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## **Theodore Spera v. State of Florida**

**SC06-1304**

>> ALL RAISE -- THE SUPREME COURT OF FLORIDA IS NOW IN SESSION.

ALL THOSE HAVING BUSINESS BEFORE THIS COURT, GAVE TENGS AN YOU SHALL BE HEARD, GOD SAVE THE UNITED STATES THE GREAT STATE OF FLORIDA, AND THIS HONORABLE COURT.

>> GOOD MORNING.

>> GOOD MORNING.,,

LADIES AND GENTLEMEN, THE FLORIDA SUPREME COURT PLEASE BE SEATED.,,

.  
>> GOOD MORNING FRIENDS AND WELCOME TO THE OR WILL ARGUMENT CALENDAR FOR THE FLORIDA SUPREME COURT FRIDAY, JUNE 8, 2007, THE ONLY CASE ON THE CALENDAR THIS MORNING IS THE SPERA VERSUS STATE OF FLORIDA.

READY TO PROCEED?

>> MR. CHIEF JUSTICE.

>> -- MR. CHIEF JUSTICE MAY IT PLEASE THE COURT, BRUCE AND CYNTHIA FOR THEODORE SPERA THIS COURT AND SERIOUS OF CASES HAS HELD, THAT A DIE EFFICIENT PLEADING IN RAOUL 3.850 MOTION MAY BE CORRECTED, WITH LEAVE TO AMEND, OH --

>> I'M NOT INSURE WHETHER THAT MICROPHONE IS WORKING BUT, PULL IT UP A LITTLE BIT.

AND.

>> IS THIS BETTER JUSTICE ANSTEAD!!\$\$!!!!!!!!!!!!!! ANSTEAD?

>> YES, MARSHALL IS CHECKING.

>> IN A SERIOUS OF CASES -- IN A SERIOUS OF CASES, THIS COURT HAS HELD THAT APPEAR DEFECTIVE OR DEEFFICIENT 3.850 MOTION

MAY BE CORRECTED WITH LEAVE TO AMEND IN NELSON -//S ARE VERY STATE, THE COURT SAID LEAVE TO AMEND MUST BE GRANTED, IN BRYANT VERSUS STATE THE HOLDING OF THE COURT WAS AND THAT SAID THEREFORE WE HOLD THAT THERE SHOULD BE LEAVE TO AMEND.

IN MILTON VERSUS STATE, THE COURT FOLLOWED NELSON.

>> LET ME ASK YOU ABOUT BRYANT WHAT WE DID IN BRYANT IT SEEMS LIKE IN BRYANT WE DID TWO THINGS.

AS TO THE FAILURE TO ATTACH A COPY OF THE SENTENCING ORDER, WE SAID THE COURT SHOULD HAVE STRICKEN GRANTED LEAVE TO FILE A COMPLIANT MOTION, BUT AS TO ANOTHER ARGUMENT THAT HAD BEEN MADE WE AFFIRMED THE SUMMARY DENY\$\$\$!!!!IAL OF THAT CLAIM, AS INSUFFICIENT.

>> YOU DID, IN BRYANT, AND BRYANT IS WHAT THE FOURTH DISTRICT COURT OF APPEAL SEIZED UPON IN COMING TO THE CONCLUSION THAT THE PLEADING IN THIS CASE COULD NOT BE AMENDED.

>> RIGHT.

>> BUT WHEN, REMEMBER OF COURSE!!\$\$!!!!!!

COURSE, BRYANT WAS AN AMENDED 3.850 TO BEGIN WITH.

SO BRYANT HAD AMENDED ONCE, AND THEN IT WAS ON THE AMENDED PLEADING THAT THE COURT FOUND IT WAS INSUFFICIENT.

>> BUT DO YOU THINK BRYANT STANDS FOR THE PROPOSITION THAT -- THAT DEFENDANTS SHOULD BE GIVEN ONE CHANCE TO AMEND A DEFICIENT PLEADING.

>> DO I, BECAUSE THE LANGUAGE IN BRYANT, IS, THEREFORE, WE HOLD THAT WHEN A \$\$DEFENDANT'S INITIAL POSTCONVICTION MOTION FAILS TO COMPLY WITH THE REQUIREMENTS IN THAT CASE IT WAS 3.851, IT WAS A DIETING PENALTY CASE THE PROPER PROCEDURE IS TO STRIKE THE

MOTION WITH LEAVE TO AMEND  
THAT WAS THE HOLDING IN  
BRYANT.

NOW I RECOGNIZE THAT BRYANT --  
I.

>> I GUESS THAT THE -- THAT  
THE TUG HERE IS BETWEEN THE --  
THE FACT THAT THE COURT HAS  
BEEN VERY RELUCTANT WITH OUR  
EXPERIENCE IN CAPITAL  
POSTCONVICTION TO GET INTO  
SITUATIONS IN WHICH PLEADING  
IS BECOMES SUCH A TECHNICAL  
REQUIREMENT THAT CASES ARE  
BOUNCED OUT AND THEN WE HEAR  
THEM ON APPEAL, AND RATHER  
THAN GETTING TO THE MERITS OF  
A MATTER.

AND WHAT OUR WE ARE -- HAVE  
BEEN STRUGGLING WITH SINCE  
I'VE BEEN HERE, IS WHETHER  
WHEN A POSTCONVICTION MOTION  
IS FILED EVERY ONE OF THEM  
SHOULD GO TO JUST  
AUTOMATICALLY A EVIDENTIARY  
HEARING, BUT THAT HAS AN  
OVERWHELMING ADMINISTRATIVE  
PROBLEM AS FAR AS THE TRIAL  
COURTS ARE CONCERNED, OR  
WHETHER WE SHOULD HAVE SOME  
PLEADINGP STANDARDS AND I WAS  
UNDER THE IMPRESSION IN NELSON  
THAT WHAT WE WERE DEALING WITH  
WAS A VERY DISCREET MATTER,  
HAVING TO DO WITH WLGS AND  
WHEN YOU -- WITNESSES WHEN YOU  
SAY DOESN'T HAVE BIRTH YOUR  
LAWYER DIDN'T HAVE THE BENEFIT  
OF GETTING A WITNESS, THAT  
THAT IS SOMETHING THAT IS VERY  
DISCREET THAT COULD BE TAKEN  
CARE OF, AS FAR AS APPEAR  
PLEADING IS CONCERNED, ISN'T  
THIS -- AREN'T WE IN A VERY  
DISCREET AREA HERE?

>> WELL, I THINK WE ARE,  
JUSTICE WELLS BUT I THINK YOUR  
CONCERN ABOUT OPENING THE  
FLOOD INVESTIGATES TO  
EVIDENTIARY HEARINGS IS NOT A  
REAL PROBLEM, BECAUSE  
OFTENTIMES!!\$\$!!!!!!!!!!!!!!!!!!!!  
OFTENTIMES, ON THE FACE OF THE  
3.8 A -- 3.850 MOTION THE

COURT COULD FIND THAT IT IS INSUFFICIENT BECAUSE THE RECORD ITSELF --

>> MR. ROGOW, THE STATS THAT WE HAVE IN OUR COURT SYSTEM SHOWS THAT -- THAT WE DO HAVE A PROBLEM.

IN THAT THE TRIAL COURT CASELOAD IN CRIMINAL MATTERS ARE SO MUCH MORE SUBSTANGSLY WHITED TOWARD POSTCONVICTION THAN ANYTHING ELSE.

AND SO IT ISN'T -- AN ADMINISTRATIVE PROBLEM.

>> THERE IS NO QUESTION THAT THERE IS A CASELOAD AND A NUMBER OF THESE 3.850 MOTIONS THAT ARE YOU ARE FILED BUT IT IS SIMPLY A PRICE THAT WE PAY FOR THE CRIMINAL JUSTICE SYSTEM, AND WHEN LIBERTY IS AT STAKE AN AMENDED PLEADING IS NOT TOO MUCH TO ASK THE COURT TO INDULGE --

>> ARE YOU ASKING FOR A SEE THIS MY PROBLEM, AND ALSO FOLLOW UPS A LITTLE BIT ON JUSTICE WELLS I'M A LITTLE MORE SYMPATHETIC IN TERMS OF WHETHER WERE YOU IN THE BALLPARK OR NOT, BUT, IS THE SAME RULE TO BE APPLAUD IF A DEFENDANT SAYS MY LAWYER WAS INEFFECTIVE!!\$\$!!!!!!!!!!!!!!!!!!!!!! INEFFECTIVE, BECAUSE YOU KNOW HE DIDN'T CALL ME.

