27

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA

VS.

CASE NO: 2001-00455 CFFA
2001-00456 CFFA
2001-00457 CFFA
2001-00458 CFFA
2001-00469 CFFA
2001-00471 CFFA

LAWRENCE WILLIAM MORTON,
DEFENDANT.
_____/

STATE'S RESPONSE TO DEFENDANT'S SECOND MOTION FOR POST-CONVICTION RELIEF

COMES NOW the State of Florida, by and through its undersigned counsel, and hereby responds as directed by this Honorable Court to the Defendant's second motion for post-conviction relief, filed through counsel pursuant to Rule 3.850, Florida Rules of Criminal Procedure. The State moves that the motion be summarily denied or, alternatively, that any claim not summarily denied be set for an evidentiary hearing and in support would show:

1. That Morton entered negotiated pleas in these six cases on March 28, 2003, prior to the conclusion of the hearing on the State's motion to admit similar fact evidence at Morton's anticipated trial and was sentenced on the same date. After Morton entered his plea and was sentenced pursuant to the negotiated plea agreement he did not elect to pursue a direct appeal. Morton's convictions and sentences thus became final thirty days after rendition. He thus had until April 28, 2005 to file a motion for post-conviction relief pursuant to Rule 3.850. Because this writer was not been able to obtain access to the Flagler County court files since these cases were transferred to the Court in Volusia County, it was

unknown what date the clerk of court actually received the Rule 3.850 motion to determine whether it was timely filed. Because Morton is represented by counsel, he is not entitled to the benefit of the "mailbox rule". *Joseph v. State*, 835 So.2d 1221, 1222 (Fla. 5th DCA 2003). Morton claims that he filed his first Rule 3.850 motion on April 22, 2005. The State did not concede that Morton's first Rule 3.850 motion was timely filed.

2. The State responded to Morton's first Rule 3.850 motion in June 2005 by asserting that that both of Morton's claims of ineffective assistance by trial counsel were facially insufficient because he did not allege in either one that he would have refused the "package deal" plea offer and would have insisted upon trials in all six cases but for trial counsel's alleged ineffectiveness. *Hoggs v. State,* 857 So.2d 358, 359 (Fla. 5th DCA 2003), citing *Hill v. Lockhart,* 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) and *Harris v. State*, 801 So.2d 973 (Fla. 2d DCA 2001). Morton's first Rule 3.850 motion did not seek to set aside his pleas, only his sentences. The State moved for summary denial of the entire motion on this basis. The trial court did summarily deny Morton's first Rule 3.850 motion in a written Order issued July 20, 2005. See Exhibit "A", attached hereto and incorporated by reference herein. Morton acknowledged this fact in his motion for the Court to re-issue the Order filed June 21, 2006. See Exhibit "B", attached hereto and incorporated by reference herein. Morton appealed the denial of his first Rule 3.850 motion, which was *per curiam* affirmed. Mandate issued on April 20, 2007. Morton sought to recall the mandate in the district court of appeal, arguing that the trial court erred in summarily denying his first Rule 3.850 motion without first affording him an opportunity to amend his post-conviction claims to cure any facial deficiencies. See Exhibit "C", Motion to Recall Mandate, attached hereto and incorporated by reference herein. The appellate court denied the motion to recall mandate. See Exhibit "D", attached hereto and incorporated by reference herein.

3. Based upon the Fifth District Court of Appeal's denial of Morton's motion to recall mandate in his Rule 3.850 appeal, the State submits that it is obvious that the appellate court squarely rejected Morton's attempt to somehow get his cases accepted into the "pipeline" recognized by the Fifth District Court of Appeal in *Pierre v. State*, 973 So.2d

547 (Fla. 5th DCA 2008). Morton's Rule 3.850 appeal was final and the mandate had issued months prior to the Florida Supreme Court's decision in November 2007 in *Spera v. State*, 971 So.2d 754 (Fla. 2007). Thus, *Spera* and *Pierre* are clearly inapplicable to permit Morton to avoid the time and procedural bars that would otherwise normally apply to prevent him from litigating a successive and untimely post-conviction motion.

