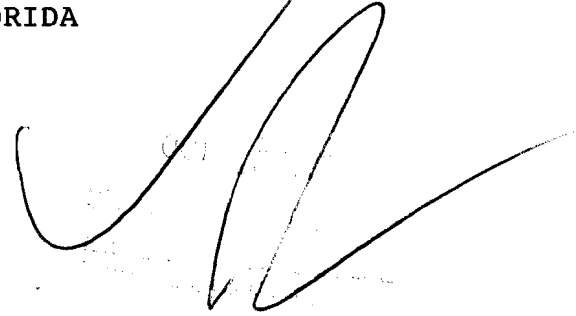


O/A 10-30-86

IN THE SUPREME COURT OF FLORIDA



PHILLIP DYLAN HOLLAND,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

CASE NO. 68,320

PETITIONER'S REPLY BRIEF

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ARGUMENT

THE DISTRICT COURT ERRED IN AFFIRMING THE SUMMARY DENIAL OF PETITIONER'S 3.850, WITHOUT AN EVIDENTIARY HEARING, AND WITHOUT ANY ATTACHED PORTIONS OF THE RECORD, TO REFUTE HIS CLAIM THAT COUNSEL'S CONCESSION OF HIS GUILT AMOUNTED TO INEFFECTIVE ASSISTANCE OF COUNSEL.

Respondent prefers to restate the point on appeal and avoid the trial court's failure to attach portions of the record to the order denying post-conviction relief by filing an appendix of the defense attorney's closing arguments at trial. Of course, these closing arguments are from the appellate record of Mr. Holland's direct appeal. Nothing in the record of the appeal of the Rule 3.850 shows that the trial court reviewed and considered these portions of the trial record in summarily denying the 3.850 motion. The order recites that the trial court did review them, but the trial court did not attach any portion of the record to support that such review took place. Certainly, these transcripts were not before the district court when it determined that summary denial was proper. The Attorney General's office cannot fulfill the trial court's duty under Rule 3.850 to attach portions of the record to support summary denial because the rule delegates that function to the judiciary. For the Attorney General, instead of the circuit court, to fulfill that function constitutes an impermissible delegation of the trial court's responsibility. Cookish v. State, 416 So.2d 53 (Fla. 4th DCA 1982).

Respondent asks this Court to look to matters not before the district court to determine that the district court was correct to affirm on the merits. Respondent states that there is "unequivocal record support" for the trial court's conclusion that defense counsel was not ineffective (AB-10). However, Mr. Holland has never been given a hearing or a lawyer in the trial court or on appeal to the district court to argue the merits of his ineffective assistance of counsel claim. He was entitled to a lawyer on his 3.850 claim in both the trial court and the District Court, Graham v. State, 372 So.2d 1363 (Fla. 1972), because his claim is facially sufficient, colorable, and requires thorough and adequate research to show the court that defense counsel's argument in its entirety need not concede guilt in order for trial counsel to be ineffective on the grounds asserted. As petitioner's counsel argued in its Initial Brief on the Merits to this Court, a defense attorney's error of conceding guilt on a lesser-included offense or in only a portion of his closing argument which otherwise urges a verdict of not guilty, may constitute ineffective assistance of counsel (Petitioner's Brief at 10-14). However, neither the trial court nor the appellate court granted the petitioner's request for court-appointed counsel (R-26-27).

Respondent says that the state filed no response to the trial court's order requesting the same on petitioner's post-conviction motion. Respondent made no appearance in the appellate court and has never before claimed that the state made no response to the trial court's order on the motion for post

conviction relief. Had the state made such a claim in the district court and had Mr. Holland been represented by counsel, his lawyer could have immediately moved to correct the appellate record under Florida Rule of Appellate Procedure 9.200(f). Surely, the state did not ignore, disregard or disobey the trial court's order of January 17, 1985, that it respond to petitioner's motion for post-conviction relief (R-25). It must be noted that at the time the trial judge asked for a response from the state on the motion for post-conviction relief, the applicable law in the Fourth District encouraged the trial judge to ask for the state's participation to resolve factual matters before or without granting an evidentiary hearing. See State v. Kaufman, 456 So.2d 531 (Fla. 4th DCA 1984). That practice under former Rule 3.850 was not specifically disapproved by this Court until its September 5, 1985, decision in Morgan v. State, 475 So.2d 681 (Fla. 1985).

The State Attorney's office would not have disregarded the trial court's order of January 17, 1985, and supplemental proceedings to correct the record are necessary upon this Court's remand of this case. Supplemental proceedings to correct the record would or will show that the trial court's order denying post-conviction relief was prepared and typed by the State Attorney's office. Petitioner's counsel acquired this information from a phone conversation with Assistant State Attorney Paul Zacks and asserts it here only to the extent necessary to claim that the procedural issue cannot be finally resolved unless and until petitioner is given an attorney in the trial court and an

opportunity to correct the record to demonstrate the state drafted the trial court's order under review. The trial court's acceptance and signing of that order, under the circumstances of this case, is tantamount to the prohibited practice under Morgan v. State, supra, of the trial court's consideration of a response by the state.

Preparation of an order for the trial court that recites that the record refutes the claims of the motion, when the trial court has not held any hearing or proceeding on the record to announce its findings and conclusions, would be an impermissible procedure under the former rule as strictly interpreted by Morgan. Former Rule 3.850 required the trial court, not the state, to determine the legal sufficiency of the motion and whether the record and files in the case conclusively show the prisoner is entitled to no relief. Only after the court has made these preliminary determinations that the motions and files do not conclusively refute the petitioner's allegations "shall" the court "cause notice thereof to be served on the prosecuting attorney of the court, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." Rule 3.850(e)(1984). After quoting this portion of the rule, this Court said in Morgan:

This rule limits the court's initial consideration to the motion and the "files and records of the case." It does not contemplate the consideration of a response by the state nor any resolution of factual matters without an evidentiary hearing. Id. at 682.


Although in general practice a court may request the state and defense counsel to prepare and tender for its consideration a proposed course of action in a particular case, the court may never delegate to the state the responsibility of making findings and conclusions of law where statute or rule requires that the responsibility for making those findings belongs exclusively to the judiciary. Carnegie v. State, 473 So.2d 782 (Fla. 2d DCA 1985), Johnson v. State, 483 So.2d 839 (Fla. 2d DCA 1986), Wilson v. State, 485 So.2d 42 (Fla. 5th DCA 1986). In State v. Kaufman, the Fourth District said, "Unless its authority is specifically restricted, a court has the inherent power to require the participation of the parties in the resolution of the issues before the Court." Id. at 534. The court then concluded that Rule 3.850 did not restrict the court's authority to require a response from the state before the trial court determined whether the records and files of the case conclusively refuted the petitioner's claim on a motion for post-conviction relief. In Morgan, this Court said that Rule 3.850 specifically did restrict the court's authority to require or consider such a response by the state. Accordingly, the procedure utilized by the trial court in the present case was erroneous, and under the specific authority of Morgan v. State the district court erred in failing to reverse the summary denial. Morgan v. State, supra.

CONCLUSION

Based on the foregoing, petitioner requests this Court to quash the decision of the District Court of Appeal and remand with directions to hold an evidentiary hearing on petitioner's facially sufficient claim of ineffective assistance of counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to RICHARD BARTMON, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 15th day of October, 1986.


MARGARET GOOD
Assistant Public Defender