NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

EUGENE GREGORY WALTON, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D08-1935

Opinion filed April 16, 2010.

Appeal from the Circuit Court for Hillsborough County; Anthony K. Black, Judge.

Eugene Gregory Walton, pro se.

Bill McCollum, Attorney General, Tallahassee, and Danilo Cruz-Carino, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

In January 2005, Eugene Gregory Walton was convicted and sentenced for burglary of a dwelling with assault and false imprisonment. We affirmed his convictions and sentences on direct appeal. Walton v. State, 928 So. 2d 350 (Fla. 2d DCA 2006) (table decision). Mr. Walton now appeals the denial of his August 9, 2006,

amended postconviction motion. See Fla. R. Crim. P. 3.850. He raised twenty-four claims. By order dated June 11, 2007, the postconviction court allowed Mr. Walton to amend claim one. It ordered a State response to claims ten, twelve, thirteen, and twenty-four. In the same order, the postconviction court denied the remaining claims as refuted by the record, procedurally barred, or facially insufficient or conclusory. After receiving Mr. Walton's amended claim one and the State's response, the postconviction court, by order dated September 11, 2007, ordered an evidentiary hearing on claims one and ten. It denied claims twelve and thirteen as refuted by the record, and denied claim twenty-four as facially insufficient. By final order dated March 20, 2008, the postconviction court denied claims one and ten after conducting an evidentiary hearing.

We affirm, without further discussion, the denial of claims one and ten, the summary denial of claims four and eleven through seventeen as refuted by the record, and the summary denial of claims eighteen through twenty-three as procedurally barred.

Although we are sympathetic to the position taken in the dissent, the established practice of this court in reviewing pro se appeals of rule 3.850 orders compels us to reverse the summary denial of claims two, three, five, six, seven, eight, nine, and twenty-four as facially insufficient or conclusory and remand for the postconviction court to allow Mr. Walton a reasonable period of time to amend the claims if he can do so in good faith. See Spera v. State, 971 So. 2d 754, 761-62 (Fla. 2007);[1] Jimenez v. State, 993 So. 2d 553, 556 (Fla. 2d DCA 2008) (applying Spera to claims that allege merely conclusory allegations as well as to claims that are facially insufficient).

[1]The postconviction court did not have the benefit of Spera, which issued after its first two orders. However, Spera applies to cases in which an appeal is pending once it issued. Rodriquez v. State, 993 So. 2d 152, 153 (Fla. 1st DCA 2008).

Shortly after his direct appeal failed, Mr. Walton filed his amended rule 3.850 motion. In July 2007, he amended claim one. Spera issued in November 2007. Until the postconviction court's final order in March 2008, Mr. Walton had several months to seek leave to amend the facially insufficient or conclusory claims. He did not do so. Nor did he raise any issue about those claims in his brief.[2] He focused, instead, on claims that were denied as procedurally barred or refuted by the record.

Some districts do not afford relief to a postconviction claimant who fails to properly raise an issue in his brief; effectively, such relief is waived. See Watson v. State, 975 So. 2d 572 (Fla. 1st DCA) (holding that when a defendant has appealed from a summary denial of a claim but fails to address Spera in his brief, appellate court need not consider the matter because the issue is waived), appeal dismissed, 987 So. 2d 1211 (2008); Williams v. State, 24 So.3d 1252 (Fla. 1st DCA 2009).

Watson relies principally on death penalty postconviction cases where an attorney represented the petitioners and waived certain claims. Mr. Walton is pro se. But, it has been noted that a pro se postconviction claimant can, by failing to raise issues in a brief in the appellate court, waive a Spera or other claim. See Watson, 975 So. 2d at 574-75 (Wolf, J., concurring); see also Ward v. State, 19 So. 3d 1060, 1061 (Fla. 5th DCA 2009); cf. Austin v. State, 968 So. 2d 1049 (Fla. 5th DCA 2007); Hammond v. State, 35 Fla. L. Weekly D670 (Fla. 4th DCA Mar. 24, 2010).[3]

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[2]The State filed an answer brief but did not argue that Mr. Walton had waived review of his other claims. See Bilotti v. State, 27 So. 3d 798 (Fla. 2d DCA 2010).

