THE SUPREME COURT OF FLORIDA

CASE NO. 66, 991

WILLIAM D. CHRISTOPHER,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal From the Circuit Court of the
Twentieth Judicial Circuit in and for Collier County, Florida

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Appellant, WILLIAM D. CHRISTOPHER, will be referred to as Appellant, Defendant, or Christopher.

Appellee, STATE OF FLORIDA, will be referred to as State or Appellee.

1. The Appellant, WILLIAM D. CHRISTOPHER, respectfully requests this Court take judicial notice of the Record on Appeal in Appellant's initial appeal from his conviction, and in Appellant's appeal from the denial of his first Rule 3.850 motion.

2. The Appellate Numbers therein are Case No. 55698 and Case No. 62183, respectively.

3. Contained in those records are certain documents of particular relevance to this appeal; these documents are contained in the appendix to this brief, and will be referred to as "App. ___, at ___."

STATEMENT OF THE FACTS

For a complete statement of the facts in this cause, the court is directed to the records referenced above. The facts particularly relevant to this appeal are hereinafter set forth.

In 1977, Appellant was arrested in Memphis, Tennessee concerning the deaths of George Ahern and Bertha Skillin. Norma Sands, the Appellant's daughter, and Pete and Pam Scott, Appellant's half brother and half sister, were taken into custody along with the Appellant. App. C at 3-4. Collier County detectives interrogated the Appellant in Memphis on September 22, 1977. App. C, at 8, 34-57. The Interrogation occurred in three separate segments. Id. at 34-57. In the first, the detectives illicited from Appellant a "murder-suicide" explanation of the murders, wherein Ahern had murdered Skillin, and then had committed suicide. Id. at 38. This first segment was tape recorded, id., and terminates upon Appellant's request that the tape recorder be turned off. Id. at 40-52. During this first segment, Appellant made several attempts to terminate the interrogation. App. D at 46-47, 51-52. These unavailing attempts to terminate the interrogation yielded the Miranda issue presented in the instant 3.850 motion.

The interrogation's second segment occurred off tape. Id. at 40-45. It begins with Appellant's questions to the police as to their intended charges against his daughter Norma, and against the Scotts. Id. Prior to his

confession, Appellant expressed anxiety concerning his daughter's involvement in the murder investigation. App. D at 39-45. Based on his concern for his family, Appellant then "confessed" to the murders of Skillin and Ahern. App. D at "A-206".

The interrogation's third and final segment occurred with the tape recorder turned on once again. App. D at "A-192"-"A-207" (Appellant's 10:25 statement). Appellant repeated the "confession" he had earlier given off-tape. The police's use of Appellant's concern for his family in a coercive manner during the interrogation presents constitutional concerns also addressed in the instant 3.850 motion.

Appellant was eventually returned to Collier County, and various pre-trial proceedings were had. Of particular importance is the hearing on the motion to suppress Appellant's confession. App. C. During this hearing, the events surrounding the above-referenced interrogation were retold by the police officers present at the interrogation. Id. at 2-57. After the State rested, Appellant's counsel considered having the Appellant testify at the hearing. Id. at 58. Counsel was unclear as to the admissibility of Appellant's suppression hearing testimony at a later trial, and requested the Court rule on that issue. Id. See also R. 17-18 (Affidavit of Robert G. Hines, Counsel for Appellant at the suppression hearing). The Court would not rule on the issue, and stated that the admissibility of the suppression hearing testimony

"for any purpose" would be determined later at trial. Id. (emphasis supplied).

Faced with this unresolved question, Appellant, upon advice of counsel, decided not to testify at the suppression hearing. Id. at 59-60. See also R. 17-18 (Affidavit of Robert G. Hines). As a result, no defense testimony was presented at the suppression hearing, id., and the Court eventually denied the motion to suppress, ruling that the confession would be admissible at trial. Id. at 78. The confessions were introduced at trial over the Appellant's objections. Christopher v. State, 407 So.2d 198, 200-201 (Fla. 1981), cert. denied, 456 U.S. 910 (1982) ("Christopher I"). The procedural propriety of the confession suppression hearing, and the ineffectiveness of Appellant's counsel therein, yields the primary bases for the instant 3.850 motion.

STATEMENT OF THE CASE

The essence of the instant Rule 3.850 motion is the effective preclusion of the Appellant from testifying at the hearing to suppress his "confession", caused by (1) the failure of the trial court to rule on the issue of the admissibility of the confession suppression hearing testimony at a later trial; and (2) the misapprehension of the law by Appellant's trial counsel concerning the admissibility of the suppression hearing testimony at a later trial. R. 3-10. App. F. As such, this Statement of the Case will focus upon the procedural history of the issues of ineffective assistance of counsel, and the involuntariness of Appellant's confession.

