IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,816

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ALLEN LEE DAVIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

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# REPLY BRIEF OF APPELLANT

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### ARGUMENT I

**REPLYING TO APPELLEE'S ARGUMENT THAT THE CIRCUIT COURT DID NOT ERR IN FAILING TO ORDER A HUFF HEARING ON MR. DAVIS' RULE 3.850 CLAIM.**

Appellee concedes that, but for its proposed harmless error analysis, the plain language of Rule 3.851(c) required the trial court to hold a Huff hearing in this case. Appellee further concedes that the trial court erred in relying on the authority of Groover v. State, 703 So. 2d 1035 (Fla. 1997), to assert the proposition that no Huff hearing was required in Mr. Davis' case. Nevertheless, Appellee cites Groover to maintain that the error by the trial court in failing to grant a hearing was harmless.

Appellee's reliance on the "alternative holding" of Groover, in turn, ignores this Court's rejection of that argument in Mordenti v. State, 711 So. 2d 30 (Fla. 1998):

> As noted by the State, we did conclude in Groover that the failure to hold a Huff hearing on the defendant's fourth request for postconviction relief constituted harmless error. We did so, however, after finding that our ruling in Huff was limited to initial postconviction motions. Additionally, we stated in Groover that "it would have been the better practice for the court to have permitted legal argument on the motion."[1]

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[1]In footnote 3 of Mordenti the Court summarized the dispositive law of the issue before this Court, "Effective January 1, 1997, a Huff hearing must be conducted on all rule 3.850 motions filed in capital cases where the defendant has been sentenced to death." Id. (Citation omitted) (emphasis added); See Fla. R. Crim. P. 3.851(c); Court Commentary to Rule 3.851(c) regarding 1996 amendment ("Subdivision (c) is added to make the Court's decision in Huff v. State, 622 So. 2d 982 (Fla. 1993), applicable to all rule 3.850 motions filed by a prisoner who has been sentenced to death.")

Mordenti, 711 So. 2d at 32 (emphasis added)(citations omitted).

Mordenti is also instructive because the Court approves of allowing Mordenti to be heard on his public records requests. Id. Mr. Davis should likewise be allowed to present his claim that he should be entitled to complete his FOIA request and otherwise discover the documentation on which the Report is based.

In sum, pursuant to the plain language of Rule 3.851(c) of the Florida Rules of Criminal Procedure and to this Court's analysis in Mordenti, the Appellee's reliance on Groover to argue that this Court conduct a harmless error analysis to deprive him of a hearing is misplaced.

**ARGUMENT II**

**REPLYING TO THE APPELLEE'S ARGUMENT THAT THE CIRCUIT COURT DID NOT ERR IN SUMMARILY DENYING MR. DAVIS' 3.850 MOTION ON THE GROUNDS THAT HE WAS PROCEDURALLY BARRED AND THAT HIS MOTION WAS INSUFFICIENTLY PLED.**

Mr. Davis' Initial Brief addresses the Appellee's factual arguments that the claim of his 3.850 Motion is facially insufficient and procedurally barred. Appellant therefore reiterates those arguments and further asserts that the facial insufficiency standard is prematurely applied by the Appellee, as that standard should be employed only after the Huff hearing to determine whether an evidentiary hearing is warranted. The procedural bar argument is also based on facts the trial court has prematurely and without any evidentiary basis found to be true. Finally, the newly asserted procedural bar based on the "late" filing of the verification is not supportable as a matter of law

and has been, in any event, waived.

First, Appellant disputes the Appellee's contention that his Motion is time-barred because Mr. Davis failed to file a properly verified motion until more than one year had elapsed following the date of release of the OIG Report.

The Motion was, in fact, timely filed because the facts on which his claim were predicated were unknown to Mr. Davis and his attorneys and could not have been ascertained by him or them in the exercise of due diligence until a reasonable time after the April 14, 1997 issuance of the Justice Department Report. See Fla. R. Crim. P. 3.850(b)(1). Certainly, the Report is of such a volume and density that neither Mr. Davis nor his attorneys could become aware of a "claim," as Rule 3.850(b)(1) requires, for a reasonable time after the release of the Report. No reasonable person could contend that Mr. Davis' claim could be immediately ascertained upon release of the Report. Some de minimis period, which surely would exceed a week or two, after the release of such a massive tome would be required if the huge, complicated, technical Report were to be fairly digested and analyzed for a "claim."

Secondly, although noting the typographical errors in the dates of the Appellant's pleadings, the Appellee does not dispute the trial court's finding that the Report was released on April 15, 1997. Thus, the April 14, 1998 filing of the 3.850 Motion would be timely. Further, like the trial court, the Appellee relies exclusively on the Report, which refers to media coverage of the allegations pursuant to which the investigation was mounted and the

Report produced.

In the event that the Court concludes that filing occurred on April 21, 1998, the date the Appellee alleges the verification of the Motion was filed, that filing would be timely because the triggering date of the limitation is the date the "claim" could or should be ascertained. It is notable that, in the lower court, the State challenged neither the April 14, 1998 filing nor the legal effect of the subsequent verification and has not preserved the right to do so now. See Cook v. State, 638 So. 2d 134 (Fla. 1st DCA 1994) (By responding in trial court to claims, State waived right to contest their timeliness on appeal.)

Even assuming arguendo that a proper record has established that April 14, 1998 was a fixed and final date for filing the 3.850 Motion and that the State has not waived the assertion of that bar, the subsequent filing of the verification relates back to the filing date of the Motion. See, Florida v. Burton, 654 So. 2d 672 (Fla. 3rd DCA 1995) (subsequently supplied verification on remand makes motion a 3.850 Motion - no limitation asserted or acknowledged); Goff v. State, 673 So. 2d 990 (Fla. 4th DCA 1996) (remand for verification); Rozier v. State, 618 So. 2d 120 (Fla. 5th DCA 1992) (supplemental documentation filed within reasonable time after original, timely motion filed); Rivet v. State, 618 So. 2d 377 (Fla. 5th DCA 1993) (timely 3.850 motion may be amended or supplemented to cure deficient oath prior to hearing on Motion directing court's attention to deficiency...even though untimely).

In sum, the Groover dicta cited by Appellant is inapposite.

Groover notes that the trial court was warranted in dismissing the unverified Motion with prejudice. In the instant case, the trial court ruled only on a duly verified Motion.

## CONCLUSION AND RELIEF SOUGHT

Based upon the foregoing and the record, Mr. Davis respectfully urges this Court to reverse the lower court, allow Appellant leave to amend his 3.850 after fair opportunity to review documents produced pursuant to the FOIA, order a Huff hearing be held in due course, and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 28, 1999.

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