4. Accordingly, the State submits that Morton's second Rule 3.850 motion is untimely and improperly successive and moves that it be summarily denied on that basis.

5. If this Court does not summarily deny Morton's second Rule 3.850 motion, the State requests that both claims be set for an evidentiary hearing. The undersigned has interviewed Morton's trial counsel, Michael H. Lambert, Esquire. Based on the information provided by Mr. Lambert, the State expects to show at an evidentiary hearing that his actions at issue in these cases fell within the wide range of reasonable professional assistance and that Morton is not entitled to any relief because he was not deprived of his constitutional right to the effective assistance of trial counsel. Trial counsel's performance is strongly presumed to be effective in Rule 3.850 proceedings. *Duncan v. State,* 894 So.2d 817, 823-4 (Fla. 2004), *rehearing denied.*

WHEREFORE, the State of Florida moves this Honorable Court to summarily deny Morton's second Rule 3.850 motion for post-conviction relief or, alternatively, to set any claim not summarily denied for an evidentiary hearing, for the reasons set forth above.

RESPECTFULLY SUBMITTED
FOR THE STATE ATTORNEY

Rosemary L. Calhoun

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished by mail/delivery to the Honorable Kim C. Hammond, Circuit Court Judge, Kim C. Hammond Judicial Center, 1769 East Moody Boulevard, Bldg. #1, 4th Floor, Bunnell, Florida 32110; and to Bernard F. Daley, Esquire, 901 North Gadsden Street, Tallahassee, Florida 32301, this 29th day of July, 2008.

ROSEMARY L. CALHOUN
ASSISTANT STATE ATTORNEY
Florida Bar No.: 0611700
251 N. Ridgewood Avenue
Daytona Beach, FL 32114
(386) 239-7710

EXHIBIT 'A'

Flagler GC 8/8/05

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

STATE OF FLORIDA

V.

LAWRENCE WILLIAM MORTON
Defendant

CASES: 01-00455-CFFA; 01-00456-CFFA
01-00457-CFFA; 01-00458-CFFA
01-00469-CFFA; 01-00471-CFFA

ORDER DENYING DEFENDANT'S MOTION FOR POST-CONVICTION RELIEF

THIS CAUSE came to be heard by this Court on defendant's motion for post-conviction relief, filed under Fla. R. Crim. P. 3.850, and the Court having considered the motion, the court file, and being otherwise fully advised in the premises, finds as follows:

Statement of the Case and Facts

On September 25, 2001, the State filed informations against defendant in six cases. Each of the cases alleged that defendant engaged in sexual improprieties with minors. The most serious offense was alleged in Case No. 01-00455. There the State accused defendant of sexual battery on a person younger than 12-years old, in violation of Fla. Stat. ch. 794.011(2)(a), a capital felony. The cases were filed in Flagler County but were transferred to Volusia County. The State sought to include similar fact evidence during the trial in Case No. 01-00455. *See* Williams v. State, 110 So. 2d 654 (Fla. 1959). The hearing on the Williams rule evidence commenced on March 24, 2003. After evidence was heard and video taped interviews of the children were submitted to the court, the hearing was continued until the morning of March 28, 2003, for counsel to prepare and present arguments.

Prior to the March 28 hearing, defense counsel and the prosecutor entered plea negotiations. Although both parties presented their arguments concerning the Williams rule testimony, the judge deferred ruling on the issue until after lunch so that the prosecutor would have the opportunity to discuss the sentencing offer with the parents of the victims in each of the cases. When court reconvened in the afternoon, the State

~~the victims in each of the cases. When court reconvened in the afternoon, the State~~ announced that a plea agreement had been reached and that the parents of the victims had consented to the terms.

Thereafter, the court conducted a lengthy conversation with counsel and defendant, during which defendant stated that he understood the consequences of pleading to the charges and his willingness to proceed. The parties stipulated to the factual bases for the pleas, and defendant pleaded no contest to the charges in each of the six cases. Thereafter, defendant was sentenced to incarceration with the Department of Corrections, to be followed by sex-offender probation. Further, defendant was found to be a sexual predator. The court did not rule on the admissibility of the Williams rule evidence.

