IN THE SUPREME COURT OF FLORIDA

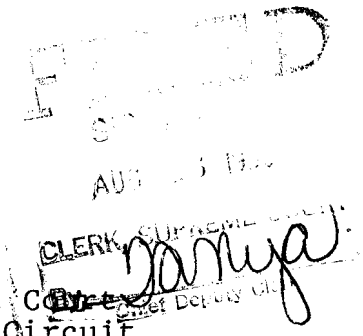
WILLIAM D. CHRISTOPHER,

Appellant,

v. CASE NO. 66,991

STATE OF FLORIDA,

Appellee.



On Appeal from the Circuit Court
Of the Twentieth Judicial Circuit
In and for Collier County, Florida

INITIAL BRIEF OF APPELLEE

JIM SMITH
ATTORNEY GENERAL

WILLIAM E. TAYLOR
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR APPELLEE

/tms

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PRELIMINARY STATEMENT

The appellant, WILLIAM D. CHRISTOPHER, will be referred to either by his proper name, or as the "appellant" or "defendant below". The appellee, STATE OF FLORIDA, will be referred to as the "state" or the "appellee". The appellee will join the appellant in asking this Honorable Court to take judicial notice of the record on appeal that was previously relied on by this Honorable Court in the appellant's direct appeal and also the record on appeal that this court relied on in affirming the trial court's denial of the appellant's original 3.850 motion.

Portions of the record will be referred to by "R" followed by the appropriate page number, and for expedience sake, by sometimes referring to the exhibits provided by the appellant. Also, however, since various appellate records concerning this matter are part of this Honorable Court's file, some documents are more clearly identified by reference to the specific item, nature of the item, date, etc. The appellee will also refer to the previous findings of this Honorable Court in the cases of Christopher v. State, 407 So.2d 198 (Fla. 1981) and Christopher v. State 416 So.2d 450 (Fla. 1982).

STATEMENT OF THE FACTS

The appellee accepts the appellant's statement of the facts, but would suggest to this Honorable Court that it may be interwoven with statements that are more closely akin to interpretation or opinion than facts.

STATEMENT OF THE CASE

The appellee accepts the appellant's statement of the case, since it provides a brief summary of the judicial history of the case in the courts of this state. The appellee again would suggest to this Honorable Court, however, that this portion of the appellant's brief is interwoven with some statements that are more closely akin to opinion or commentary than to factually retracing the history.

Also, the appellee notes that while the appellant in his brief has relied heavily on federal case law to instruct this court as to how the federal courts would treat this matter, he neglects to mention or trace the success of his attempts at presenting these same arguments to the federal courts.

PREFACE TO THE COURT

The appellee would ask leave of this Honorable Court to follow a somewhat different format in this brief. The appellee believes that to fragment the question, as the appellant has done in his brief, is much akin to examining a beach by sorting through the sand grain by grain. The prospective is lost, and it leaves nothing but utter confussion. The appellee herein does not argue with most of the cases relied upon by the appellant or with the propositions for which they stand, but believes that the appellant has stretched the facts in an attempt to superimpose those cases over the facts sub judice.

The appellant interweaves faulty premises with fact and law and includes matters under each issue which are not properly part of those issues. He then proceeds to the next issue where he treats the prior faulty premises as fact.

In order to untangle this gordian knot, the appellee will trace the appellant's brief page by page and counter each of his arguments, conclusions, premises, etc. as they occur.

SUMMARY OF THE ARGUMENT

ISSUE I
(as stated by the appellant)

WHETHER THE PROCEDURAL PROPRIETY OF THE CONFESSION SUPPRESSION HEARING IS PROCEDURALLY BARRED BY RULE 3.850'SPROVISIONS CONCERNING (1) FAILURE TO ASSERT NEW AND DIFFERENT GROUNDS, OR (2) ISSUES DIRECTLY APPEALABLE.