The Florida trial court denied defense counsel's pre-trial motion to suppress Appellant's confession. App. C. Appellant's second trial resulted in a jury verdict on August 18, 1978, finding Appellant guilty of both counts of first degree murder. Christopher I, 407 So.2d at 199-200. The Florida trial court adjudicated Appellant guilty on both counts, and imposed a sentence of death. Id.

A timely direct appeal was taken to the Florida Supreme Court, which denied Appellate relief, affirming Appellant's conviction and sentence December 10, 1981. Christopher I, 407 So.2d 198 (Fla. 1981). Appellant's Petition for Certiorari to the United States Supreme Court from this initial

decision of the Florida Supreme Court was denied March 29, 1982. 456 U.S. 910 (1982). Pursuant to Florida Rules of Criminal Procedure, Rule 3.850, Appellant then moved the Florida trial court for post-conviction relief. App. A (First Amended Motion to Vacate, Set Aside, or Correct Sentence). This relief was summarily denied, without evidentiary hearing, App. B (Supplemental Order dated June 10, 1982), and an appeal to the Florida Supreme Court followed. On June 23, 1982, the Florida Supreme Court denied Appellant's post-conviction relief; denied leave to amend his Rule 3.850 pleading; and denied leave to file a writ of coram nobis. Christopher v. State, 416 So.2d 450 (Fla. 1982) ("Christopher II").

The undersigned firm noticed an appearance in this case on September 22, 1984, pursuant to a request to volunteer its services by the Florida Bar Committee for Representation of Death Sentenced Inmates in Collateral Proceedings. R.1.

On January 17, 1985, Appellant filed his Second Rule 3.850 Motion. R. 2-18, App. F. The Appellant filed a supporting Memorandum of Law on February 6, 1985. R. 22-36. On February 6, 1985, the State, sua sponte, filed a combined response and memorandum of law to the Rule 3.850 motion. R. 37-59. On March 11, 1985, a non-evidentiary hearing on Appellant's Rule 3.850 motion was held, R. 64, 69-103; the trial court orally denied the motion at the conclusion of the hearing, R. 102, and entered its written order of denial

on April 4, 1985. R. 65-66, App. E. An amended notice of appeal was timely filed from this decision. R. 67.

A. Ineffective Assistance of Counsel Claims

Appellant asserted ineffective assistance of counsel in his original Rule 3.850 Motion. Said claims were denied in part because of the failure to adequately plead the claims, and thus these claims were not fully decided on the merits. App. B, at 1-2. See also pp. 27-30, infra. On appeal, the Florida Supreme Court affirmed the denial, including the ineffective assistance of counsel claim, and ruled that the 3.850 allegations concerning ineffective counsel were inadequate. Christopher II, 416 So.2d at 453. The first Rule 3.850 Motion did not assert the lack of knowledge concerning the law of the admissibility of suppression hearing testimony as a grounds for ineffective assistance of counsel. App. A, at 9-10.

B. Procedural Propriety of Confession Suppression Hearing.

The Appellant, in his direct appeal to the Florida Supreme Court, challenged the substantive conclusion that his confession was voluntary; the Court rejected this contention. Christopher I, 407 So.2d at 200-201. However, the procedural propriety of the confession suppression hearing, given that the Appellant was effectively precluded from testifying at the hearing, was not raised. Christopher I, 407 So.2d 198. Moreover, the procedural

inadequacies of the confession suppression hearing were not raised in the original 3.850 motion. App. A.

SUMMARY OF ARGUMENT

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

The procedural deficiencies in appellant's confession suppression hearing have not been previously asserted in any motion or appeal. These grounds thus constitute new and different grounds, and are not barred by Rule 3.850's provision that the grounds previously asserted in a 3.850 motion, and decided on their merits, cannot be asserted in a later 3.850 motion.

Because the deficiencies at the confession suppression hearing unconstitutionally infringed upon appellant's constitutional rights against self incrimination, the error complained of constitutes a fundamental error. The procedural bar against permitting appealable issues to be asserted in a 3.850 motion is thus inapplicable.

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

The "abuse" bar to the consideration of the merits of Rule 3.850 motions should be applied only in extraordinary situations. Given the finality of the instant sentence, this procedural bar should indeed be applied sparingly.

The appellant was unaware of the availability of the grounds asserted in the present 3.850 motion, and was unaware of the legal significance of the impropriety surrounding his confession suppression hearing. The appellant therefore did not deliberately withhold these claims from his previous 3.850 motion, nor was the appellant inexcusably neglectful in failing to assert them in the prior motion. Because of the significant impact the denial of this motion will have upon the appellant's attempts to obtain relief from his death sentence, the trial court should exercise its discretion and consider the instant motion.

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

Numerous grounds in support of appellant's ineffective assistance of counsel claim were asserted in his first 3.850 motion. While some of these grounds were purportedly decided on their merits by the trial court, many of the grounds were determined to be inadequately alleged, and thus were not decided on their merits.