Judgment and sentence were rendered on March 28, 2003. Defendant did not seek a direct appeal. Consequently, the judgment and sentence became final 30 days after rendition. This is defendant's first motion for post-conviction relief. It was timely filed on April 22, 2005. This court has jurisdiction to hear this motion.

Ground for Relief and Legal Analysis

Defendant seeks relief on two grounds, both of which allege ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, defendant must show both that trial counsel's performance was outside the wide range of reasonable professional assistance, and that counsel's deficient performance prejudiced the defense, *i.e.*, there is a reasonable probability that the result of the trial would have been different but for the alleged ineffective assistance. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); Cherry v. State, 659 So. 2d 1069 (Fla. 1995). A claim of ineffective assistance of counsel will warrant an evidentiary hearing only where the movant alleges "specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Roberts v. State, 568 So. 2d 1255, 1259 (Fla. 1990); Fla. R. Crim. P. 3.850(d). Prejudice is demonstrated if the deficiency is sufficient to render the result unreliable. Gorham v. State, 521 So. 2d 1067 (Fla. 1988). *See also* Betts v. State, 792 So. 2d 589 (Fla. 1st DCA 2001). General allegations or mere conclusions are insufficient to demonstrate entitlement

to relief. Flint v. State, 561 So. 2d 1343, 1344 (Fla. 1st DCA 1990); Williams v. State, 553 So. 2d 309 (Fla. 1st DCA 1989). Moreover, "a court considering a claim of ineffectiveness of counsel need not make a specific ruling on the performance component of the test when it is clear that the prejudice component is not satisfied." Kennedy v. State, 547 So. 2d 912, 914 (Fla. 1989) (citing Maxwell v. Wainwright, 490 So. 2d 927 (Fla.), cert. denied, 479 U.S. 972 (1986)); see also Waterhouse, 792 So. 2d at 1182; Downs v. State, 740 So. 2d 506, 518 n. 19 (Fla. 1999).

First, defendant claims defense counsel rendered ineffective assistance at the hearings on the State's Notice of Intent to Introduce Similar Fact Evidence. This claim is based on a lack of notice to the defense concerning the hearing. It is also based on post-conviction counsel's claim that testimony by the parents of the victims and taped interviews of the children by the Child Protection Team were inadmissible.

Issues concerning the admissibility of the Williams rule statements and the notice requirement of the Williams rule hearing are procedurally barred. This is so because defendant decided to plead no contest to the charges against him. In entering the plea, defendant gave up his right to go to trial and to have the State prove its case against him. (Transcript pgs. 66 – 68). Defendant stated during the plea colloquy that he understood that he was giving up that right. Defendant, through counsel, admitted that there was a factual basis for the plea. Because the case was not proceeding to trial, there was no need for the trial court to rule on the admissibility of the Williams rule evidence. The issue was moot.

Whether trial counsel was prepared for the Williams rule hearing is not material since the case never went to trial. Finally, defendant does not now seek to set aside his plea, nor does he claim that but for trial counsel's ineffectiveness, defendant would have insisted on going to trial in all six of the cases. Hoggs v. State, 857 So.2d 358, 359 (Fla. 5th DCA 2003). Thus, this claim is facially insufficient and is summarily denied.

As his second claim, defendant alleges that trial counsel's representation was ineffective because trial counsel had a conflict of interest in that trial counsel had at one time represented the parents of one of the victims. There is no evidence of this alleged conflict in the record before the court, and post-conviction counsel has failed to attach any documentation of this alleged conflict. However, even if such conflict existed,

defendant's claim is facially insufficient in that defendant does not allege that but for trial counsel's deficient representation, defendant would have insisted on going to trial in all six cases. *Id.*

Conclusion

Defendant has failed to allege any grounds upon which relief may be granted. Accordingly it is:

ORDERED AND ADJUDGED that defendant's Motion for Post-Conviction Relief, filed under Fla. R. Crim. P. 3.850, is **DENIED**.