[3]We note that the supreme court has required that a party's appellate brief make specific argument in support of rule 3.850 claims or they are waived for review. Typically, however, the cases are death penalty postconviction cases where the party is represented by an attorney. See, e.g., Rose v. State, 985 So. 2d 500, 509 (Fla. 2008);

In postconviction appeals before this court, we have considered all issues summarily denied by the trial court irrespective of the fact that such issues have not been briefed.[4] Our practice is based on the appellate rule of procedure relating to the summary grant or denial, without evidentiary hearing, of collateral or postconviction motions–"[o]n appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief." Fla. R. App. P. 9.141(b)(2)(D). This admonition does not appear to prevent a postconviction claimant from waiving claims; nevertheless, this court has interpreted the rule to require review of all summarily denied claims.

Based on this court's practice, and as Spera instructs, when faced with a conclusory or facially insufficient claim, the postconviction court should strike the facially insufficient or conclusory claims with leave to amend, if the movant can do so in good faith. See 971 So. 2d at 761. Accordingly, we reverse and remand for further consideration of claims two, three, five, six, seven, eight, nine, and twenty-four. In doing so, we certify conflict with Watson, 975 So. 2d 572, Williams, 24 So. 3d 1252, Ward, 19 So. 3d 1060, Austin, 968 So. 2d 1049, and Hammond, 35 Fla. L. Weekly D670. We also certify to the supreme court the following question of great public importance:

> WHEN CONSIDERING A POSTCONVICTION APPEAL, UNDER RULE 9.141(b)(2)(D), MUST THE DISTRICT

Doorbal v. State, 983 So. 2d 464, 482 (Fla. 2008); Griffin v. State, 866 So. 2d 1, 7 (Fla. 2003); Duest v. Dugger, 555 So. 2d 849, 852 (Fla. 1990). Recently, we found a waiver of claims where (1) counsel's appellate brief asserted no error as to the denial of some rule 3.850 grounds, (2) the State, in its answer brief, argued that any error in the postconviction court's rulings on those grounds was waived because it was not challenged on appeal, and (3) no reply brief or request to file a supplemental brief was filed to address the State's argument. Bilotti, 27 So. 3d 798.

[4]Many postconviction appeals in this court proceed without briefing.

COURT OF APPEAL AFFORD REVIEW OF ALL SUMMARILY DENIED CLAIMS EVEN WHEN THE PRO SE APPELLANT, OR ONE REPRESENTED BY COUNSEL, HAS FILED A BRIEF BUT HAS NOT BRIEFED OR OTHERWISE FURTHER PURSUED CERTAIN CLAIMS?

Affirmed in part, reversed in part, and remanded with instructions.

LaROSE, J., and FULMER, CAROLYN K., SENIOR JUDGE, Concur.
KELLY, J., Concurs in part and dissents in part.

KELLY, Judge, Concurring in part and dissenting in part.

I would affirm the trial court's order. Mr. Walton raises five issues in his brief. In them, he challenges the summary denial of claims twelve, fifteen, nineteen, and twenty of his amended postconviction motion and the denial after an evidentiary hearing of claims one and ten of that motion. I agree with the majority that we should affirm the postconviction court's order denying relief on each of these grounds. I dissent from the portion of the opinion that reverses the postconviction court's denial of claims two, three, five, six, seven, eight, nine, and twenty-four because Mr. Walton has not argued that the summary denial of those claims was erroneous.