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

The Court below concluded, without evidentiary hearing, that appellant abused the 3.850 procedures. The appellant rebutted a claim of "abuse" by asserting that the instant grounds were wholly unknown to the appellant at the time of filing the original 3.850 motion. Under such circumstances, the appellant could not have deliberately withheld these grounds from the prior

motion. Nor do the facts ascertained to date support a finding that the appellant was inexcusably neglectful in not discovering and asserting these grounds in his earlier motion. Simply put, the trial court determined that as a matter of fact the appellant had abused the 3.850 process. This conclusion, however, was reached without the benefit of any factual development concerning (1) whether the appellant knew of these grounds, and purposefully did not assert these grounds when he filed his first 3.850 motion or (2) whether the appellant was inexcusable neglectful in not recognizing and asserting these grounds previously. As Federal case law has established, unless an appellant has no chance of rebutting the "abuse" claim, he should be given an opportunity to present evidence to contradict the claim. Before the trial court decides that the merits of appellant's claim should not be considered, it should determine whether in fact the appellant did abuse the 3.850 procedure.

V. 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 instant "abuse" amendment immediately foreclosed the rights of prisoners to assert previously unasserted grounds for 3.850 relief. The amendment is therefore akin to an amendment shortening a statute of limitations period, without providing a savings clause. Such amendments, although concerning a "procedural" matter, have consistently been held by the

Florida Supreme Court to be strictly prospective unless a contrary intent is manifestation intent the act. The instant amendment contains no such manifest intent of its intended retroactivity; indeed, another of the amendments to Rule 3.850 includes, through a savings clause, an indication that it is to be retroactively applied. Such an indication is conspicuously absent from the "abuse" amendment. The amendment should therefore be applied prospectively only.

ANALYSIS OF APPEALED ORDER

Rule 3.850, Florida Rules of Criminal Procedure, provides in part:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

The Order appealed from expressly states that the Appellant's motion was denied strictly for procedural reasons; the merits of the instant motion were not reached. R. 65-66, App. E. The procedural bars enunciated by the Court were (1) an abusive fragmentation of issues; and (2) a failure to allege new or different grounds for relief. Id. Immediately, the inherent contradiction in the Court's order becomes apparent. See, e.g., Potts v. Zant, 638 F.2d 727, 739 (5th Cir.), cert. denied, 454 U.S. 877 (1981). Rule 3.850 is clear: a successive motion may be dismissed if (1) no new grounds for relief are

alleged and the prior determination was on the merits; or (2) the movant failed to assert new and different grounds in a prior motion. The Court herein has found both a fragmentation of the issues (i.e. raising new grounds which should have been previously raised) and the failure to raise new grounds. Because these findings are mutually exclusive and inherently inconsistent, they are suspect. Moreover, as discussed below, neither conclusion is supported by the record. Finally, the instant Order nowhere addresses Appellant's claim that the suppression hearing was procedurally defective. R. 65-66, App. E.

Because the lower court's denial of the instant 3.850 motion was based exclusively on procedural bases, the merits of Appellant's asserted grounds for relief are addressed herein only to the extent that the merits impact on the propriety of the lower court's order. The merits of Appellant's claims are addressed in greater detail in his Memorandum of Law in support of the present 3.850 motion, R. 22-36, and in the transcript of the hearing held below. R. 69-103. If, however, this Court deems it necessary to consider the merits of Appellant's claim, Appellant requests an opportunity to fully brief the issues for this Court to enable a proper disposition of the claims.

ARGUMENT

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

In Appellant's motion for relief from judgment (R. 2-11), the two bases for obtaining relief pursuant to Rule 3.850 were plainly spelled out: (1) the procedural deficiencies in the confession suppression hearing, id. at 3; and (2) the ineffective assistance of trial counsel at the confession suppression hearing, id. at 7. The procedural deficiencies of the hearing simply were not raised in the first 3.850 motion. App. A. Thus, the record baldly rebuts any assertion that the instant 3.850 motion fails to allege new and different grounds.

The trial court therefore incorrectly ruled that the present 3.850 motion was barred on the basis that no new grounds were asserted. Nor can the court's order be affirmed based on the alternative procedural bar that appealable issues may not be asserted in a 3.850 motion. Such a procedural bar is inapplicable as the error concerns Appellant's fundamental rights against self-incrimination.

At the confession suppression hearing, the Defendant and his counsel perceived a dilemma: (1) Christopher could testify at the hearing, and present evidence in opposition to the State's case; or (2) he could choose not to

testify, and forego presenting evidence in opposition to the State's case. If Christopher elected to testify, he would risk self-incrimination through the use of that testimony at the subsequent trial. If Christopher chose not to testify, he would risk the improper admission of an involuntary confession. Thus, Christopher was forced to choose between two constitutional rights. The State may not exact a constitutional right as the price for the exercise of another constitutional right.