DEFENDANT HAS 30 DAYS WITHIN WHICH TO APPEAL THIS ORDER.

DONE AND ORDERED in Chambers, in Volusia County, Daytona Beach, Florida, this 20 day of July, 2005.

R. MICHAEL HUTCHESON
CIRCUIT COURT JUDGE

CC: Assistant State Attorney Rosemary Calhoun, 251 N. Ridgewood Ave., Daytona Beach FL 32114.

Bernard F. Daley, Esq., Counsel for Defendant, 901 N. Gadsden St., Tallahassee, FL 32303.

BF

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT
OF FLORIDA, IN AND FOR FLAGLER COUNTY

STATE OF FLORIDA,	CASE NOS.: 01-00455-CFFA
	01-00456-CFFA
v.	01-00457-CFFA
	01-00468-CFFA
LAWRENCE WILLIAM MORTON,	01-00469-CFFA
	01-00471-CFFA
Defendant.	

Criminal Justice Center
251 North Ridgewood Avenue
Daytona Beach, Florida
March 28, 2003
10:08 a.m.

ARGUMENT ON SIMILAR-FACT EVIDENCE MOTION
PLEAS AND SENTENCES

TRANSCRIPT OF PROCEEDINGS

The above-styled cause came on for hearing before the Honorable R. Michael Hutcheson, Circuit Court Judge, at the time and place above indicated.

forty-eight hours?

THE DEFENDANT: None.

THE COURT: Are you on any type of prescription medicine, doesn't have to be for mental-health problems, but any type of prescription medicines

THE DEFENDANT: No.

THE COURT: All right. So you feel in your own mind you are sober and competent at this time?

THE DEFENDANT: Yes.

THE COURT: All right, then.

Let me advise you that in this case, but for your plea, you could not be compelled to testify against yourself, would have had the right to remain silent, would have had the right to have a trial by jury to determine your guilt or innocence on each of these six felony cases, and had you chosen to continue forward with trial, you would have had the right to have an attorney represent you at trial on these six cases, would have had the right to confront or face any witnesses who might be testifying against you on any of these six cases had you chosen to go to trial, and would have had the right to call any witnesses, if any, that you might have that could have helped you out had you chosen to go forward to trial on any of these cases, but by entering your plea today, there will not be a trial

in any of these six cases. Understand that?

THE DEFENDANT: Yes.

THE COURT: And I may have already stated this, but had you chosen to go to trial, then the state would have had to convince the jury or juries, if you went to trial on all six cases, that you were in fact guilty beyond and to the exclusion of all reasonable doubt. Do you understand that?

THE DEFENDANT: Yes, sir, I do.

THE COURT: All right.

All right, we've covered the charges against you in each of the six cases, including the one case that had the capital sexual battery that's being reduced down to attempted capital sexual battery, so you feel you understand the charges against you?

THE DEFENDANT: I do.

THE COURT: All right.

Mr. Lambert, the state asked if you would stipulate to a factual basis.

MR. LAMBERT: Judge, I would stipulate and agree that the 798 as well as the videotapes as they relate to the singular allegations contained in the various informations would support a prima facie case, and nothing else as they contain multiple allegations, but as to what is alleged in the information that there is a

prima facie case contained within the 798 and the videotapes, that I have discussed all of these with Mr. Morton and he understands the elements of the offense.

THE COURT: All right. And I don't know, did Mr. Morton have the opportunity to review those videotapes?

THE DEFENDANT: Yes, sir.

MR. LAMBERT: Yes.

THE COURT: Okay.

All right. So you're at least aware of the allegations that the six children made against you.

THE DEFENDANT: I am.