The appellant refers to deficiencies at the confession suppression hearing; however, there were no deficiencies. He was deprived of nothing through the actions of the state or the trial court, but chose not to testify. He originally raised the question of ineffective assistance of counsel in his first 3.850 motion; and what he presents now are not new grounds, but as the trial court noted in its order, merely a new twist or a new argument. The appellant states that his constitutional rights against self-incrimination have been infringed; however, that is not true since he in fact enjoyed the benefits of the right against self-incrimination. The appellant confuses a fundamental right with a fundamental error. Here, the only question that was properly before the trial court had to do with the issue of effective assistance of counsel.

ISSUE II
(as stated by the appellant)

WHETHER THE INSTANT 3.850 MOTION CONSTITUTES AN ABUSE OF THE PROCEDURE GOVERNED BY THE RULES OF CRIMINAL PROCEDURE.

The appellant argues that the "abuse" bar should be used sparingly and the appellant has no disagreement with that.

The appellee, however, will argue that since the appellant has had a succession of eminent attorneys at the appellate level, who have not been challenged on the grounds of ineffectiveness, he cannot, at this late date, claim that he was unaware of the availability of the present argument.

ISSUE III
(as stated by the appellant)

WHETHER THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS DECIDED ON THE MERITS IN THE ORIGINAL 3.850 MOTION.

The appellee under this issue will argue that all of the grounds that were properly the subject of a 3.850 motion, and which had not previously been ruled upon by this Honorable Court, were in fact decided on the merits by the trial court when it reviewed the original 3.850 motion. While it is true that no testimony was heard at the original hearing, there was an extensive hearing after ominous pleadings and amended pleadings had been submitted by the appellant.

ISSUE IV
(as stated by the appellant)

WHETHER AN EVIDENTIARY HEARING NEED BE HELD ON THE ABUSE ISSUE.

The appellant under this issue claims that an evidentiary hearing needs to be held by the trial court as to the abuse issue alone. This is not necessary, since the record and the trial judge's order are quite clear and there would be nothing further to inquire into. The appellant cannot now claim that he was not given an opportunity to rebut the abuse issue since the pleadings previously filed before that court detailed the

state's argument and at the hearing concerning this matter before the trial court the present appellate counsel certainly had the opportunity to offer whatever argument, case authority, etc. existed for rebuttal purposes.

ISSUE V
(as stated by the appellant)

WHETHER THE ABUSE PROVISIONS OF RULE 3.850, WHICH BECAME EFFECTIVE JANUARY 1, 1985, SHOULD BE RETROACTIVELY APPLIED TO RULE 3.850 PROCEEDINGS INSTITUTED PRIOR TO 1985.

The appellee herein, will argue that no rights of Mr. Christopher have been foreclosed if the amendment to Rule 3.850 is applied to him. More importantly, however, the appellee will argue that this Honorable Court need not reach the question of retroactivity in this case or hypothetical circumstances, since the concept of "abuse" existed long prior to the amendment, and the trial judge in his order denying the subsequent 3.850 motion specifically states that he also relied on cases that were extant prior to the amendment.

ARGUMENT

ISSUE I
(as stated by the appellant)

WHETHER THE PROCEDURAL PROPRIETY OF THE CONFESSION SUPPRESSION HEARING IS PROCEDURALLY BARRED BY RULE 3.850'SPROVISIONS CONCERNING (1) FAILURE TO ASSERT NEW AND DIFFERENT GROUNDS, OR (2) ISSUES DIRECTLY APPEALABLE.

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(as stated by the appellant)

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ISSUE IV
(as stated by the appellant)

WHETHER AN EVIDENTIARY HEARING NEED BE HELD ON THE ABUSE ISSUE.

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(as stated by the appellant)

WHETHER THE ABUSE PROVISIONS OF RULE 3.850, WHICH BECAME EFFECTIVE JANUARY 1, 1985, SHOULD BE RETROACTIVELY APPLIED TO RULE 3.850 PROCEEDINGS INSTITUTED PRIOR TO 1985.