As the United States Supreme Court has held:

> A defendant is "compelled" to testify in support of a motion to suppress only in the sense that if he refrains from testifying he will have to forego a benefit, and testimony is not always involuntary as a matter of law simply because it is given to obtain a benefit. However, the assumption which underlies this reasoning is that the defendant has a choice: he may refuse to testify and give up the benefit. When this assumption is applied to a situation in which the "benefit" to be gained is that afforded by another provision of the Bill of Rights, an undeniable tension is created. Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered to assert another.

Simmons v. United States, 390 U.S. 377, 393-94 (1968) (emphasis supplied). As in Simmons, Christopher was obliged either to give up what he believed, with advice of counsel, to be a valid Fifth Amendment claim against self-incrimination, or to assert that claim at the risk of making additional

potentially incriminating statements which could later be used against him. This is constitutionally impermissible.

The rights against self-incrimination are incontrovertibly fundamental rights. The United States Supreme Court stated in Miranda v. State of Arizona, 384 U.S. 436 (1966):

> We start here, as we did in Escobedo [v. Illinois, 378 U.S. 478 (1964)], with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough re-examination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an application of basic rights that are enshrined in our Constitution--that "No person * * * shall be compelled in any criminal case to be a witness against himself," and that "the accused shall * * * have the Assistance of Counsel" -- rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And in the words of Chief Justice Marshall, they were secured "for ages to come, and * * * designed to approach immortality as nearly as human institutions can approach it," Cohens v. Commonwealth of Virginia, 6 Wheat. 264, 387, 5 L.Ed. 257 (1821).

Id. at 442. The privilege against self-incrimination is highly cherished, and should be protected with ardor.

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, notwithstanding that it could have been, but was not, raised on direct appeal. See Nova v. State, 439 So.2d 255, 261 (Fla. 3d DCA 1983); Dozier v.

State, 361 So.2d 727 (Fla. 4th DCA 1978); O'Neal v. State, 308 So.2d 569 (Fla. 2d DCA 1975), overruled on other grounds, Roberts v. State, 320 So.2d 832 (Fla. 2d DCA 1975). See also Flowers v. State, 351 So.2d 387 (Fla. 1st DCA 1977).

The effective preclusion of the Defendant from testifying at his confession suppression hearing, and the concomitant impermissible violation of the Defendant's rights against self-incrimination, are grounds not previously raised in Appellant's 3.850 motion. The error alleged, however, is a fundamental error, as it concerns self-incrimination; the procedural bar to a 3.850 motion concerning issues which could have been appealed is not present. The only possible procedural bar remaining is abuse.

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

The appealed order states that the Defendant abused Rule 3.850 by filing this second 3.850 motion; the merits of Defendant's contentions were therefore deemed not entitled to consideration by the court. R. 65-66. As stated in the 1984 committee note to Rule 3.850, the "abuse" provision is analogous to Rule 9(b) of 28 U.S.C.A. foll. § 2254; indeed, Rule 9(b) and the above-quoted section of Rule 3.850 are identical save for certain grammatical changes. Given the relatively few Florida cases concerning the new provision, Federal interpretations of Rule 9(b) should provide insightful analysis on what constitutes the "abuse" of post-conviction motions.

A. "Abuse" Case Law

The Federal courts have often stated that the "abuse of the writ" doctrine is to be invoked only in extraordinary situations.

> [I]n this circuit, the "'abuse of the writ' doctrine is of rare and extraordinary application." Paprskar v. Estelle, 612 F.2d 1003, 1007 (5th Cir.), cert. denied, 449 U.S. 885, 101 S.Ct. 239, 66 L.Ed.2d 111 (1980) (citation omitted). See Hardwick v. Doolittle, 558 F.2d 292 (5th Cir. 1977), cert. denied, 434 U.S. 1049, 98 S.Ct. 897, 54 L.Ed.2d 801 (1978); Simpson v. Wainwright, 488 F.2d 494 (5th Cir. 1973). The doctrine is applied narrowly because, under this rubric, full consideration of the merits of a new petition is not necessary if the filing is found to be abusive. Our reluctance to invoke the rule, save in rare and extraordinary instances, was dramatized in Haley v. Estelle in which we noted that "The principle behind Rule 9(b) is to dismiss those petitions that constitute 'needless piecemeal litigation' or whose 'purpose is to vex, harass, or delay.'" 632 F.2d at 1275 (quoting Sanders v. United States, 373 U.S. at 18, 83 S.Ct. at 1078).

Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982). The abuse doctrine is therefore intended to be of limited application. Federal courts have favored the resolution of post-conviction motions on their merits; only under limited circumstances is a conclusion of abuse warranted.