AND THEREFORE I WANT RELIEF. IS THAT THE SAME AS HAVING FACTS THAT ARE ALLEGED BUT YOU ARE NOT SURE WHETHER ALL THOSE FACTS ARE GOING TO BE PUT TOGETHER IN A WAY THAT WILL ACTUALLY SET FORTH A CLAIM FOR RELIEF!!\$\$!!!!!!!!!!!!!!

RELIEF?

IN OTHER WORDS, IS THERE TO BE DISCRETION FOR THE TRIAL JUDGE, BECAUSE WE SEE, AGAIN, YOU KNOW, WE SEE HUNDRED OF THESE PLEADINGS, AND MOST OF THEM ARE PRO SE, AND MOST OF THEM AREN'T IN EVEN THE BALLPARK!!\$\$!!!!!!!!!!!!!!!!!!!!!! BALLPARK.

SO THAT IS THE QUESTION IS ARE YOU ASKING THIS FOR A PER SE RULE SOMEONE GETS ONE CHANCE AND THAT IS IT? OR ARE YOU SAYING THAT IN THIS CASE THE JUDGE -- GIVEN THE CIRCUMSTANCES SHOULD SHOULD XERD -- XERD HERDITON CREATION TO SAY WERE YOU THIS THE BALL PARKION AND HAVE BEEN ALLOWED TO PLEAD --

>> I'M CERTAINLY SAYING IN THIS CASE, IT SHOULD HAVE BEEN LEAVE TO AMEND, SO WINNING THIS CASE WOULD BE IMPORTANT.

>> I DON'T SEE IN THIS CASE -- WE SEE A LOT OF THIS, THAT SOMEONE SAYS, A LAWYER DIDN'T YOU KNOW WASN'T -- HAD ALL THIS DOESN'T GIVE ANY FACTS AS TO WHAT WERE THE OMISSIONS DURING THE TRIAL THAT WOULD SET FORTH A CLAIM FOR RELIEF.

>> JUSTICE PARIENTE I'M SAYING IN THIS CASE IT SHOULD HAVE BEEN DONE BUT I ALSO AM GOING BEYOND THAT BECAUSE I THINK, I THINK THAT THERE SHOULD BE LEAVE TO AMEND.

>> WHEN DID THE LAWYER SAY IN THIS PLEADING THAT WOULD GIVE THAT COULD GIVE RISE TO A COLRABLE CLAIM.

>> THAT HE DID NOT BEGIN PREPARATION SO THE -- TILL WEEK BEFORE TRIAL DIDN'T PRESENT A DEFENSE DID NOT CALM WLGZS ON DEFENDANTS BEHALF THOUGH INSTRUCTED TO DO SO NOW THAT COULD BE FLESHED OUT I THINK THIS GOES TO MY POSITION THAT A PER SE RULE SAYING ONE SHOT AT AMENDING ONE LEAVE TO AMEND, WOULD BE HELPFUL EVEN IN ADDRESSING WHAT JUSTICE WELLS IS TALKING ABOUT BECAUSE IF THE AMENDED PLEAD WAS DEFICIENT SHOWED THERE WAS NOTHING THERE, WELL, THEN IF THE COURT DENIED RELIEF AT THAT POINT --

>> BUT ON THE OTHER HAND HOW DO YOU SQUARE THAT POSITION? ONE CHANCE TO AMEND WITH THE

IDEA THAT WE TALKED ABOUT IN BRYANT, THAT WE ARE NOT REAL AUTHORIZING PEOPLE TO MAKE SHELL MOTION SO IS IF YOU FILE 3.850 MOTION, AND MAKE NONE OF THE ALLEGATIONS, THAT WOULD REALLY SUPPORT SAY IN THIS CASE, THERE WERE NO ALLEGATIONS!!\$\$!!!!!!!!!!!!!!!!!!!!!! ALLEGATIONS, MADE, WITH THE NAMES OF THE WLGZS WHAT IT WERENESSES WERE GOING TO SAY HOW WITNESSES TESTIMONY WOULD HAVE BEEN HELPFUL TO THE DEFENSE OR ANY OF THOSE KINDS OF ALLEGATIONS, SO BASICALLY, MY MIND, WAS A SHELL ALLEGATION, OF INEFFECTIVE ASSISTANCE OF COUNSEL, AND BRYANT, WE SAY WE ARE NOT AUTHORIZE\$\$!!!!!!ING SHELL MOTIONS. SO HOW DO YOU SQUARE WHAT YOU ARE SAYING AND SOMEONE FILES WHETHER IN ESSENCE A SHELL MOTION, WITH OUR CASE LAW?  
>> JUSTICE QUINCE I DON'T THINK THIS WAS A SHELL MOTION, IT WAS DEFECTIVE, AND DEFICIENT!!\$\$!!!!!!!!!!!!!!!!!!!!!! DEFICIENT, CLEARLY A SHELL MOTION TO ME WOULD SIMPLY BE SAYING, MY LAWYER WAS INEFFECTIVE!!\$\$!!!!!!!!!!!!!!!!!!!!!! INEFFECTIVE, DIDN'T DO A GOOD JOB.  
THAT I THINK WOULD BE A SHELL MOTION.  
HERE THERE IS SOMETHING THAT, PERHAPS, COULD BE FLESHED OUT. AND SO ALL I'M SAYING IS IF THERE IS SOMETHING MORE, HOW DIFFICULT IS IT --  
>> HOW FAR DO WE GO?  
I MEAN IF YOU HAVE SAY AN ALLEGATION THAT REQUIRES, SAY, FIVE DIFFERENT THINGS, TO REALLY MAKE IT A GOOD ALLEGATION, OF AN INEFFECTIVE ASSISTANCE OF COUNCIL CLAIM DO YOU UNDERSTAND TWO OF THEM, I MEAN THAT IS -- DOES THAT AMOUNT TO SAY THAT -- YOU GET AN OPPORTUNITY TO TO AMEND, OR IF YOU DO LEAVE OUT ONE OF

THEM IS THAT -- I'M JUST  
STRUGGLING HERE WITH -- THERE  
IS A POINT WHEN A MOTION IS  
JUST LEGALLY INSUFFICIENT.  
>> THERE -- THERE IS AND I  
THINK ONE KNOWS IT WHEN ONE  
SITES, BUT THIS IS NOT THAT  
KIND OF CASE AND I GO TO WHAT  
JUSTICE LEWIS SAID IN HIS  
DISSENTING OPINION IN NELSON  
THE ODOM STANDARD, I THINK  
THAT WOULD BE THE ULTIMATE  
TEST SHOULD BE MET IDENTITY IT  
WERENESSES SHOULD HAVE BEEN  
CALLED, AND, WHAT THEY WOULD  
HAVE SAID, AND HOW THERE WOULD  
HAVE BEEN PREJUDICE, HOW THAT  
WOULD SUPPORT PREJUDICE SO I  
THINK IF THE IF THE COURT  
STRIKES THE 3.850, WITH LEAVE  
TO AMEND, SAYING LEAVE TO  
AMEND SEE, NELSON,SEE MILTON,  
AND THEN IF THE AMENDMENT  
DENTISTRY MEET THAT STANDARD  
THEN I THINK THE COURT THE  
TRIAL COURT AND THIS COURT  
COULD FEEL COMFORTABLE, IN  
SAYING, THIS WAS A DEFICIENT  
3.850 --

>> ISN'T IT POSSIBLE TO DRAW A  
DISTINCTION WHEN WHAT WE MAKE  
TECHNICAL VIOLATIONS GOING  
BACK TO THE ODOM KIND OF  
APPROACH!!\$\$!!!!!!!!!!!!!!  
APPROACH, IT SEEMED TO ME  
THERE REALLY ISN'T A TANG  
DIFFERENCE BETWEEN A MOTION  
THAT SAYS -- MY ATTORNEY WAS  
INEFFECTIVE!!\$\$!!!!!!!!!!!!!!  
INEFFECTIVE, JUST THAT, NO  
STRICKLAND KIND OF APPROACH,  
AND ONE THAT SAYS -- THIS IS  
THE WITNESSES THIS WHAT THE  
WITNESSES WOULD HAVE SAID THIS  
HOW IT WOULD HAVE IMPACTED MY  
CASE, BUT THERE WAS THE  
ABSENCE OF THE ALLEGATION THAT  
IT WAS AVAILABLE.  
STRUGGLING WITH THOSE TWO, I'M  
NOT SURE THAT THAT CONCEPT OF  
IT WERENESS NOT BEING  
AVAILABLE THAT CONNECT --  
TECHNICAL REQUIREMENT ON THE  
SAME LEVEL WITH ONE DOESN'T

SAY ANYTHING OTHER THAN  
CONCLUSION COULD YOU HELP WITH  
THIS.