The appellee asks leave of this Honorable Court to answer all of the issues together, thus being able to track the statements of the appellant, page by page, even when those statements refer to subsequent issues.

The appellee recognizes that a defendant is entitled to

zealous representation by his attorney, and the appellee further recognizes that nowhere is this more true than a capital case. However, this zealousness has lead to conclusions in the brief submitted by the appellant based on faulty premises.

The appellant at page seven of his brief claims that "because the deficiencies at the confession suppression hearing unconstitutionally infringed upon appellant's constitutional rights against self-incrimnation, the error complained of constitutes fundamental error." This is not accurate. The deficiencies that the appellant now refers to in such sweeping terms, were no more than tactical decisions during the time of trial. He was not deprived of any rights against self-incrimination since he, in fact, chose not to testity at the suppression hearing. He was not deprived of any right, either by the state of by the court, and tactical decisions have repeatedly been held not to constitute ineffective assistance of counsel unless irresponsible. See Stright v. Wainwright, 422 So.2d 827 (Fla. 1982); State v. Eby, 342 So.2d 1087 (Fla. 2 DCA 1977); Ferby v. State, 404 So.2d 407 (Fla. 5 DCA 1981); Armstrong v. State, 429 So.2d 287 (Fla. 1983).

Further, one must wonder at the good faith of this argument at the present time since, while the appellant did not testify at the suppression hearing, he did testify at his first trial, but chose not to testify at his second trial. One must ask what would have occurred differently at trial had he testified at the suppression hearing. That is to say -

if he had testified at the suppression hearing, as to what he now claims he would have, there was certainly nothing that could have been used to impeach him at the first trial where he testified. On the other hand, if he had testified at the suppression hearing, it could not have been used against him at the second trial, since he did not testify during the second trial.

The appellee will argue that the defendant, rather than having been the victim of a bad tactical choice by his defense counsel, by not testifying at the suppression hearing, benefited thereby. An examination of the transcript of the hearing shows that the trial court, without the testimony of the appellant, was fully apprised of all of the arguments that have ever subsequently been presented to the various appellate courts. The appellee would ask this Honorable Court to take specific notice of the appellant's exhibit "C" at A-118 and A-119. Two things become evident; first, that the defense attorney was relying upon the proper case authority and further, that he was reluctant to have Christopher testify if his testimony could later be used for any purpose. The appellee will show later in this brief that indeed, had Christopher testified at the suppression hearing, his testimony could have been used for later impeachment purposes. The trial judge at that porition of the record notes, and the defense attorney agrees, that he was being asked for nothing more than an advisory opinion. Even if the trial court had given such an advisory

opinion, it would have been to the effect that the testimony could be used later for impeachment purposes, and it appears from the record that that is specifically what the defense attorney feared. The question of the voluntariness of his confession has been examined in minute detail both by the trial court, this Honorable Court, the Federal District Court for the Southern District of Florida and found to be without merit. Unless the appellant can now show that there was something that he would have testified to that would clearly have changed the outcome of the suppression hearing, or added a new question concerning the voluntariness for later appellate review, his argument that his trial attorney was ineffective is baseless.

The appellant at page eight of his brief states "the appellant was unaware of the availability of the grounds asserted in the present 3.850 motion . . . " It is important to note that in addition to trial counsel, the appellant has subsequently had three different appellate counsels before this Honorable Court in both the direct appeal and the denial of the 3.850 motion as well as the habeas corpus proceedings in the federal district court and the appeal to the Eleventh Circuit Court of Appeals. While these various appellate counsels have attacked trial counsel as being ineffective, there has never been a claim by any of them that the other appellate counsels have been ineffective. This means in effect, that as each new appellate counsel takes on the case and relieves the

previous appellate counsel, he sees a new twist and attempts to pursue that through other judicial avenues. These new twists, however, are nothing more than subsequent attorneys viewing the matter differently as to how they would have approached the matter. For the appellant to claim in his brief that he was unaware of the availability of the grounds that he now asserts is ludicrous, since he has been represented at all appellate and collateral proceedings by able counsel who certainly are trained in the law and who have viewed this record with a fine toothed comb. Further, this Honorable Court has reviewed the entire record sua sponte as it does in all capital cases and has found that the confession voluntary.