The Federal courts have grouped the reasons for finding a habeas writ abusive into two general categories. "[A] rule 9(b) dismissal will be granted only if 'it can be shown that the petitioner either [1] deliberately withheld a claim from a previous petition or [2] was inexcusably neglectful.'" McShane

v. Estelle, 683 F.2d 867, 869-70 (5th Cir. 1982) (quoting Haley v. Estelle, 632 F.2d 1273, 1275 (5th Cir. 1980). See, e.g., Baker v. Estelle, 715 F.2d 1031, 1034 (5th Cir. 1983), cert. denied, 104 S.Ct. 1609 (1984); Sockwell v. Maggio, 709 F.2d 341, 344 (5th Cir. 1983); Potts v. Zant, 638 F.2d 727 (5th Cir.), cert. denied, 454 U.S. 77, 102 S.Ct. 357 (1981). See also Witt v. State, 465 So.2d 510 (Fla. 1985) (conscious decision to forego presentation of claim constitutes abuse).

Stated conversely,

> "[i]f a petitioner's unawareness of facts which might support a habeas application is excusable, or if his failure to understand the legal significance of the known facts is justifiable, the subsequent filing is not an abuse of the writ. McShane v. Estelle, 683 F.2d 867, 870 (5th Cir. 1982); Jones v. Estelle, 692 F.2d 380, 386 (5th Cir. 1982); Haley v. Estelle, 632 F.2d at 1275."

Sockwell v. Maggio, 709 F.2d at 344. An appellant must have either knowingly omitted the instant claims, or have been inexcusably neglectful in not comprehending their legal significance; neither of these conditions are applicable to this Appellant.

Finally, Federal case law is clear that the dismissal of a second petition is not mandated by a finding of abuse. Where the ends of justice would be served by addressing the merits of the cause presented, then a purported abuse of the writ can be, and indeed should be, disregarded by the court. Sanders v. United States, 373 U.S. 1 (1963). See also Potts v. Zant, 638 F.2d 727,

741 (5th Cir.), cert. denied, 454 U.S. 877 (1981). Certainly in a capital case, discretion should be freely exercised. As a punishment inflicted by society, death has a unique status. The United States Supreme Court has often recognized that. In Gardner v. Florida, 430 U.S. 349 (1977) the plurality opinion recognized that capital punishment is different from all other punishment both in severity and finality.

> Five members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

(emphasis added) 430 U.S. at 357-58 (plurality opinion) (referring to Justices Brennan, Stewart, Marshall, Powell and Stephens) (citations omitted). Since the decision in Gardner three more justices have indicated their belief that the death penality is different. Chief Justice Berger authored the prevailing opinion in Locket v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978); Justice White wrote the prevailing opinion in Coker v. Georgia, 433 U.S. 584 (1977) and Enmund v. Florida 458 U.S. 782 (1982); and Justice Blackmon joined the prevailing opinion in Coker, Godfrey v. Georgia, 446 U.S. 420 (1980), and Enmund. Lockett, Bell, Coker, Enmund and Godfrey found individual death sentences unconstitutional in circumstances in which noncapital sentences would clearly have been permissible.

In light of the special character of the death penalty, the Gardner plurality voided the trial judge's imposition of the death penality because the sentence was based in part upon the judge's review of a presentence report that had not been fully disclosed to the defense. Although most authorities agree that the Constitution does not require complete disclosure of presentence reports in noncapital cases, the Gardner plurality concluded that changing standards of procedural fairness require full disclosure in capital cases. 430 U.S. at 357.

These evolving standards of procedural fairness have compelled a reexamination of other facets of the capital sentencing process. Courts and legislators have adopted different procedures not only for reviewing capital sentences, but for charging and trying capital defendants. Florida law is representative of this trend.

The Florida rules of criminal procedure promulgated by this Court require that prosecutions for capital offenses begin with a Grand Jury indictment. All other criminal cases may proceed on the basis of information. Fla. R. Crim. P. 3.140(a). Similarly, a jury of twelve (12) must try capital cases in Florida, while other criminal trials require a jury of only six (6). Id. at 3.270. The Florida Legislature has directed appeals from capital convictions to this Court rather than to the Appeals Court, whereas Florida's intermediate appellate courts hear appeals from all other criminal convictions. Fla. Stat.

§ 924.08 (1983); see also Florida Constitution Art. V, Sec. 3. Logically, different procedures for post-conviction relief are required as well. As stated by Justice Marshall:

> Surely those ... who believe that there are circumstances in which the State may legitimately impose this ultimate sanction would not want to see an innocent individual put to death. Certainly no [proponent of capital punishment] would countenance a conviction obtained in violation of the Constitution. Because of the unique finality of the death penalty its imposition must be the result of careful procedures and must survive close scrutiny on post trial review.

Coleman v. Balkcom, 451 U.S. 949,955, (Marshall, J., dissenting from denial of certiorari).