>> I THEY IF SIMPLY CONCLUSION!!\$\$!!!!!!!!!!!!!!!!!!!!

CONCLUSIONRY THEY LAWYER WAS  
INEFFECTIVE DIDN'T DO GOOD JOB  
FOR ME THAT WOULD BE SHELL  
MOTION I THINK COULD BE DENIED  
ON ITS FACE I'M TRUPTH --  
TROUBLED BY THAT TOO IN THE  
SITUATION WHERE YOU HAVE --  
DEFENDANT, WHO ARE OPERATING  
ON THEIR OWN, AND TO ME IT IS  
NOT SUCH A BIG BURDEN TO SAY  
LEAVE TO AMENDMENT SEE NELSON  
SEE WHAT THEY CAN DOVMENT IT  
IS A SIMPLE, ONE PARAGRAPH  
ORDER, AND THEN, YOU COULD SEE  
WHETHER OR NOT WOULD IT BE  
CURED!!\$\$!!!!!!!

CURED, WE ARE TALKING ABOUT  
LIBERTY HERE WE ARE TALKING  
ABOUT PEOPLE TRYING TO ATTACK,  
A COLLATERALLY ATTACK THEIR  
CONVICTION.

>> I'M TRYING TO UNDERSTAND  
HOW FAR YOUR ASKING US TO GO.  
MY UNDERSTANDING OF THE  
CURRENT LAW IS IF A INITIAL  
POSTCONVICTION MOTION IS  
DISMISSED FOR INSUFFICIENCY,  
AND THE DEFENDANT FILE AN  
AMENDED CLAIM WITHIN THE  
TWO-YEAR PERIOD EVEN UNDER THE  
CURRENT LAW, THE COURT MUST  
ACCEPT THAT MANY PLEADING.

>> WELL, NELSON,AND BRYANT  
TALK ABOUT REALLY A REASONABLE  
TIME SUGGESTING 30 DAYS, SO --

>> BUT I THINK --

>> IN BRYANT WHAT HAPPENED WAS  
BY THE TIME THE CLAIM WAS  
DISMISS!!\$\$!!!!!!!!!!!!

DISMISSED, THE LIMITATIONS  
PERIOD HAD EXPIRED THE  
ONE-YEAR PERIOD.

BUT I THOUGHT THAT WE HAD LAW  
AND THERE IS LAW IN DCAS THAT  
SAY IF THE AMENDED PLEADING IS  
FILED WITHIN THE TWO-YEAR  
PERIOD THE COURT HAS TO  
ACCEPT, THAT BECAUSE THE  
PREVIOUS DISMISSAL HAD NOT  
BEEN ON THE MERITS.

>> WELL, YOU KNOW I'M NOT SURE WHAT THE ANSWER TO THAT IS JUSTICES CANTERO BUT I THINK LOOKING AT NELSON LOOKING AT MILTON LOOKING AT BRYANT I THINK WE ARE TALKING ABOUT LEAVE TO AMEND WITHIN A REASONABLE PERIOD OF TIME AND IF THAT ISN'T DONE THEN IT COULD BE DISMISS I DON'TED THINK WOULD BE OPEN ENDED KIND OF SITUATION.

>> I UNDERSTAND ALL I'M SAYING IS THAT FROM MY UNDERSTANDING OF THE CURRENT LAW YOU ARE NOT ASKING US TO GO VERY FAR. THE ONLY DIFFERENCE IN THE LAW BETWEEN WHAT IT IS NOW AND WHAT YOU ARE ASKING US TO DO IS IF THE MOTION THE DEFICIENT MOTION WAS FILED RIGHT AT THE TWO-YEAR PERIOD, AND THE AMENDED MOTION WOULD BE FILED AFTER THE DEADLINE HAD EXPIRED BECAUSE IF THE AMENDED MOTION CURRENTLY IS FILED BEFORE THE DEADLINE EXPIRES EVEN UNDER CURRENT LAW WOULD YOU HAVE TO SET UP.

THE COURT HAS TO SET UP AND LOOK AT IT ON THE MERITS.

>> I'M NOT ASKING THE COURT GO TOO FAR I'M JUST SAYING THAT WOULD RELATE BACK, THAT AMENDED MOTION WOULD RELATE BACK TO THE TIME --

>> HOW ABOUT BECAUSE HE IS -- JUSTICE CANTERO IS ASKING YOU, I BELIEVE -- ABOUT SUBSECTION F, OF 3850.

ARE YOU FAMILIAR WITH THAT.

>> YES BHAP DOES IT SAY.

>> I DON'T HAVE IT RIGHT IN FRONT OF ME BUT BASICALLY --

>> I HAVE IT IN FRONT OF ME I DON'T WANT TO BE LABOR THIS, BECAUSE -- JUSTICE --

>> A TEST.

>> -- SUCCESSIVE MOTION BY O MAY BE DISMISSED IF THE JUDGE FINDS IT FAILS TO ALING NEW OR DIFFERENT GROUNDS FOR RELIEF AND THE PRIOR DETERMINATION WAS ON THE MERITS, OR IF NEW

AND DIFFERENT GROUNDS ARE ALLEGED THAT JUDGE FINDS THAT THE FAILURE TO THE MOVEMENT OF THE OR THE ATTORNEY TO A -- ASSERT THOSE GROUNDS IN A PRIOR MOTION CONSTITUTED AN ABUSE OF THE PROCESSOR GOVERNOR -- PROCEDURE GD HE GOVERNED BY THESE RULES ALLUDING TO CASE LAW THAT REAL SAYS THESE DISMISSALS, SWIEFRPS TALKING ABOUT HERE, IN THE PAST, HAD BEEN TREATED, AS DISMISSALS WITHOUT PREJUDICE, AS LONG AS A THE NEXT TIME THEY MAKE AN EFFORT AT IT MAYBE GET IT RIGHT AS FAR AS GETTING IT BEFORE THE COURT, IS WITHIN THE TWO-YEAR PERIOD!!\$\$!!!!!!!!!! PERIOD -- I'M WONDERING WHETHER OR NOT YOU KNOW WHAT WE ARE DEBATE\$\$!!!!ING HERE IS REAL NOT COVERED BY SUBSECTION F, THAT IS, IF THE YOU KNOW, ALL THESE RULES WERE DRAFTED INITIALLY SO THAT PRO SE PRISONERS WOULD BE SPOON-FED HOW TO DO THIS. AND ACTUALLY SO THAT TRIAL COURT JUDGES ALSO COULD JUST GO YOU KNOW, THE GO DOWN A LIST, AND ADJUDICATE THEM TOO. SO MANY WHILE -- DOESN'T F, REAL -- REALIZE -- REALLY!!\$\$!!!!!!!!!! REALLITAINING CARE OF THAT IF YOU FILE ANOTHER ONE, NOW YOU LAY OUT, YOU KNOW, FACTS, THAT SAY, WELL, THERE WAS AN EYEWITNESS TO THE CRIME I TOLD MY LAWYER ABOUT IT. AND THE EYEWITNESS SAID THAT IT WAS A GIANT EIGHT FOOT PERSON, THAT COMMITTED THE CRIME AND I'M ONLY 4'2", AND NOW YOU HAVE GOT SOMETHING GOING, YOU KNOW MAYBE THAT HAS TO BE HEARD. BUT WHY DOES -- WHY DOESN'T SUBSECTION F REALLY TAKE CARE OF THAT EXCEPT IN THE SKWAIGS WHERE THE TWO-YEAR PERIOD MAY HAVE PASSED. >> ONE COULD MAKE THAT

ARGUMENT, THAT F WOULD TAINING  
CARE OF IT ALTHOUGH I DON'T  
THINK THIS A SUCCESSIVE MOTION  
I THINK THAT IS THE TROUBLE  
HERE.

WHEN YOU LOOK AT THIS  
CLASSICALLY WE ARE TALKING  
ABOUT AMENDMENTING THE MOTION  
THAT YOU FILE IT JUST SEEMED  
TO ME MUCH MORE EFFICIENT  
FRENCH THE COURT POT VOINT OF  
-- POINT OF VIEW TO DEAL WITH  
IT AS AMENDMENT NOT ENCOURAGE  
A SECOND SUCCESS IFK MOTION.