The appellant states at page thirteen of his brief that "the state may not exact a constitutional right as the price for the exercise of another constitutional right", and relies in support thereof on Simmons v. United States, 390 U.S. 377, 19 L.Ed.2d 1247, 88 S.Ct. 967 (1968). The appellee has no disagreement with that concept, but would suggest that Mr. Christopher did not have to make a hard choice sub judice, since he was able to present all of the argument that he wished to the trial court based on examination of the state's witnesses and the presentation of the tapes themselves, yet was able to shield himself from cross examination or from later use of whatever he might say for impeachment. There was no action by the state or by the court that deprived Mr. Christopher of a constitutional right or forced him to make an

improper choice.

The appellant at page fourteen of his brief states "because the right against self-incrimination is fundamental, a violation of that right may be raised for the first time in a Rule 3.850 motion, not withstanding . . ." There are two problems with this statement by the appellant. First, he was not denied his right against self-incrimination. He, in fact, exercised that right and chose not to testify. Second, the appellant obviously from this statement confuses a fundamental right with a fundamental error. While it is true that a fundamental error may be heard on appeal even though it was not contemporaneously preserved; a fundamental right is an entirely different matter. A constitutional right does not necessarily constitute fundamental error. No academic discussion of these concepts, however, is necessary since in the matter sub judice, the facts control, and there was neither fundamental error nor constitutional error.

At page fifteen, sixteen and seventeen of his brief, the appellant argues that this matter is analogous to a Federal Rule of Criminal Procedure, Rule 9(b). The appellee will argue that these cases have only persuasive value at most with this Honorable Court and certainly do not constitute mandatory authority when this Honorable Court is considering whether the trial court abused its discretion in applying the state law. Further, the propositions for which these federal cases stand are not at all repugnant to the ruling of the trial court in

the matter sub judice. These cases relied upon by the appellant hold that the abuse of writ doctrine is to be invoked in unusual circumstances and is to be of a limited application. The appellee has no disagreement with that concept, but would argue that after one reviews the judicial history of the Christopher case, this further 3.850 motion falls within that category. In addition to two jury trials, Mr. Christopher has had every aspect of his case reviewed and re-reviewed, both on direct appeal and collaterally, by both the state courts and the Federal District Court for the Southern District of Miami.

The appellant at page eighteen and nineteen of his brief states that the death penalty has a unique status and therefore, special scrutiny is required. He relies on the cases of Gardner v. Florida, 430 U.S. 349 (1977); Locket v. Ohio, 438 U.S. 586 (1978); Bell v. Ohio, 438 U.S. 637 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Enmund v. Florida, 458 U.S. 782 (1982) to support this position. The appellee has no argument with those cases or with this proposition, but would argue that if it were not for this unique status, Mr. Christopher's case would have long since been resolved based on the doctrine of finality.

At page twenty and twenty-one of his brief, the appellant argues that the courts should not rush to judgment for the sake of finality alone. In support of this he relies on Kaplan, "Dunwody Distinguished Lecture on Law - Administering Capital Punishment" 36 U.Fla.L. Rev. 177, 190 (1984). Again,

the appellee has no disagreement with that article or with that proposition, but can only marvel at that statement when one reviews the judicial history of this case and the degree of scrutiny it has received. The matter has been consistently before the courts (and at some times, even though improperly, before two or three courts simultaneously) in the many years since the crime was originally committed. Certainly no rush to judgment is evident.

At page twenty-two of his brief, the appellant states, "Mr. Christopher has not to date been allowed to present his testimony regarding the circumstances of his confession". This statement is clearly untrue. Mr. Christopher had the opportunity to present his testimony both at the suppression hearing and at the trial, but chose not to. The appellant, through new counsel, now argues that this was not a wise choice, yet the fact remains that it was a tactical choice and that tactical choice would not constitute ineffective assistance of counsel lest it was done "irresponsibly" See State v. Eby, supra.