A legitimate concern with finality and with delay in the imposition of capital punishment may be raised in regard to any review procedures. Delay, however, is unavoidable even absent post conviction relief. Preparation for a capital trail, as well as the process of appeal and application for Executive Clemency, is time consuming. The Court should, however, accept this inevitable delay, using it to enhance the capital punishment process by carefully examining every aspect of the defendant's case. Professor Kaplan uses the following example:

> Take the case of Carly Chessman who staved off his execution for fourteen years, and cost the State of California (in present day dollars) over a million dollars to execute him. His main claim (which was factually correct) was that the court reporter had died before transcribing two-thirds of his notes. After the notes

> proved to be indecipherable by other official reporters, the prosecutor called upon his close relative, a former court reporter, to complete the transcript. On appeal, Carly Chessman was denied a hearing to question whether the final transcript was correct or not. The California Appellate Court, the California Supreme Court, the Federal District Court, and the Court of Appeals for the 9th Circuit all were so intent on ridding society of Carly Chessman that it took the United States Supreme Court to say that the least one can do is listen to Chessman and see whether there were problems with the trial transcripts produced by the prosecutor's relative. Seemingly, the step could have been taken years and many appeals earlier, but apparently the impatience of prosecutors and judges obscured their acumen.

Kaplan, "Dunwody Distinguished Lecture on Law - Administering Capital Punishment," 36 U. Fla. L. Rev. 177, 190 (1984).

But, even if there is a delay, caused by special concern for those sentenced to death, the State will have paid a very small price for assuring the constitutionality of its act of taking a human life.

The reason for countenancing delay in the capital punishment process derives from what Justice Marshall labels "The unique finality of the death penalty." 451 U.S. at 955. Execution, being irreversible, should not occur until the Courts are certain a prisoner's conviction and sentence of death are correct and constitutionally proper. Florida courts should not deny relief to capital prisoners who validly claim that a conviction or sentence is constitutionally defective. Until a review of the evidence, a determination as to the validity of Mr. Christopher's claim cannot be made. Mr. Christopher

has not to date been allowed to present his testimony regarding the circumstances of his confession. No court has had the opportunity of making an informed determination as to Mr. Christopher' constitutional claims of coercion because of ineffective assistance of counsel.

The Court should not allow, by application of the abuse standard, defaults of counsel in the prior 3.850 motion to forever preclude the presentation of this potentially critical testimony. "Abuse" is not an objective term capable of quantification. The abuse standard is inherently subjective, and subject to the judicial discretion of individual courts. Regardless of the standard for the merely incarcerated, this Court should interpret the abuse standard in capital cases to encourage the liberal exercise of judicial discretion in the interest of justice.

B. Procedural Deficiencies at Confession Suppression Hearing

The State has nowhere contested the Defendant's statements that he was unaware that his being effectively precluded from testifying gave rise to a ground for relief from judgment (R. 3, 76-77, 101). At a minimum, these statements negate any potential contention that the Defendant deliberately withheld this claim from the prior 3.850 motion. Moreover, Defendant's appellate counsel on his initial appeal was likewise unaware of the legal significance of this procedural deficiency. R. 77. This lack of knowledge erodes a claim of inexcusable neglect by the Defendant. Indeed, because the

instant error complained of is essentially a "non-ruling" by the trial court, the likelihood of excusable neglect causing its omission, and the likelihood of not comprehending its legal significance, are great.

The limited facts adduced to date therefore rebut any conclusion that the Appellant either knowingly omitted the present claims from his first 3.850 motion, or was inexcusably neglectful in failing to assert these claims. Moreover, due to the nature of the instant penalty, and due to the serious constitutional violations set forth herein, as supported by affidavits of the Defendant and trial counsel (R. 13-15, 17-18), the substance of the instant 3.850 motion compels the trial court to consider its merits despite any potential abuse.

C. Ineffective Assistance of Counsel.

This Court needs no authority for the proposition that ineffective assistance of counsel is properly raised by a Rule 3.850 motion. 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. The first bar, failure to allege new grounds, is addressed in Issue III. The abuse of the Rule 3.850 procedure is addressed herein.

The ineffective assistance of counsel claim is based primarily on defense counsel's ignorance of law concerning the admissibility at trial of a defendant's confession suppression hearing testimony. R. 7. This ineffec-

tiveness is even more egregious given the importance of the suppression hearing and counsel's awareness of the legal issues he would face at the hearing.

The Defendant's confession was clearly the strongest and most direct evidence of the Defendant's culpability. The remaining evidence was, at best, circumstantial. The need to suppress the confession was therefore patent. As such, the suppression confession hearing was probably the most vital hearing in the Defendant's cause.

At the suppression hearing, defense counsel certainly was aware that the various police officers present during the Defendant's interrogation would be witnesses. The only defense, and indeed the only possible defense, was the Defendant's testimony. See R. 17-18. See also Simmons v. United States, 390 U.S. 377 (1968) (defendant's own testimony is most natural defense at suppression hearing). Defense counsel was expressly aware that he would not call the Defendant as a witness, due to the risk of self-incrimination, unless his testimony could not be used substantively against him at trial.