>> THE ON THE PART IN  
SPOON-FEEDING THE JUDGE SAYS  
THE JUDGE CAN LOOK ATMOSPHERE  
THE MOTION, AND YOU KNOW,  
WHILE THIS ISN'T A CIVIL  
MATTER, OR MAYBE IT IS, HABEAS  
CORPUS HABEAS CORPUS IF IT  
DOESN'T STATE A CAUSE OF  
ACTION SUFFICIENTLY THE JUDGE  
CAN DISMISS IT, IT TELLS THE  
JUDGE TO DO THAT THAT IS WHAT  
THE JUDGE DID HERE.

>> IT DOES BUT THIS \$\$COURT'S  
CASES EVEN TALK IN TERMS OF  
DUE PROCESS, BRYANT TALKS IN  
TERMS OF DUE PROCESS AS MATTER  
OF DUE PROCESS ONE SHOULD  
SHOULD -- SHOULD HAVE THE  
OPPORTUNITY TO AMEND SEEMS  
MUCH MORE EFFICIENT TO SAY  
HERE IS THE 3.850, I DON'T  
THINK ENCOURAGES\$!ING A SECOND  
SUCCESSIVE ONE TO TRY TO CURE  
IT IS AS EFFECTIVE, AS SAYING,  
IT IS DEFECTIVE, LEAVE TO  
AMEND --

>> AREN'T YOU ARE GETTING TO  
THE POINT THOUGH WHERE YOU ARE  
ASKING REALLY FOR THE TRIAL  
JUDGE TO SORT OF DO A TUTORIAL  
IN HERE, AND SAY, WELL, YOU  
KNOW, I HAVE EXAMINED THIS,  
AND YOU SAID SOMETHING ABOUT  
WITNESSESES OR WHATEVER SO I'M  
GOING TO DENY THIS WITHOUT  
PREJUDICE FOR YOU TO NOW NAME  
THOSE WITNESSES TELL ME WHAT  
THEY WOULD SAY THAT YOU WILL  
THAT IS NOT THE ROLE OF THE  
TRIAL JUDGE TO EXPLAIN WHAT

MIGHT BE THERE OR MIGHT NOT BE THERE.

YOU KNOW, TO THE PERSON FILING THE MOTION.

NOW, WE REALLY ARE ALREADY, TRIAL JUDGES FEEL OVERWHELMED BY THIS, AND THE WHETHER THEY ARE OR NOT IS A DIFFERENT STORY.

BUT WHY -- I AM HAVING DIFFICULTY OF WHY THIS PROVISION IN THE RULES DOES -- DOESN'T TAKE CARE OF IT.

>> GO AHEAD AND ANSWER QUICKLY YOU ARE USING UP ALL YOUR TIME.

>> LET ME.

>> JUSTICE SAYING IT DOESN'T TAKE CARE OF IT.

>> I'M SAYING IF THE COURT FEELS THAT F TAKES CARE OF IT THAT IS SATISFY FREE OEBL WOULD DO THE JOB THE OTHER POINT THAT I WANTED TO MAKE THAT IS IN CIVIL CASES, TRIAL JUDGES DO GRANT LEAVE TO AMENDMENT AND BASICALLY IN-- TO AMEND INSTRUCT THE PLAINTIFF WHAT IS DEFECTIVE LET ME ADD ONE LAST THING IN LAST MINUTE, HERE WHEN HE FILES HIS 3.850, GASKIN WAS A CONTROLLING LAW, AND UNDER GAS!!\$\$!!!! GASKIN, HE DIDN'T HAVE TO PUT ANYTHING IN, THAT FOOTNOTE IN GASKIN WAS RECEDED FROM IN NELSON LADER ON BUT AT THE TIME THAT HE 2350I8D HIS COMPLAINT!!\$\$!!!!!!!!!!!!!!!!!!!! COMPLAINT, NO MATTER WHAT THE COURT DOES, WITH THE LARGER ISSUE IN THIS CASE, HE IS ENTITLED TO AN AMENDMENT UNDER GASKIN STANDARD BECAUSE THAT WHAT IS CONTROLLED \$\$MISS.850 MOTION AT THAT TIME.

FOR ALL OF THESE REASONS WE THINK THAT THE FOURTH DCA DECISION SHOULD BE REVERSED.

>> MR. HAMEL?

>> MAY IT PLEASE THE COURT MARK HAMEL FOR THE STATE OF FLORIDA.

IN BRYANT, THIS COURT SET

FORTH CRITERIA THAT IS FOR PRACTICAL PURPOSES, TRIAL COURTS CAN CUES IN DETERMINE WHETHERING TO DENY A CLAIM AND GRANT LEAVE TO AMEND OR NOT IN A TRIAL COURT SHOULD LOOK TO WHEN WE ARE TALKED ABOUT A DEFICIENCY STRICTLY A MATTER OF FORM OVER SUBSTANCE.

>> -- LET ME LET ME ASK YOU THIS.

JUST AS A MATTER OF FUNDAMENTAL FAIRNESS AS MR. ROGOW SEEMS TO BE ARGUING OR MATTER OF COMMON SENSE WE'VE GOT A SITUATION IN 3.850 IN WHICH THEY ARE -- PRO SE, AND WHAT WE REALLY ARE STRIVING TO DO IS TO HAVE AN ADMINISTRATIVE PROCESS IN OUR COURTS SO THAT THE SUBSTANTIVE MATTERS WHICH THEY CAN RAISE ARE GOING TO BE HEARD ON THEIR MERITS!!!!!!!!!!!!

MERITS. BUT THAT THOSE THAT AREN'T SUBSTANTIVE ARE CULLED OUT, AND SO THAT THE COURTS ARE NOT OVERWHELMED BY THE FACT THAT WE'VE GOT SO MANY PEOPLE IN PRISON IN THIS STATE.

AND WHAT BOTHERS ME IS THAT AS NELSON STATES, WHETHERWHERE THERE IS A MATTER THAT CAN IN GOOD FAITH BE AMENDED SO THAT THE MATTER CAN GO FORWARD ON ITS MERITS AND BE HEARD WHY ISN'T THAT THE MOST EFFICIENT AND FAIREST THING TO DO?

>> YOUR HONOR IS I -- IT IS FAIREST THING TO DO WHEN JUST TALKING ABOUT A TECHNICAL VIOLATION TECHNICAL DEFICIENCY BUT CERTAIN CLAIMS DON'T HAVE ANY SUBSTANCE TO THEM.

>> WELL, I GUESS THE PROBLEM IS THAT AS MR. ROGOWERE YOU. IS TRYING TO -- DISCUSS SHELL MOTIONS!!!!!!!!!!!!!! MOTIONS, AND YOU ARE TRYING TO TALK ABOUT TECHNICAL THINGS IT IS WHAUL THOSE MATTERS ARE, ALL IN THE MIND OF THE BEHOLDER!!!!!!!!!!!!!!

BEHOLDER, AND IN A SPECIFIC CASE WE'VE GOT TO SOME UP WITH SOMETHING THAT HOPEFULLY WILL FIT MANY CASES.

>> YOUR HONOR, WHEN THIS COURT CONSISTENTLY SAID IS THAT IF A METAPHORANT FAIL TO ALING ANY ASPECT OF DEFICIENT PERFORMANCE OR ANY ASPECT OF PREJUDICE, THEY ARE NOT ENTITLED TO EVIDENTIARY HEARING, THAT PLEADING IS SO DEFICIENT!!\$\$!!!!!!!!!!!!!! DEFICIENT, THAT THE TRIAL COURT SHOULD BE ABLE TO DENY INSIGHT BUT WE ARE NOT TALKED ABOUT AN EVIDENTIARY HEARING, AND THIS IS -- MY PROBLEM, WHAT WE MAY HAVE CREATED INADVERTENTLY!!\$\$!!!!!!!!!!!!!! INADVERTENTLY, AS JUSTICE LEWIS WAS MENTIONING THE MAGIC WORDS SOME OF US FELT NELSON NEEDED TO SAY AVAILABLE FOR TRIAL THAT SORT OF -- I MEAN THAT'S GOING TO BE PART OF THE APPROVE, NOW THAT IS IN THE RULE.