At a later portion of this brief, the appellee will address in more detail the shortcomings of the appellant's argument concerning what constitutes ineffective assistance of counsel.

At page twenty-three of his brief, the appellant states, "The only remaining procedural bars to the consideration of the instant ineffective counsel claims are those contained in

the "abuse" amendment to Rule 3.850". This again, is just not accurate. THe appellant admits at page thirty-six of his brief that procedural rules can be applied retroactively, and the appellee herein will argue that not only can they be applied retroactively, but in the matter sub judice, there is no valid argument presented by the appellant to do otherwise. More importantly, however, this Honorable Court need not reach the question of whether the amendment is to be retroactive since the appellant at page thirty-five of his brief admits something that is obvious in this regard. He acknowledges that the amendment, in effect, codified what had been case law previously. The concept of "abuse" existed prior to the amendment, and while it became codififed and toughened by the amendment, it is not a new concept, but more in the nature of a clarification. If one examines the trial court's order of April 3, 1985, one immediately notices that the court specifically stated that he relied on the rule and certain cases that were extant prior to the amendment. See inter alia, State v. Washington, 453 So.2d 389 (Fla. 1984); Smith v. State, 453 So.2d 388 (Fla. 1984); Dobbert v. State, 456 So.2d 424 (Fla. 1984); Witt v. State, Case No. 66,626, F.S.C. March 4, 1985, 10 F.L.W. 148, cert. denied, U.S.S.C. App. No. A-1030, 35 CL 4083, June 1984. In short, the appellee believes that the amendment applies to the subsequently filed 3.850 motion of the appellant, but even if this court were not to decide that matter, there is no showing of error on the trial court's part

since it relied on case law prior in time.

At page twenty-five of his brief, the appellant states that he was foreclosed from the only defense to the admission of his confession. This is not true. Again, it is important to recognize that all of the argument and evidence, (albeit without testimony of Christopher) was heard by the trial court, and there was no facts or argument that Christopher was foreclosed from presenting merely because he chose not to testify.

At page twenty-six, the appellant states that, "this error was compounded when Christopher did not testify at the trial which he was convicted". The appellant picks his words carefully with that statement, since he did in fact testify at his first trial, and for whatever other tactical considerations subsequently arose chose not to testify at the second trial. At page twenty-seven of his brief, the appellant states that, "The record is, at best, unclear . . . " The appellee will argue that it is only unclear in the eyes of the appellant since it is to his advantage for it to be so. When one looks at the admitted findings of fact in the appellant's brief at pages twenty-seven and twenty-eight, it undermines his argument that the questions were not resolved on the merit originally. The trial court in its original order (quoted in part at page twenty-eight of the appellant's brief) states that the remaining issues are "either belied by the record and files . . ." This means that each issue that was properly

before the 3.850 court, and not previously determined by this high court (binding the lower court by that ruling) was decided on the merits.

At page twenty-nine of his brief, the appellant begins a discussion of whether the correct supporting documents were in fact attached to the original order of the trial court denying the 3.850 motion. The appellee will argue that this court has already affirmed that ruling by the trial court and the doctrine of finality would not at this time permit re-examination of that question concerning the attachment of supporting documents.

At page twenty-nine, the appellant finds fault with consideration of the testimony of Mary Still (Christopher's mother) at the first trial. The appellee will argue that certainly a trial judge can take judicial notice of testimony under oath and at previous proceeding on the same question, but further, and more importantly, here the same judge presided at both trials, it would be impossible for his to not remember that testimony. Secondly, the entire question is not properly before this Honorable Court at the present time since the question of new evidence was not properly before the trial court at any time. This Honorable Court in the previous affirmance of the trial court regarding the 3.850 motion denied the appellant's Petition for Writ of Error Coram Nobis.