Nevertheless, and despite (1) knowing the overriding importance of the confession to the case; (2) knowing the great importance of the confession suppression hearing; (3) knowing that the Defendant would be the only potential witness to rebut the testimony of the State's witnesses; and (4) knowing that the issue of self-incrimination would determine whether he would

call his only witness at the hearing, Defendant's trial counsel came to the hearing with a professed ignorance as to the law of the admissibility at trial of a defendant's suppression hearing testimony. App. C at 58-60. To compound this serious deficiency, trial counsel then did not require a court ruling on this issue. Id. Finally, trial counsel made an incorrect "guess" at law which should have been completely familiar. Because of his ignorance of the law, and his failure to require the court to rule, trial counsel then improperly advised the Defendant to not testify at the hearing, foreclosing the only defense to the admission of the "confession." R. 17-18.

The ineffectiveness of trial counsel at this most important hearing, and his inadequate legal knowledge on an admittedly crucial issue, is, it is respectfully submitted, glaring. Moreover, this is not a case in which counsel's actions appear ineffective only in hindsight. The record clearly shows that counsel was aware of the self-incrimination issue when he came to the confession suppression hearing; he simply had not determined the answer to this question of law. App. C at 58-59. The second 3.850 motion therefore establishes, at minimum, a prima facie case of ineffective assistance of counsel. See, e.g., Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983), cert. denied, 104 S.Ct. 2667 (1984) (advice of counsel must be premised on reasoned basis); Mason v. Balcom, 531 F.2d 717, 724-25 (5th Cir. 1976) (quoting Herring v. Estelle, 491 F.2d 125, 128 (5th Cir. 1974), quoting Walker

v. Caldwell, 476 F.2d 213, 218 (5th Cir. 1973). This error was compounded when Christopher did not testify at the trial at which he was convicted. He did not have an opportunity to explain the "confession," and the decision to not testify at the suppression hearing becomes an even bigger factor.

As is apparent from the above summarization of the ineffective assistance of counsel claim asserted in the second 3.850 motion, the ineffective assistance of counsel claim is inextricably woven into the self-incrimination/procedural deficiency basis for relief from judgment. As such, the analysis of procedural abuse concerning the procedural deficiencies in the suppression hearing are applicable to the ineffective counsel claims: the Defendant was unaware of the existence of these claims when filing the original 3.850 motion, and thus this ground was not deliberately withheld before, and the failure to include that ground is not inexcusably neglectful.

The Appellant therefore did not abuse the 3.850 procedures by asserting them in this second 3.850 motion. At the time of filing his initial 3.850 motion, Appellant was unaware these grounds existed. The only remaining procedural bar to the consideration of the ineffectiveness of counsel claim asserted in the present 3.850 motion is whether this ground for relief was decided on its merits in the resolution of the first 3.850 motion.

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

In addition to concluding that asserting the ineffective assistance of

counsel claim was abusive, the court below determined that the ineffective assistance of counsel claim was not a new or different ground for relief. R. 65-66. This finding implicitly concludes that the first 3.850's ineffectiveness of counsel claims were completely determined on the merits. See Rule 3.850, Fla. R. Crim. Proc. The record is, at best, unclear whether a prior determination on the merits of the ineffective assistance of counsel claim was made.

In the initial 3.850 motion, App. A, Appellant asserted nine grounds to support his ineffective assistance of counsel claim. Id. at 9-10. These nine grounds were: (1) failure to preserve defense of insanity or incompetency to stand trial; (2) inadequate preparation, as evidenced by counsel's numerous motions to withdraw; (3) failure to object to certain jurors, thus evincing a basic misapprehension of Witherspoon; (4) failure to move for a second change of venue, where new venue was potentially partial; (5) failure to conduct juror voir dire individually; (6) failure to have jury sequestered; (7) closing argument was little more than a mechanical submission of the defendant's fate to the decision making process without attempting to influence the decision; (8) failure to submit any mitigating evidence to the jury; and (9) waiver of opening argument at both the guilt phase and penalty phase of the trial. Id.

In the lower court's supplemental order on the first amended 3.850 motion, App. B, the court made the following "findings of fact and conclusions of law" concerning ineffective counsel claims: (1) Trial counsel deliberately abandoned the defense of insanity, and said abandonment was not due to ineffective counsel; (2) trial counsel's failure to sequester individual veniremen was not ineffective; (3) lack of jury sequestration caused no prejudice to the Defendant; and (4) defense counsel's decision to forego presenting opening argument is tactical. Id. at 1-2. Said order therefore purported to dismiss the first, fifth, sixth and ninth grounds asserted in support of Defendant's ineffective counsel claim. There remained, therefore, five grounds which the court did not specifically address (second, third, fourth, seventh, and eighth fact). These claims were disposed of as follows:

> Those claims of ineffective assistance of counsel which have not been specifically addressed in this Order are either belied by the records and files or are not sufficiently detailed in the pleadings as required by Knight v. State, 394 So.2d 997 (Fla. 1981) and other appropriate case authorities.