IT WASN'T AT THE TIME NOW WE HAVE FOR FAILURE TO CALL WITNESSES THE RULE SPOON FOEDZ THE LITIGANT TO -- WHATEVER THE ALLEGATION, MY CONCERN IS THAT WHAT WE WOULD BE SAYING THAT IS IF A IF A ALLEGED FACT THAT THEY DON'T USE THE MAGIC WORD AND IT WAS -- IT IS PREJUDICED THE OUT!!\$\$!!!! OUTCOME OF THE CASE, WE GOING TO SAY WE WILL LET THAT ONE BE AMENDED, BUT, ON THE OTHER HAND!!\$\$!!!!!! HAND, THEY HAVE USED THE MAGIC WORDS!!\$\$!!!!!! WORDS, THEY HAVE ALLEGED SOME FACTS BUT THEY HAVEN'T QUITE A TIED IT TOGETHER, AS WE TELL THEM IN THE FORUM WHICH NO ONE MNGS THE FORM THE FOLLOW NOW THEY ARE SUPPOSED TO TELL THEIR STORY BRIEFLY WITHOUT CITING CASES OR LAW, SO YOU ARE NOW SAYING IF IT IS TECHNICAL!!\$\$!!!!!!!!!!!!!!

TECHNICAL, LET THEM AMEND, BUT IF THERE ARE FACTS, THAT THEY JUST -- FACTS THEY DON'T QUITE STATE CLAIM FOR RELIEF THERE SHOULD BE MORE FACTS THOSE SHOULD BE DENIED THAT IS WHAT IT SEEMS THE FOURTH DISTRICT ENDED UP SAYING SO THAT WELL YOUR HONOR, YES, WHAT IT IS.

>> YES, AND YOU THINK THAT IS A GOOD THING IN OTHER WORDS TO MAKE PEOPLE AMEND IN PRISON IF THEY LEFT SOMETHING TECHNICAL OUT BUT IF ALMOST IN THE BALLPARK BECAUSE THEY ALLEGED A LOT OF FACTS, NOT TO LET THEM AMEND?

>> NO, YOUR HONOR, BECAUSE IN THIS CASE, MR. SPERA DIDN'T EVEN GET IN THE BALLPARK HE ALLEGED A LAUNDRY LIST OF COMPLAINTS ABOUT HIS ATTORNEY AND DID NOT TIE THAT ALL IN ANY WAY TO HOW IT PREJUDICED HIM AT TRIAL.

THE PRACTICAL THING IS THAT WHEN SOMEONE HAS A VALID CLAIM, ABOUT PREJUDICE, OR INEFFECTIVE ASSISTANCE AT TRIAL, THEY RAISE THESE CLAIMS AND THEY SAID, MY ATTORNEY SHOULD HAVE CALLED MY BROTHER OR MY ATTORNEY SHOULD HAVE OBJECTED TO THIS PIECE OF EVIDENCE, AND THEY TRY TO TIE IT TOGETHER THE JURY WOULD HAVE HEARD THIS WORK NOT HAVE HEARD THIS, AND I WOULD HAVE BEEN ACQUITTED ON THIS CHARGE, SO --

>> BUT IN THESE SITUATIONS WHERE THERE ARE THINGS, THAT ARE MISSING IN THE TRIAL JUDGE LOOKS AT A MOTION, FOR -- FOR POWER NO POSTCONVICTION TECHNICALLY DOES NOT STATE A CLAIM MANY WHY ISN'T IT A BETTER RULE AS MR. ROGOW PROPOSES THAT YOU GIVE THESE DEFENDANTS, ONE OPPORTUNITY TO AMEND AND I'M NOT ADVOCATING THE TRIAL JUDGE HAS TO SAY IN THIS CLAIM, YOU

OMITTED X, YIZ, THOSE KINDS OF THINGS!!\$\$!!!!!!!!!!

THINGS, BUT TELL THE DEFENDANT, THAT HIS -- MOTION IS INSUFFICIENT, AND YOU HAVE AN OPPORTUNITY TO AMEND, WHY ISN'T THAT A BETTER RULE RATHER THAN WORRYING ABOUT WHETHER A TECHNICAL ARE, SUBSTANTIAL FORM OVER SUBSTANCE OR WHATEVER.

>> WELL BECAUSE YOUR HONOR IT IS CLEAR THAT THERE ARE PLEADING REQUIREMENTS FROM THE RULE, AND IF NIF THOSE ARE NOT MET, SUCH AS SIGNING IT OR THE PROPER OATH HE SHOULD BE GRANTED LEAVE TO AMEND THAT THIS COURT HAS ALSO SAID IF SOMEONE FAILS 230 INCLUDE TALKING ABOUT A WITNESS NOT AVAILABLE FOR TRIAL IN EFFECT ASSISTANCE COUNSEL THAT IS SOMETHING THAT IS --

>> YOU SEE WHAT YOU ARE DOING YOU ARE P\$\$ARSING OUT, IF HE MISSES THIS, THEN GETS AN OPPORTUNITY TO AMEND, BUT IF HE -- IN ANOTHER SITUATION IF HE MISSES SOMETHING ELSE HE DOESN'T, WHY ISN'T IT JUST A BETTER RULE THAT IF THIS INSUFFICIENT, GIVE HIM 30 DAYS TO AMEND, ONCE HE AMENDED OR NOT AMENDED, YOU CAN MOVE ON FROM THERE

>> YOUR HONOR BECAUSE THIS COURT HAS SAID, THAT THE DEFENDANT HAS TWO YEARS, TO RAISE A MOTION FOR POSTCONVICTION RELIEF, AND TWO YEARS, IS A SUFFICIENT AMOUNT OF TIME WITH DUE DILIGENCE, TO BRING A PROPER CLAIM.

>> ISN'T THAT WHAT HAPPENS NOW UNDER THE CURRENT RULES YOU REAL REALIZE DO HAVE A CHANCE TO AMEND ALTHOUGH WE DON'T USE THE SAME NOMENCLATURE IT IS A SUCCESSIVE MOTION INSTEAD OF AMENDED MOTION IF THE PREVIOUS MOTION HAS NOT BEEN DISMISSED ON THE MERITS IT WAS SOME PLEADING DEFICIENCY, THEN THE

DEFENDANT HAS AN OPPORTUNITY TO FILE A SUCCESSIVE MOTION WHERE HE REPAIR AS THE DEFICIENCY AS LONG AS WITHIN THE TWO YEAR --- YEAR PERIOD APPEARED WE ARE NOT REALLY TALKED VERY MUCH HERE.

>> YOU ARE RIGHT I WOULD ADD ONE THING YOU ARE RIGHT THE DEFENDANT MAY BRING CLAIM ANY POINT WITHIN A TWO-YEAR PERIOD AS LONG AS PREVIOUS CLAIM HAS NOT BEEN DENIED ON THE MERITS THE RULE ALSO ALLOWS DISCRETION EVEN IF A PRIOR CLAIM HAS BEEN PROPERTY AND DETERMINED ON THE MERITS, THE RULE SAYS A TRIAL COURT MAY DENY THIS SUCCESSIVE SO, THEREFORE!!\$\$!!!!!!!!!!!!!! THEREFORE, THE TRIAL JUDGE HAS AN OPPORTUNITY TO LOOK AT THE CLAIM, AND TO LOOK AT THE RECORD, AND CAN SAY, YOU KNOW, WELL HE WAS JUST MISSING A SMALL THING.

>> ISN'T MORE EFFICIENT INSTEAD OF THE TRIAL JUDGE HAVING TO LOOK AT THE FIRST MOTION, WHICH HE DISMISSED AND THEN THE SUCCESSIVE FILED SIX MONTHS LATER, AND KIND OF DO A COMPAR AND CONTRAST ISN'T IT MORE EFFICIENT IF THE JUDGE SAYS I'M GOING TO DISMISS THIS, WITH LEAVE TO AMEND AND FILE AN AMENDED ONE AND THEN SEE MAKE SURE THE AMENDED ONE CURES THE DEFICIENCY WHY ISN'T THAT MORE EFFICIENT WAY TO ACCOMPLISH THE SAME THING SMIET IS FINE YOUR HONOR IF A CONNECT -- TECHNICAL DEFICIENCY BUT IN SOME K4R5I78Z A TRIAL COURT CAN LOOK AT IT AND IN THIS CASE THIS COURT CAN SAY -- SEE THE RECORD INCLUDES THE ENTIRE %%"E TRIAL, ATTACHED AS PART OF THE RECORD

--

>> WHAT DO YOU CONSIDER A TECHNICAL DEFICIENCY, I MEAN, IF YOU PARSE IT OUT INTO TECHNICAL DEFICIENT EVERYONE

ELSES VERSUS SOMETHING ELSE,  
WHAT IS A TECHNICAL DEFICIENCY.