THE COURT: And I will find that the -- again on the record, as I stated earlier today, I did review each of those six Child Protection Team tapes and I am aware of the allegations that each of the six children made against Mr. Morton contained in the six felony informations in front of me and I am aware of the precise charges brought against Mr. Morton in each of the informations and the 798 sworn affidavit, and I will find that the facts alleged in the 798 affidavit as it relates to the charges brought in each of these six cases, and the statements that each of the six children gave to the Child Protection Team in those videotapes I did review, I do find that those facts would establish a factual basis sufficient to justify the plea in these

OFFICE OF THE STATE ATTORNEY

SEVENTH JUDICIAL CIRCUIT OF FLORIDA
VOLUSIA, FLAGLER, PUTNAM & ST. JOHNS COUNTIES

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Phone (386) 239-7710
SUNCOM 377-7710
Fax (386) 239-7716

facsimile transmittal

TO: Atty. Stephen Tourtelot FAX: 727-894-2504

FROM: State Atty's Ofc. DATE: 6/15/06

RE: Lawrence W. Morton PAGES: 9

CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

OTHER:

attached - order denying Def's. motion for Post Conviction Relief.

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*** TX REPORT ***
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PAGES SENT	9
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OFFICE OF THE STATE ATTORNEY

SEVENTH JUDICIAL CIRCUIT OF FLORIDA
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RE: Lawrence W. Morton PAGES: 9

CC:

☐ Urgent ☐ For Review ☐ Please Comment ☐ Please Reply

OTHER:

attached - order denying Def's. motion for Post Conviction Relief.

EXHIBIT 'B'

IN THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

LAWRENCE WILLIAM MORTON,

Defendant.
_____/

Case Nos.: 01-00455-CFFA; 01-00456-CFFA
01-00457-CFFA; 01-00458-CFFA
01-00469-CFFA; 01-00471-CFFA

DEFENDANT'S MOTION REQUESTING COURT TO RE-ISSUE ORDER DENYING MOTION FOR POST CONVICTION RELIEF

Comes now Lawrence William Morton, the defendant, by and through the undersigned counsel, and requests this Honorable Court to re-issue its Order Denying Defendant's Motion for Post Conviction Relief. In support thereof, the defendant states:

1. On April 22, 2005, the defendant filed a Motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850.

2. Thereafter, this Court ordered to the State to respond.

3. On or about June 17, 2005, the State filed its Response.

4. On July 20, 2005, this Court denied the defendant's 3.850 motion.

5. The undersigned did not receive a copy of the Order denying the defendant's 3.850 motion.

6. Not knowing that the 3.850 motion had been denied, in early June of 2006, the undersigned scheduled a status hearing on the 3.850 motion. This was done because it appeared the 3.850 motion had been pending for about one year without any action.

7. Thereafter, on June 15, 2006, the undersigned received a phone call from Rosemary Calhoun, Assistant State Attorney, seeking clarification of the need for a status hearing and advising that the defendant's 3.850 motion had been denied in July of 2005. It was

during this conversation that the undersigned first learned of this Court's Order denying relief.

8. Ms. Calhoun faxed a copy of this Order to the undersigned. Although the Order indicates that copies were mailed to the undersigned, the undersigned never received a copy of the above referenced Order.

9. In addition, the undersigned contacted the Flagler County Clerk's Office to verify that said Order was filed. During this conversation, the Clerk's Office said that its records do not show that this Order was ever received or filed. The location of this order is unknown to the undersigned and the Flagler County Clerk. The undersigned notes, however, that the caption of this Order inadvertently provided "Volusia County" instead of "Flagler County." Thus, this Order may have been received by Volusia County Clerk.

WHEREFORE, the defendant respectfully requests this court to re-issue its Order denying the defendant's 3.850 motion dated July 20, 2005.

Respectfully submitted,

Stephen P. Fourtelot, Esq.
Fla. Bar No. 010155
The Law Office of Bernard F. Daley, Jr.
901 N. Gadsden Street
Tallahassee, Florida 32303
Tele: (850) 224-5823
Counsel for the Defendant
Mr. Lawrence Morton

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of foregoing notice has been provided to Rosemary L. Calhoun, Esq., Assistant State Attorney, 251 N. Ridgewood Avenue, Daytona Beach, Florida 32114 this 20th day of June, 2006 by United States mail delivery.