Typically, an appellant who wants the court to consider an issue must present argument regarding that issue in the initial brief; otherwise, the court will view it as waived or abandoned. See Chamberlain v. State, 881 So. 2d 1087, 1103 (Fla. 2004) (stating that because the appellant failed to advance an argument in his brief, the court would consider it abandoned); Hall v. State, 823 So. 2d 757, 763 (Fla. 2002) (stating

that the petitioner was "procedurally barred" from making an argument in the reply brief that he did not raise in the initial brief); Bilotti v. State, 27 So. 3d 798 (Fla. 2d DCA 2010) (agreeing that claims not raised in postconviction appellant's initial brief were abandoned); Ward, 19 So. 3d at 1061 (concluding that issues presented to the postconviction court but not addressed in the appellant's brief were abandoned); Watson, 975 So. 2d at 573 (stating that in a postconviction appeal, appellate courts traditionally do not review claims that are not raised and fully argued in the appellant's brief). Because Mr. Walton's brief contains no argument pertaining to claims two, three, five, six, seven, eight, nine, and twenty-four, I do not agree that we should consider whether they were erroneously denied or whether Mr. Walton should have been allowed to amend them. Additionally, because Mr. Walton's brief contains no argument regarding these claims, the State, which filed an answer brief addressing each of Mr. Walton's arguments, has not had an opportunity to address the appropriateness of reversing as to these claims. In other words, we are reversing the denial of a handful of claims without being asked to do so by the appellant, without giving the State an opportunity to address whether we should, and without any indication from the appellant that he wants to amend these claims or that he would be able in good faith do so.

We find ourselves in this position because of the language used in the rules governing postconviction appeals. When a rule 3.850 motion has been summarily denied, the appeal proceeds under Florida Rule of Appellate Procedure 9.141(b)(2), which does not require the appellant to file a brief.[5] See Fla. R. App. P. 9.141(b)(2)(C).

[5]Rule 9.141(b)(2) states:

> *Summary Grant or Denial of Motion Without Evidentiary Hearing:*
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> ....

Consequently, the appellate court necessarily reviews the denial of each of the appellant's claims to determine whether the record "shows conclusively that the appellant is entitled to no relief." Fla. R. App. P. 9.141(b)(2)(D). However, where a defendant's motion is denied after an evidentiary hearing, the appeal proceeds under rule 9.141(b)(3). Under that rule, the defendant is obligated to file a brief. See Fla. R. App. P. 9.141(b)(3)(C).[6]

Nothing in rule 9.141(b)(3)(C) prevents appellants from arguing issues pertaining to claims that were summarily denied, and in fact, in this case Mr. Walton did just that. Nevertheless, as alluded to by the majority, this court has a "practice" of reviewing summarily denied claims in appeals after an evidentiary hearing regardless of whether the appellant has raised their denial as an issue in his brief. This practice is based on the belief that although the rules refer to appeals from a "motion" that is denied either summarily or after an evidentiary hearing, the rules should be understood to govern appeals from *claims*, not motions. This belief is in turn based on the perception that reading the rule literally unfairly creates two classes of summarily denied claims: those that get reviewed automatically and those that do not. The assumption

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> (C) No briefs or oral argument shall be required, but any appellant's brief shall be filed within 15 days of the filing of the notice of appeal. The court may request a response from the appellee before ruling.
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> (D) On appeal from the denial of relief, unless the record shows conclusively that the appellant is entitled to no relief, the order shall be reversed and the cause remanded for an evidentiary hearing or other appropriate relief.

[6]Rule 9.141(b)(3) states:

> *Grant or Denial of Motion after Evidentiary Hearing.*
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> ....
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> (C) **Briefs**. Initial briefs shall be served within 30 days of service of the record or its index. Additional briefs shall be served as prescribed by rule 9.210.

that this was not the intent of the rules committee and that the wording in the rule was simply an oversight may be correct; however, the perceived unfairness in this arrangement is not compelling enough to persuade me to ignore the plain language of the rule. In my view the disparate treatment is justified given that in the latter case the appellant is obligated to file a brief.

Here, Mr. Walton directed our attention to summarily denied claims he thought should not have been denied, while saying nothing about other claims. I see no reason why we should not conclude that he has abandoned those claims. On the contrary, a recent case from this court, Bilotti, 27 So. 3d 798, found that claims not raised in a postconviction appellant's initial brief were abandoned. Bilotti represents a departure from the "practice" referenced by the majority. I would follow Bilotti and affirm the denial of all of Mr. Walton's claims.