At page thirty-one of his brief, the appellant argues that federal courts have long held that evidentiary hearings

may be appropriate to inquire into the question of "abuse". The appellee will again state that there is no argument with those cases or with that position, but the facts sub judice do not require this Honorable Court to remand this question for further hearings by the trial court. The record and pleadings are clear as to exactly what transpired below and why. The judge's order denying the subsequent 3.850 motoin could not be clearer even to the inclusion of the case authority upon which he relied. If one wishes to argue that the federal courts set a stricter standard regarding hearings, the appellee will again suggest that the appellant failed to include in his brief a discussion of how his arguments faired before the United States District Court for the Southern District of Florida.

The appellee herein bases its primary argument on the correctness of the trial court's order denying the subsequent 3.850 motion on procedural grounds. However, since the appellant has interwoven the questions of merit with procedural questions in the body of his brief, the appellee will argue that an examination of this matter on a question of the merits would still have required the trial court to deny the motion since the pleadings failed to even remotely rise to the threshold of showing ineffective assistance of counsel, and that would have been the only question that would properly even had been before the court in a subsequent 3.850 motion.

A 3.850 motion is not meant to be a substitute for a new

trial or a second direct appeal. Jones v. State, 446 So.2d 1059 (1984). The court's of this state have uniformly held that the purposes of the 3.850 motion should not be expanded. See Ashley v. State, 350 So.2d 839 (Fla. 1 DCA 1977); Hall v. State, 420 So.2d 872 (Fla. 1982); State v. Matera, 226 So.2d 661 (Fla. 1972) and Spinkellink v. State, 350 So.2d 85 (Fla. 1977).

The United States Supreme Court in Strickland v. Washington, ___ U.S. ___ , 80 L.Ed.2d 674, 104 S.Ct. ____ (1984) has effectively found the requirements in Knight v. State, 394 So.2d 997 (Fla. 1981) to be appropriate in setting a threshold in ineffective assistance of counsel claims. The Knight case sets down four steps. (1) specified act or acts which are claimed to be ineffective must be detailed in the appropriate pleading; (2) specific acts or ommissions must be substantial and serious deficiencies measurably below that of competent counsel; (3) the defendant must carry the burden of showing that these specific serious deficiencies when considered under the circumstances of the individual case were serious enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct effected the outcome of the court proceedings; (4) if the above three requirements are met, the state then has an opportunity to rebut by showing that there was no prejudice in fact. Strickland sets forth a two step test. (1) the burden is upon the defendant to show that counsel's performance was deficient and that

the errors were so serious that counsel did not function as counsel within the meaning of the Sixth Amendment; (2) the defendant must show that the deficient performance prejudiced the defense and requires a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial who's result is reliable. There is a strong presumption by the reviewing court that counsel's representation was effective and the review must be show that in the light of all the circumstances, the acts or omissions are outside of the range of effective counsel. The High Court further found that the deficiencies must be prejudicial to the defense before ineffectiveness can be found. Therefore, even if the defendant shows that counsel's errors were unreasonable, he stil must show that such errors had an actual adverse effect on the defense. It is not enought that the defendant show that the errors had some conceivable effect on the outcome of the proceedings. It is important to note that the United States Supreme Court stated that a reviewing court need not determine whether counsel's performance was deficient before examining prejudice. That is to say, if a showing of prejudice is lacking, the reviewing court need go no further in examining the question of effectiveness.