Stephen P. Tourtelot, Esq.

EXHIBIT 'C'

Golden
1D06-1-3912

IN THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, STATE OF FLORIDA

(CLOSED)

Pet Opt 3-17

LAWRENCE WILLIAM MORTON,

Appellant,

vs.

DCA Case No.: 5D06-3530

STATE OF FLORIDA,

Appellee.

_____/

APPELLANT'S MOTION TO RECALL MANDATE

Comes now LAWRENCE WILLIAM MORTON, appellant, by and through undersigned counsel, and files this motion requesting the Court recall its mandate, stating:

1. On April 22, 2005, the defendant filed a Motion for Post-Conviction Relief pursuant to Florida Rule of Criminal Procedure 3.850, which raised the following issues:

> Issue I -- Defense Counsel rendered Ineffective Assistance at the Hearings on the State's Notice of its Intent to Introduce Similar Fact Evidence.
>
> Issue II -- Defense counsel Rendered Ineffective Assistance by representing the defendant despite the existence of an Actual Conflict of Interest

2. On August 4, 2006, the Circuit Court of the Seventh Judicial Circuit in and for Flagler County, Florida summarily denied the Appellant's 3.850 motion. Specifically, the court denied Grounds One and Two on the basis that said claims were legally insufficient.

3. Thereafter, the defendant appealed to this Honorable Court. The first issue raised in the appeal was whether the lower court erred in denying the defendant's claims as legally insufficient without first affording him the opportunity to amend his claims.

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4. On February 20, 2007, this Court affirmed (without a written opinion) the lower court's order denying Appellant's motion for post conviction relief filed pursuant to Florida Rule of Criminal Procedure 3.850.

5. On March 7, 2007, the defendant filed a motion for rehearing and requested the Court to issue a written opinion as to the propriety of the lower court's summary denial of Appellant's 3.850 motion on the basis that the claims were legally insufficient without first affording the Appellant the opportunity to amend his allegations.

6. Appellant cited Keevis v. State, 908 So. 2d 552 (Fla. 2d DCA 2005), Nelson v. State, 875 So. 2d 579 (Fla. 2004), and Bryant v. State, 901 So. 2d 810 (Fla. 2005) to support his claim. These cases support Appellant's claim that a lower court must provide a defendant with reasonable time within which to amend an otherwise legally insufficient claim.

7. In addition, the Appellant also cited Spera v. State, 923 So. 2d 543 (Fla. 4th DCA 2006), in which Fourth District Court disagreed with the Second District's rationale in Keevis and recognized conflict of same. In this regard, Appellant pointed out that the Florida Supreme Court accepted jurisdiction to resolve the conflict and that resolution of the issue would be forthcoming. See Spera v. State, SC06-1304, 2006 Fla. LEXIS 3053 (Fla. December 21, 2006).

8. Moreover, the undersigned expressed a belief, based upon reasoned and studied professional judgment, that a written opinion would provide a legitimate basis for supreme court review. This is so because the conflict issue in the Spera case, in which the Florida Supreme Court accepted jurisdiction to resolve, is virtually the same issue presented in this case.

9. On April 3, 2007, this Court denied the defendant's motion for rehearing. The mandate was issued on April 20, 2007.

10. On November 1, 2007, the Florida Supreme Court's decided the Spera case and held that if a defendant's motion for post conviction relief is summarily denied because the allegation was legally insufficient, the trial court must give the defendant the opportunity to amend the motion. See Spera v. State, 971 So. 2d 754 (Fla. 2007).

11. Recently, in Pierre v. State, 33 Fla. L. Weekly D167 (Fla. 5th DCA January 4, 2008), analyzed the Spera case and held:

> The court in Spera held that a post-conviction motion should not be denied because of a pleading defect if that pleading defect could be remedied by a good faith amendment to the motion. The court further held that the proper procedure when a motion is legally insufficient is for the trial court to strike the motion with leave to amend within a reasonable period.