>> IT IS ANY FAILURE TO COMPLY  
WITH RULE 3.850, TO INCLUDE A  
PROPER OATH, OR INCLUDE THE  
NECESSARY DOCUMENTS.

VERSUS SOMEONE WHO ABSOLUTELY  
ASSERTS NO FACTS AS TO  
PREJUDICE OR --

>> UNDER MOST OF THESE  
SITUATIONS WE SEE, ACROSS THE  
LAW, WHETHER CRIMINAL, OR CIVIL,  
WE TEND TO -- DO WE NOT AT THE  
STAGE WHEN WE ARE TRYING TO  
DETERMINE WHAT IT IS WE ARE  
GOING TO DETERMINE, IT -- FOLKS  
KNOW WHAT THE OBJECTION IS, TO  
WHAT THEY HAVE SAID AND HAVE  
THE OPPORTUNITY TO CAPTURE WHAT  
THE DISPUTE IS ABOUT?

IT IS A DIFFERENT STORY ONCE  
YOU GO TO TRIAL I ME, PUT ON  
YOUR CASE AND IF YOU MISSED  
SOMETHING THEN WE HAVE RULES  
THAT DO THAT.

BUT AT THE STAGE WHERE WE ARE  
TRYING TO FORMULATE WHAT IS THE  
DISPUTE ABOUT, DON'T WE  
GENERALLY HAVE SOME KIND OF  
MECHANISM THAT LETS FOLKS, IF  
THEY HAVE A DEFICIENCY WITHOUT  
PARSING, THAT PERMITS THEM TO  
AMEND THAT TO -- YOU DIDN'T  
SATISFY STRIKLAND BECAUSE YOU  
DID NOT ALLEGE HOW THE ACT  
IMPACTED YOUR CASE.

I CAN SHOW YOU THAT SO YOU CAN  
FILE THE AMENDED MOTION.

WHAT -- DON'T WE NORMALLY DO  
THAT IN OTHER AREAS, OTHER  
AREAS OF EVEN THE CRIMINAL LAW.

>> WELL, I WOULD POINT TO THE  
GASKIN CASE IN 1999.

THE GASKIN CASE, THIS COURT  
SAID NO EVIDENTIARY HEARING AND  
AT THAT POINT, THERE WAS NO GO  
BACK TO AMEND THE TRIAL COURT  
HAD NOT GRANTED LEAVE TO AMEND  
IN THAT CASE AND THERE WAS ALSO  
-- I MEAN, THE VARIAN CASE AND  
LOOKING AT THE CLAIM, WHERE  
THERE IS ABSOLUTELY NO  
ALLEGATION AS TO PREJUDICE,.

>> ARE WE TALKING ABOUT WHO

HAPPENS THE BURDEN TO ASK --  
LET'S ASSUME THE INDIVIDUAL IS  
REPRESENTED BY VERY COMPETENT  
COUNSEL.

AND THAT COUNSEL GOES TO A  
HEARING AND THEY SAY THIS IS  
INSUFFICIENT AND DISCUSS WHY  
AND COUNSEL SAYS, I WOULD LIKE  
LEAVE TO AMEND AND YET WE HAVE  
SOMEONE WHO IS NOT A LAWYER AND  
HAS NO IDEA AND IS NOT EVEN  
PRESENT AT THE TIME THIS IS  
GOING ON AND IT IS INSUFFICIENT  
AND WE DON'T EACH DISCUSS THE  
CONCEPT OF AMENDING IT, IS THAT  
WHAT HAPPENED?

IS THAT THE PRACTICAL --  
REALITY OF WHAT GOES ON ON THE  
GROUND?

>> NO, YOUR HONOR, THE REALITY  
IS THAT INMATES HAVE A LOT OF  
CASE LAW TO INSTRUCT ON HOW TO  
PROPERLY FILE A 3850 MOTION,  
AND THEY KNOW WE -- HAS TO  
INCLUDE ALLEGATIONS OF  
PREJUDICE, AND PERFORMANCE, IF  
IT IS INEFFECTIVE --

>> YOU SAY THAT BUT THE FORM  
I'M LOOKING AT 3.987 REALLY  
DOESN'T TELL THEM THE AT ALL  
THAT THAT IS WHAT THEY HAVE TO  
DOCUMENT IT SAYS THAT THEY CAN  
CHECK OFF DENIAL OF INEFFECTIVE  
ASSISTANCE OF COUNSEL AND THEN  
IT SAYS, GIVE THE FACTS TO TELL  
YOUR STORY.

WITHOUT CITING CASES OR LAW.  
THE WHOLE IDEA OF THIS RULE WAS,  
YES, WE WANTED FACTS.  
WE DIDN'T WANT THERE TO BE SOME  
TECHNICAL PLEADING AND NOW ALL  
OF A SUDDEN WE ARE TAKING 3.850  
WITHOUT WARNING TO THE INMATES,  
BECAUSE I'M -- I'M CONCERNED  
ABOUT THIS CASE BUT CONCERNED  
-- AND SAYING, YOU BETTER DOT  
EVERY I AND WE CONCERN.

>> I LOOK AT WHAT HAPPENED IN  
THE CIVIL ARENA WITH THE  
AUTOMOBILE ACCIDENT CASE, YOU  
SAY THAT AN ACCIDENT OCCURRED,  
THERE WERE NEGLIGENT -- THEY  
WERE NEGLIGENT AND IT WAS A  
LEGAL CAUSE OF DAMAGES AND

THAT'S ALL THE FORM SAYS YOU HAVE TO DO. NOTHING ABOUT FACT, SO EXPLAIN TO ME WHERE WE HAVE DEVELOPED THE RULES THAT -- FACTS ARE ALLEGED THAT IF THEY ARE IN THAT BLACK HAWK, WITH THE FACTS, THAT THEY ARE GOING TO BE DISMISSED IF THEY HAVEN'T GIVEN ENOUGH FACTS WITHOUT LEAVE TO AMEND.

>> YOUR HONOR, THERE ARE TWO PLEADING REQUIREMENTS. FIRST IS A PLAEDING REQUIREMENT OF THE RULE 3.850.

AND IN CASES OF INEFFECTIVE,, ASSISTANCE OF COUNSEL THERE IS A PLEADING REQUIREMENT END WHERE IT WOULD COME IN AS FACT AND THE PERSON WOULD HAVE --

>> THAT'S WHAT I AM ASKING, WHERE DOES IT SAY THAT IN THE RULES, TO PUT THE INMATE ON NOTICE.

>> AND WHERE DOES IT SAY IT IN THE FORM.

>> IT JUST SAYS INCLUDE A BRIEF STATEMENT OF THE FACTS.

>> EXACTLY.

>> AND THAT SHOULD INDICATE TO AN INMATE WHO, AT TRIAL IN THIS CASE TO SAY MORE THAN MY ATTORNEY SHOULD HAVE CALLED WITNESSES.

>> FORGET -- MY PROBLEM IS, WHAT I'M SAYING IS, SOMEONE'S LIFE IS AT STAKE, ARE THEY GOING TO SPEND THE REST OF THEIR LIVES IN PRISON, WE'RE GIVING THEM LESS OPPORTUNITY THAN SOMEBODY WHO HAS BEEN INVOLVED IN A FENDER BENDER AND DOESN'T THAT SEEM AT ALL TO BE A REVERSE OF WHAT WE NEED TO BE DOING.

>> WELL, I WOULD DISAGREE, ESPECIALLY IN THIS CASE, WHERE THE DEFENDANT HAD REPRESENTATION OF COUNSEL, AND HE HAD THE BENEFIT OF SEEING THE STATE RESPONSE, HE COULD AMEND HIS MOTION AT ANTICIPATE TIME BEFORE THE TRIAL COURT RULED AND HE HAD A COMPLETE

LIST FOR THE STATE'S RESPONSE,  
OF THE DEFICIENCY -- HE DID NOT  
THINK -- AND FURTHERMORE, HE  
DID NOT EVEN MOVE TO AMEND THIS  
IS CLAIM AFTER IT HAD BEEN  
DENIED.

>> I THINK THAT WE ARE GOING TO  
HAVE TO DEAL WITH THIS IN  
PIECES.

BECAUSE IT IS -- WHEN YOU DEAL  
WITH IT IN A -- TRYING TO COVER  
ALL OF THE FACTS, THAT COULD  
POSSIBLY COME IN YOU REALLY RUN  
INTO A PROBLEM, YOU KNOW?