All of the above is important since the appellant has made only general allegations as to the prejudice due to his not testifying at the suppression hearing. The affidavit supplied to this Honorable Court by the appellant, from his

defense attorney Mr. Hines, shows that defense attorney chose not to have Mr. Christopher testify since he feared the admissibility of this testimony in later use against Mr. Christopher. The cases of Simmons, supra and McGahee v. Massey, 667 F.2d 1357 (11th Cir., cert. denied 459 U.S. 943 1982), stand for the proposition that while the testimony of Mr. Christopher at the suppression hearing would not have been admissible for substantive purposes. They would have been admissible for impeachment purposes. The appellee herein does not believe that the appellant argues with this concept. The question is, where in the pleadings in the subsequent 3.850 motion does the appellant show prejudice? The appellant titilates the court by implying there was something he would have testified to that would have made a difference in the outcome, yet he does not state what that testimony would have been; and it appears from a reading of the pleadings herein, that the testimony of Mr. Christopher would have done no more than go toward the argument that was in fact presented to the trial court. If there is further testimony that would have had a substantial impact on the trier of fact, it should have been presented to the trial court in the 3.850 motion; or at least presented to this Honorable Court at the present time. Without any more showing than the appellant presently makes, his failure to testify at the suppression hearing does not nearly approach the threshold in Knight, supra or Strickland v. Washington, supra. It appears, in fact, that the appellant is presently arguing,

at most, that his testimony may have conceivably had some impact on the trier of fact. This, however, is inadequate pursuant to Knight, supra and Strickland v. Washington, supra.

In summary, the concept of "abuse" may be applied to the appellant's subsequently filed 3.850 motion either in reliance on the amendment to the Florida Rule of Criminal Procedure 3.850 or in reliance on the case law that was extant prior thereto.

Mr. Christopher was denied no constitutional right or fundamental right, but in fact exercised his right not to testify. An examination of the suppression hearing (A 118 and A 119) clearly show that the defense attorney was aware of the appropriate case law and feared introduction of Mr. Christopher's testimony at a later date for any purpose. Even if the trial judge had given an advisory opinion, such advisory opinion would have stated that it could have been used for impeachment purposes. When all of the chaff is separated from the grain, this entire matter, as argued by the appellant, resolves itself only to one question - was the trial counsel ineffective when he chose not to have Mr. Christopher testify at the suppression hearing and avoid the danger of later impeachment? The defendant, through several previous attorneys, had the opportunity to totally exhaust this question and did so. The trial court ruled that the original trial attorney handled the case well, and this Honorable Court affirmed. What the appellant presents now are not new grounds, but merely an

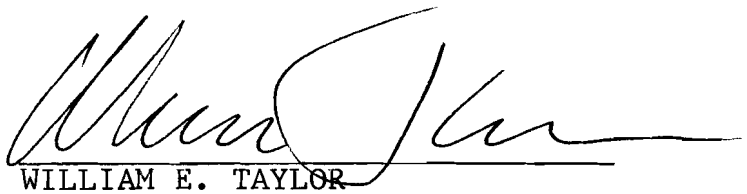
additional argument that subsequent appellate counsel have thought of.

CONCLUSION

Based on the foregoing arguments, case authority, and references to the various appellate records before this court in this matter, the appellee will ask this Honorable Court to affirm the trial court and uphold that courts order which denied the appellant's subsequent 3.850 motion on procedural grounds.

Respectfully submitted,

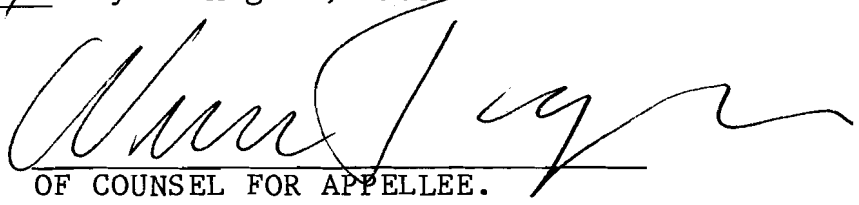
JIM SMITH
ATTORNEY GENERAL



WILLIAM E. TAYLOR
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Thomas R. Bolf, Esq., et al, One Corporate Plaza - PH-b, 110 East Broward Boulevard, P. O. Box 1900, Fort Lauderdale, Florida 33302 and to Joseph L. Daye, Esq. 318 Southeast 8th Street, Fort Lauderdale, Florida, this 14 day of August, 1985.



OF COUNSEL FOR APPELLEE.