for a limited purpose on behalf of a defendant in a capital postconviction proceeding.
> (5) After the filing of a notice of appearance, Capital Collateral Regional Counsel, Registry Counsel, or a private attorney shall represent the defendant in the state courts until a judge allows withdrawal or until the sentence is reversed, reduced, or carried out, regardless of whether another attorney represents the defendant in a federal court.
> (6) A defendant who has been sentenced to death may not represent himself or herself in a capital postconviction proceeding in state court. The only bases for a defendant to seek to dismiss postconviction counsel in state court shall be pursuant to statute due to actual conflict or subdivision (i) of this rule.

Fla. R. Crim. P. 3.851. However, as argued *supra,* Petitioner is not death-sentenced and the provision allowing for the automatic appointment of counsel pursuant to Rule 3.851 does not apply to him. The Fourth District recently summarized Federal and Florida law regarding the right to publicly funded postconviction counsel for non death-sentenced defendants as follows:

> A motion for postconviction relief under Rule 3.850 is a civil proceeding challenging a conviction and sentence. *State ex rel. Butterworth v. Kenny*, 714 So.2d 404, 409–10 (Fla. 1998). Postconviction challenges are quasi-criminal in nature because they are brought in courts with criminal jurisdiction. *Id.* A postconviction

> movant, however, does not have the same panoply of constitutional rights which are afforded to a defendant in a criminal prosecution. Neither the Fifth nor the Sixth Amendment rights of a criminal defendant apply in postconviction relief proceedings. *Arbelaez v. State*, 898 So. 2d 25, 42 (Fla. 2005). *See also Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987) (holding that prisoner has no federal constitutional due process or equal protection right to counsel in postconviction proceedings); *Mayolo v. State*, 714 So.2d 1124, 1124 (Fla. 4th DCA 1998) (recognizing that a postconviction movant has no Sixth Amendment right to appointed counsel).

Jones v. State, 69 So. 3d 329, 333-34 (Fla. 4th DCA 2011).

Pursuant to Rule 3.850, the appointment of counsel for the purpose of pursuing the instant successive postconviction claims was subject to the discretion of the trial court as governed by the following procedures set forth in Rule 3.850:

> (7) *Appointment of Counsel.* The court may appoint counsel to represent the defendant under this rule. The factors to be considered by the court in making this determination include: the adversary nature of the proceeding, the complexity of the proceeding, the complexity of the claims presented, the defendant's apparent level of intelligence and education, the need for an evidentiary hearing, and the need for substantial legal research.

Fla. R. Crim. P. 3.850. None of these factors appear to have been considered by the trial court prior to counsel's litigation of the instant successive postconviction claim. While counsel's incorrect assumption that authority existed to represent Petitioner for the purpose of filing a Rule 3.850 motion for postconviction relief may be understandable, such is the type of error that is less likely to occur when postconviction claims are not filed prematurely and the appropriate procedural

rules a postconviction movant should follow are more easily discernible. Furthermore, the State's intent to seek a potential death sentence against Farina in the future does not minimize the importance of following proper postconviction procedures. Neither the State, the trial court, nor this Court are in the position to presume Petitioner will become a death-sentenced defendant and Petitioner submits no authority to support his reliance upon the application of Rule 3.851 via speculation.

The trial court's Order applied the clear language of the relevant procedural rules while creating no prejudice to Petitioner. By dismissing Petitioner's Motion with leave to re-file, the trial court enforced the rule of procedural law and protected Petitioner from any time-bar issues concerning his alleged newly discovered evidence by granting Petitioner leave to refile his claim once his sentence becomes final. Rule 3.850 and Rule 3.851 differ due to important public policy considerations concerning death-sentenced defendants. The additional considerations afforded to death-sentenced defendants come at a cost to society, which is why it is so imperative that procedural rules be followed and that consideration of ripeness and mootness be observed.

Furthermore, while Petitioner will ultimately have an opportunity to argue the merits of his newly discovered evidence claim before the trial court, Respondent notes in response to Petitioner's merit argument that the newly discovered

evidence he alleges does not appear to present a compelling case to overturn his convictions of guilt. The anonymous letter is clearly inadmissible hearsay and the results of the investigation that ensued as a result of the letter merely established that Juror Campbell was an employee of a company that had contributed to Mr. Tanner's campaign for State Attorney in the past. As Petitioner concedes:

> To obtain a new trial based on lack of candor during *voir dire*, "a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire,* and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." *McDonough Power Equip.*, 464 U.S. at 556.

Petition at 17. Petitioner's newly discovered evidence claim fails to meet this standard.

Petitioner's Motion does not allege any facts that would support a finding that Juror Campbell knew Mr. Tanner or had personally contributed to Mr. Tanner's campaigns. Petitioner's Motion is based wholly upon a naked assumption that Mr. Campbell would know or would even care to know about the political affiliations of his employer. Mr. Campbell's employment as a crew chief was not an administrative management position. He was the chief of a survey crew that generally consists of two other employees: an "instrument man" and a "rod man." And even if Mr. Campbell did have administrative management duties, such would

not impute knowledge upon him of his employer's political affiliations, and Petitioner fails to present any authority that would support such a finding.

CONCLUSION

Based on the foregoing, the State respectfully requests this Court to deny the Petition and affirm the trial court's Order dismissing Petitioner's Motion without prejudice. In light of the circumstances of this case, Petitioner has not only failed to establish that the trial court below departed from the essential requirements of the law, but has also failed to demonstrate any material injury because he remains fully capable of presenting his newly discovered evidence claim once his conviction and sentence become final. The trial court's Order protects both the Petitioner and the rule of procedural law because once Petitioner's conviction and sentence become final, Petitioner, the trial court, and defense counsel will be able to properly identify the appropriate postconviction procedures to follow. The trial court's Order promotes the fair and efficient administration of justice and should accordingly be affirmed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 29, 2015, a copy of the foregoing Response has been served using the Florida Courts e-filing portal on Garry Wood, Esquire, garrywood2011@hotmail.com, 417 St. Johns Avenue, Palatka, FL 32177, and Marie-Louise Samuels Parmer, Esquire, marie@samuelsparmerlaw.com, P.O.

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CERTIFICATE OF COMPLIANCE

I certify that this brief was computer generated using Times New Roman 14 point font.

Respectfully submitted and certified,

PAMELA JO BONDI
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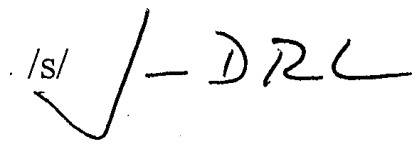

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