AS BEING A -- THE AUTHOR OF  
NELSON, I THINK WHAT I THOUGHT  
WE WERE DOINGEN NELSON IS WE  
WERE DEALING WITH A VERY  
DISCRETE MATTER.

AND WE WERE DEALING WITH A  
DILEMMA OF WHETHER, WHEN  
SOMEONE ALLEGES THAT THEY HAVE  
THEIR COUNSEL WAS INEFFECTIVE  
BECAUSE OF THE FAILURE TO CALL  
A WITNESS, WHETHER THAT CASE  
SHOULD HAVE -- GO FORWARD TO AN  
EVIDENTIARY HEARING, JUST ON  
THAT BARE ALLEGATION, OR  
WHETHER WE SHOULD ALLOW THE  
DEFENDANT TO FLESH THAT OUT, SO  
THAT WE KNOW -- THE TRIAL COURT  
KNOWS -- THAT THERE IS SOME  
BASIS OF WHO -- WHETHER THE  
WITNESS WAS AVAILABLE OR NOT.  
NOW, ISN'T IT PREFERABLE FROM  
THE STATE'S STANDPOINT TO FLESH  
THAT OUT TO THE -- SO THE  
PERSON HAS TO MAKE A GOOD-FAITH  
STATEMENT IN THE MOTION, THAT  
WE HAVE A WITNESS, WHO THAT  
WITNESS IS, AND WHETHER THAT  
WITNESS IS AVAILABLE AT THE  
TIME OF TRIAL RATHER THAN  
HAVING ALL OF THOSE CASES GO TO  
AN EVIDENTIARY HEARING JUST ON  
THE BASIS OF THAT PLEA DEAL.  
WOULDN'T THAT --

>> IT WOULD BE PREFERABLE, YOUR  
HONOR AND DEFENDANTS DO HAVE  
OPPORTUNITY, A WHOLE TWO YEARS  
AND ARE ABLE TO AMEND THE CLAIM  
AT ANY TIME BEFORE THE TRIAL  
COURT RULES AND IF THERE IS NO  
RULING ON THE MERITS THEY HAVE

THE RIGHT TO AMEND THE CLAIM  
WITHIN THE TWO-YEAR PERIOD AND  
THERE ARE LOTS OF OPPORTUNITIES  
DEFENDANTS HAVE TO GET THAT ARE  
CLAIMS RIGHT.

AND TRIAL COURTS --

>> YOU CONCEDED THAT AND I  
AGREE WITH YOU, WHY SHOULDN'T  
THEY BE GIVEN THE TWO PERIODS  
OF -- ABOUT TO EXPIRE, WHY  
SHOULDN'T THEY BE GIVEN 30 DAYS  
TO AMEND?

WHY IS 30 -- DOES 30 DAYS MAKE  
THAT BIG OF A DIFFERENCE IN THE  
CONTEXT OF WHAT WE ARE DEALING  
WITH HERE.

THAT WHAT IS WE SAID IN BRYANT,  
GIVE THEM 30 DAYS TO AMEND.

>> WELL, THAT WOULD BE FINE,  
YOUR HONOR, IF IT WAS A  
DEFICIENCY --

>> READ THAT AS TO, IF YOU ARE  
WILLING WITHIN THE TWO-YEAR  
PERIOD WE DON'T LIMIT THE  
TECHNICAL DEFICIENCY.

>> CORRECT, YOUR HONOR.

>> FILING IT ON DAY 364 OR  
TIMES TWO, WHATEVER THAT EQUALS,  
WHY NOT GIVE ANOTHER 30 DAYS.

>> WHAT IT WILL RESULT IN IS  
PERMITTING MOTIONS, IF YOU LET  
ANYTHING IN, YOU ARE GOING BACK  
TO THE SHELL MOTIONS AND  
LETTING THEM FILE AT THE LAST  
MINUTE, A CLAIM SAYING MY  
ATTORNEY WAS INEFFECTIVE AND  
YOU WILL GIVE THEM 30 DAYS TO  
TRY AND GET IT RIGHT AND GET IT  
RIGHT AGAIN.

>> 3 -- PROVIDED THE ORIGINAL  
MOTION WAS FILED IN GOOD FAITH  
OR SOMETHING LIKE THAT, SO ONE  
THAT TAKE CARE OF IT IF YOU  
INCLUDED THAT INTO YOUR HONOR,  
I THINK THAT IS WHAT THIS IS  
ABOUT WHETHER A CLAIM IN GOOD  
FAITH AND I THINK TRIAL COURTS  
SEE THESE CLAIMS ALL THE TIME  
AND THEY ARE -- THE BEST  
OPPORTUNITIES TO LOOK AT THIS  
CLAIM AND LOOK AT THE LAUNDRY  
LIST, IN THIS CASE AND THIS LNY  
RECORD AND THE PERFORMANCE OF  
THE DEFENSE ATTORNEY AT TRIAL

AND SAY THIS IS NOT IN THE  
BALLPARK.

>> WAS THERE A HEARING IN THIS  
CASE.

>> NO, URINE.

>> AND WHAT HAPPENS IN -- NO,  
YOUR HONOR.

>> WHAT HAPPENS IN THE -- WE  
COME FROM THE CIVIL ARENA,  
THESE GET FILED THERAPY JUDGE  
MAY OR MAY NOT UNDER THE RULE  
ORDER A RESPONSE, YOU SAY THE  
JUDGE HERE ORDERED A RON, IS  
THAT CORRECT.

>> YES, YOUR HONOR.

>> AND GETS DENIED -- NOBODY  
CALLS IT UP FOR A HEARING.  
AND THERE WASN'T A HUFF HEARING  
LIKE THERE IS IN A DEATH  
PENALTY HEARING.

>> THERE WAS NOT, YOUR HONOR.

>> AND I GUESS THE PROBLEM I  
HAVE IS WE HAVE A SITUATION,  
WHAT JUSTICE WELLS IS POINTING  
OUT, WE SEE VARIATION OF THESE  
THINGS AND THIS IS THE IDEA,  
WELL, OUR INSTINCT WOULD BE WHY  
WASN'T THERE A HEARING AND FIND  
OUT FROM MR. ROWING GO'S  
PREDECESSOR, YOU KNOW --  
MR. ROWING GO'S PREDECESSOR AND  
RATHER THAN SAYING WE WILL GO  
THROUGH -- ASKING US OR THE  
TRIAL JUDGE TO GO THROUGH A  
RECORD TO FIND OUTFIT IS  
REFUTED.

ISN'T IT -- DO YOU SEE THAT AS  
BEING INEFFICIENT TO HAVE TO  
LOOK AT THE RECORD TO DECIDE AS  
OPPOSED TO SAYING, LET SOMEONE  
AMEND AT LEAST ONCE, ONE TIME.

>> [INAUDIBLE] IN THIS CASE,  
THE TRIAL JUDGE WENT TO THE  
EFFORT OF GOING THROUGH THE  
WHOLE RECORD AND PROVIDING A  
DETAILED ORDER FOR WHY HE WAS  
REJECTING THE CLAIMS, BASED ON  
WHAT HE SAW IN THE RECORD.

>> A PROPOSED ORDER FROM THE  
STATE OR THE JUDGE'S OWN --

>> JUDGE'S OWN ORDER.

>> THERE ARE KNOW FACTS IN THE  
ORDER, IT'S CON SLEWSRY AND I  
CAN'T TELL -- CON CLUESRY AND I

CAN'T TELL, IS THERE SOMETHING  
HERE OR ISN'T --.

>> THERE IS NOT, YOUR HONOR.  
THE MERE -- THE FACTS OF CASE,  
INVOLVED -- IN THE TRANSCRIPT,  
INVOLVED A PERSON WHO WAS SEEN  
BY POLICE, ONE POLICE OFFICER  
AND ONE VOLUNTEER ON THE PART  
OF WEST PALM BEACH AIRPORT  
PROPERTY, WAS TOLD BY THE  
POLICE TO STOP, HE FLED, THE  
POLICE CHASED HIM --

>> BUT BEYOND THE FACTS OF THE  
CASE, WHAT WE ARE STRUGGLING  
WITH HERE IS, HOW DO YOU DEAL  
WITH THESE CASES WITHOUT HAVING  
TO DEAL WITH THE -- WHETHER A  
TRIAL JUDGE COULD SUBJECTIVELY  
SAY THIS WAS A GOOD-FAITH  
EFFORT, THIS WAS NOT, THIS WAS  
TECHNICAL, THIS WAS NOT, AND  
ALL OF THOSE KINDS OF -- HOW  
CAN WE GET TO A RULE THAT IS  
FAIR TO ALL OF THE PARTIES,  
WITHOUT HAVING TO WORRY ABOUT  
ALL OF THESE OBJECTIVE FACTORS.