12. The undersigned is mindful that generally a district court's ability to recall its mandate must be done before the court's term expires. See Plucinik v. State, 885 So. 2d 478, 479 (Fla. 5th DCA 2004) ("The general rule is that a motion to withdraw a mandate may be granted only during the term in which it is issued."). However, there are exceptions to this general rule. See Zielke v. State, 839 So. 2d 911 (Fla. 5th DCA 2003) (recognizing an exception to the general rule, where even though the term of court had already expired, this court granted a motion to recall the mandate, after it determined the motion for rehearing had, in fact, been timely filed).

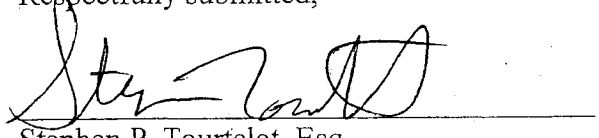
13. In this case, recalling the mandate is appropriate in this case for two reasons. First, the defendant specifically cited the pending Spera case in his Initial Brief. Thus, the defendant exercised due diligence in attempting to keep his case open and "in the pipeline" so that he could receive the benefit of a favorable outcome of the Spera case. Second, the defendant alleges that a manifest injustice would occur in this case if the court is prevented from

recalling its mandate. See State v. McBride, 848 So. 2d 287, 289, 290 (Fla. 2003) (authorizing a court to bypass a procedural bar in order prevent a manifest injustice).

14. In addition, this court is empowered to grant other relief in order to avoid a manifest injustice. In Williams v. State, 947 So. 2d 694 (Fla. 4th DCA 2007), the district court previously per curiam affirmed the defendant's judgment and sentence and later issued an opinion in another case on the same issue in which the court reversed. Id. at 694-95. The defendant alleged that the district court should recall the mandate because the two cases were in direct conflict and would result in a manifest injustice if not resolved. Id. at 695. Although the court could not recall the mandate because the court's term had already expired, the court was able to grant alternative relief by treating the motion as a petition for writ of habeas corpus and vacated his conviction and sentence. Id. Likewise, in the case at bar, if the court is unable to recall its mandate, it can grant alternative relief by denying the motion without prejudice, allowing the defendant 30 days to file an amended 3.850 motion in the lower court.

WHEREFORE, this Court is respectfully requested to recall the mandate issued on April 20, 2007 and reconsider this appeal in light of the Florida Supreme Court's decision in Spera v. State, 971 So. 2d 754 (Fla. 2007), or in the alternative, authorize the defendant to file a 3.850 motion in the circuit court within 30 days of its decision.

Respectfully submitted,



Stephen P. Tourtelot, Esq.
Fla. Bar No. 010155
The Law Office of Bernard F. Daley, Jr.
901 North Gadsden Street
Tallahassee, Florida 32303
Tele: (850) 224-5823
Counsel for Appellant
Mr. Lawrence Morton

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been furnished to Anthony Golden, Assistant Attorney General, the Office of the Attorney General, 444 Seabreaze Blvd., 5th Floor, Daytona Beach, Florida 32118, by United States mail this 5th day of March, 2008.

Stephen P. Tourtelot, Esq.

EXHIBIT 'D'

Golden G
06-1-30912
(CLOSED)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

LAWRENCE WILLIAM MORTON,

Appellant,

v. CASE NO. 5D06-3530

STATE OF FLORIDA,

Appellee.
_____/

DATE: March 14, 2008

BY ORDER OF THE COURT:

ORDERED that Appellant's Motion to Recall Mandate, filed March 7, 2008, is denied.

I hereby certify that the foregoing is (a true copy of) the original Court order.

SUSAN WRIGHT, CLERK

cc: Office of the Attorney General, Daytona Beach
Stephen A. Tourtelot, Esq. and Luke Newman, Esq.

RECEIVED
2008 MAR 17 AM 8:34
OFFICE OF THE ATTORNEY GENERAL
DAYTONA BEACH, FLORIDA

3/17