>> WELL, BECAUSE, YOUR HONOR --  
WHY ISN'T ALLOWING ONE  
AMENDMENT FOR 30 DAYS.

>> YOUR HONOR IN SOME CASES IT  
IS CLEAR.

SOME CASES, LIKE THAT, IT IS  
CLEAR, WHEN THERE ARE NO FACTS  
ALLEGED, EITHER TO DEFICIENT  
PERFORMANCE OR PREJUDICE, THAT  
IS NOT A CLAIM MAND GOOD FAITH  
BLANK INTO WHAT DO YOU DO IN A  
SITUATION -- [INAUDIBLE] BEFORE  
THE TWO YEARS IS OVER WITH, AND  
THE JUDGE DOESN'T RULE UNTIL  
AFTER THE TWO YEARS HAS PASSED  
AND RULES THAT --

IT IS IN SUFFICIENT, THE  
ABILITY -- TO AMEND IS NOT --

>> RIGHT, YOUR HONOR, IF THE  
TWO-YEAR PERIOD HAD EXPIRED IT  
WOULD BE A SITUATION IN WHICH A  
COURT NEEDS TO GRANT LEAVE TO  
AMEND BECAUSE IT WOULDN'T  
OTHERWISE HAVE THE LEAVE TO  
AMEND, BECAUSE THE TWO-YEAR  
PERIOD HAS EXPIRED.

IF THE TWO-YEAR PERIOD HADN'T  
EXPIRED, WASN'T CLOSE TO

EXPIRING.

>> DO YOU SEE ANY DIFFERENCE ON THE LAW THAT APPLIES TO THE SITUATION WHERE THE INABILITY TO AMEND IS A RESULT OF THE TRIAL COURT NOT MAKING A TIMELY RULING ON THE MOTION?

>> WE HAVE HAD SOME OF THESE MOTIONS THAT SIT FOR MONTHS, IF NOT A YEAR OR MORE.

BEFORE I TRIAL JUDGE RULES ON THEM.

>> SURE, YOUR HONOR.

AND TALKING ABOUT WHETHER A TRIAL COURT SHOULD GRANT LEAVE TO AMEND, WE ARE TALKING ABOUT, HAS THE TWO-YEAR PERIOD ALREADY EXPIRED AND NOW, IS THIS SUCH AN ERROR, OR SUCH A DEFICIENCY IN THE PLEADING, WHERE LEAVE TO AMEND SHOULD BE GRANTED OR NOT. AND WHERE THE TRIAL COURTS LOOKED IT AND DETERMINED HE IS NOT IN THE BALLPARK, HE SHOULD NOT BE GRANTED LEAVE AND --

>> I'M NOT SURE YOU REALLY RESPONDED TO HIS CONCERN ABOUT THESE MOTIONS AREN'T EVEN RULED UPON UNTIL AFTER THE TWO YEARS HAVE EXPIRED.

>> YES.

-- THE FIRST YEAR, A MOTION IS FILED AND MAY NOT HAVE ALL OF THE REQUIREMENT THAT IT NEEDS. THE DRIL JUDGE, THE DEFENDANT -- TRIAL JUDGE, THE DEFENDANT IS SITTING THERE WAITING FOR A TRIAL JUDGE TO MAKE A RULING AND THE TRIAL JUDGE DID NOT MAKE A RULING UNTIL AFTER THE TWO YEARS HAD PASSED, SO THE DEFENDANT IS NOT ABLE TO AMEND, NOT BECAUSE OF THE DEFENDANT NOT AMENDING TIMELY BUT BECAUSE HE OR SHE IS NOT ON NOTICE OF THE NEED TO AMEND.

>> I SEE THE POINT YOU ARE MAKING, YOUR HONOR, AND THE DISTINCTION THERE IS JUST A FUNCTION OF THE RULE. THE RULE 3.850-F PROVIDES THE COURT TO DISMISS IT AS EXCESSIVE IF IT HAS BEEN ADDRESSED ON THE MERITS BUT HE

ONLY HAS -- ONLY WITHIN THE  
TWO-YEAR PERIOD AND IF WE TALK  
ABOUT WHETHER A COURT CAN DENY  
IT AS SUCCESSIVE IT WOULD STIBL  
UNTIMELY BEYOND THE TIME PERIOD

--

>> EVEN IF THE YEAR PASSED  
SIMPLY BECAUSE THE JUDGE SAT ON  
THE FILE, NOT MAKING A RULING.

>> YES, YOUR HONOR AND THAT IS  
A FUNCTION OF THE RULE, WHEN A  
DEFENDANT MAKES A CLAIM, THEY  
CAN MAKE IT ON THE FIRST DAY OF  
THE TWO-YEAR PERIOD, OR THEY  
CAN WAIT UNTIL THE END.

AND THAT IS THEIR CHOICE TO  
HAVE A TWO-YEAR PERIOD TO FILE  
AND TO GET THE CLAIM RIGHT AND  
FOR PEOPLE WHO WAIT UNTIL THE  
END, IF THERE IS SOMETHING TO  
CORRECT ON IT, IT WILL BE  
UNTIMELY AFTER THAT.

>> WITH OUR ASSISTANCE YOU HAVE  
UTILIZED ALL YOUR TIME TIME.  
THANK YOU VERY MUCH.

>> THANK YOU, YOUR HONOR.

>> SHORT REBUT.

>> YES.

>> WHAT I THINK THE COURT IS  
LOOKING FOR HERE IS SOMETHING  
THAT IS BOTH FAIR AND  
EFFICIENT.

AND FAIR AND EFFICIENT WOULD BE  
LEAVE TO AMEND THE 30 DAYS IN  
BRYANT OR PERHAPS LONGER,  
DEPENDING UPON THE SITUATION IN  
THE CASE AND BRYANT TALKS ABOUT  
THE POSSIBILITY THAT THERE MAY  
BE A NEED --

>> JUST TO CLARIFY, THE  
ARGUMENT YOU ARE MAKING IS  
WHERE THE COURT FINDS THAT THE  
INITIAL MOTION IS  
INSUFFICIENTLY PLED IT WOULD  
NOT APPLY, LET'S SAY, AFTER AN  
EVIDENTIARY HEARING THAT A  
COURT SHOULD ALLOW A DEFENDANT  
TO REPLEA IT AT THAT POINT.

>> THAT'S CORRECT, JUSTICE  
CANTERO.

>> CAN YOU DO THAT IN THE CASE  
OF -- EVEN THE CONCLUSORY SHOW  
MOTION.

>> I WOULD.

I THINK THAT THAT IS BOTH FAIR  
AND EFFICIENT --

>> YOU AREN'T REALLY MAKING --  
WE AREN'T REALLY MAKING THIS UP  
AS WE GO ALONG, THE CURRENT  
RULE SAYS NOTHING EVEN ABOUT  
AMENDING AND THAT -- I THINK  
THE PROBLEM IS AND YOUR CLIENT  
THOUGHT GASKIN CONTROLLED, BUT  
IT DOES SEEM, FRANKLY, AFTER  
THE RESPONSES FILED BY THE  
STATE, AS REPRESENTED THEY THE  
LAWYER AT THAT TIME, THAT THEY  
-- [INAUDIBLE] IN THIS CASE.

>> ONE WOULD HOPE SO, IN FACT  
THAT KIND OF RAISES THE SPECTER  
OF INEFFECTIVE COUNSEL IN THE  
3.850 PETITION BUT THAT IS A  
DIFFERENT --

>> WE AREN'T GOING THERE.

>> I KNOW, WE ARE NOT GOING  
THERE.

>> I CAN SEE IN THE BACK GOING  
-- NO!  
NO!

>> WITH THE OPINION IT IS  
PRESENTED SQUARELY TO THIS  
COURT AND DOES NELSON, DOES  
BRYANT REQUIRE LEAVE TO AMEND  
AND IN FACT THE 4th DCA HAD  
THAT STANDARD UNDER FRASER AND  
RECEDED FROM FRASER AND UNIDID  
FRASER.

BUT, FAIR AND EFFICIENT, I  
THINK, IS THE TEST.

AND AMENDMENT WOULD MEET THE  
FAIR ANDEE MICHIGAN TEST.

>> THANK YOU VERY MUCH.  
SNOW COURT WILL STAND IN  
RECESS.

>> PLEASE RISE.,