Id. at 2.

The documents attached to the order are: (1) Defendant's motion to strike pleadings concerning the competency of the Defendant; (2) a transcript of a hearing on May 1, 1978, in which the insanity defense was addressed, and a motion for a continuance based on defense counsel's lack of preparation was heard; (3) an excerpt of (apparently) defense counsel's final argument; and

(4) the transcript of testimony of Mary Still taken at the June 4, 1978 trial (first trial) of the Defendant, and concerning allegations of newly discovered evidence. Of these documents, the Defendant's motion to strike concerns the First Ground (abandonment of insanity defense) regarding ineffective counsel; this First Ground had already been dismissed by the trial court. The second document, the transcript of certain motion hearings, also addresses the First Ground (competency to stand trial, which had already been expressly dismissed in the order), and further addresses the Second Ground (inadequate opportunity to prepare for trial). Indeed, therein defense counsel expressly stated he was not adequately prepared, supporting Appellant's Second Ground. Id., Exh. B at 7-16. The third document (closing argument) addresses the Seventh Ground supporting the ineffective counsel claim: that counsel's closing argument was wholly inadequate. Whether the attachment supports or undermines the Seventh Ground is unclear; however, for the purposes of this brief, Appellant will assume the trial court included the closing argument transcript to rebut the Seventh Ground. Finally, the last document (transcript of Mary Still) is a document from the first trial of the Defendant, which ended in a hung jury; the inclusion of a transcript from a prior trial to a Rule 3.850 motion for relief from judgment of a separate trial is improper, as the first trial was not part of the record of the second trial. Moreover, the reason for the inclusion of this transcript is wholly unclear; at a minimum, it is irrelevant to the ineffective counsel claim.

The attachments do not undermine the Grounds not specifically addressed in the court's Order, and there remained at least four grounds (second, third, fourth and eighth) not rejected in the Order or its attachments. These four Grounds must therefore have been insufficiently pled; as such, they were not decided on their merits. See, e.g., McCrae v. State, 437 So.2d 1388 (Fla. 1983); Reynolds v. State, 224 So.2d 772 (Fla. 2d DCA 1969); Taylor v. State, 181 So.2d 589 (Fla. 4th DCA 1965); Wallace v. State, 463 So.2d 467 (Fla. 2d DCA 1985). See also Christopher II, 416 8o.2d at 454 (ineffective counsel claims ineffectively alleged).

Although portions of Appellant's ineffective counsel claims in his first 3.850 motion were purportedly decided on their merits below, the remaining provisions were not decided on their merits. The procedural bar to alleging similar grounds for relief in a second 3.850 motion is therefore inapplicable.

The procedural bars asserted in the instant order are therefore legally and factually unsupported. The procedural improprieties of the confession suppression hearing have never been asserted in either the lower court or this Court. This oversight was not intentional, and indeed was excusably neglectful, as Appellant was unaware of these claims, and unaware of the legal significance of these claims, prior to the filing of the present 3.850 motion. Moreover, because these claims concern the fundamental right of protection against self-incrimination, the usual procedural bar against raising directly appealable issues in a 3.850 motion is inapplicable.

The ineffectiveness of counsel claims are inextricable interwoven into the procedural deficiencies of the suppression hearing. Therefore, the inapplicability of the "abuse" finding to the suppression hearing deficiencies likewise apply to the ineffective counsel claims. The availability and legal significance of those claims were unknown prior to the instant 3.850 motion's filing. Further, while portions of Appellant's ineffective counsel claims in the first 3.850 motion were purportedly decided in their merits, many of the grounds were dismissed as containing inadequate allegations; these grounds have not been decided on their merits.

The above summarized legal and factual conclusions require reversal of the order below, and a full consideration of the Appellant's claims. If, however, this Court opines that Appellant has failed to adequately explain his purported "abuse" of the 3.850 motion, then this Court should remand this cause to the lower court; Appellant's response to the abuse claim warrants an evidentiary hearing on that issue.

ISSUE IV: WHETHER AN EVIDENTIARY HEARING NEED BE HELD ON THE ABUSE ISSUE

The propriety of holding an evidentiary hearing to determine an abuse issue has long been recognized by the Federal courts.

> Once a particular abuse has been alleged, the prisoner has the burden of answering that allegation and of proving that he has not abused the writ. If the answer is inadequate, the court may dismiss the petition without further proceedings. But if there is a substantial conflict, a

> hearing may be necessary to determine the actual facts. Appropriate findings and conclusions of law can then be made. In this way an adequate record may be established so that appellate courts can determine the precise basis of the district court's action, which is often shrouded in ambiguity where a petition is dismissed without an expressed reason. And a prisoner is given a fairer opportunity to meet all objections to the filing of his petition.

Price v. Johnston, 334 U.S. 266, 292-93 (1948). This holding is particularly applicable to the instant facts. In the second 3.850 motion, and at the hearing held below, the Defendant asserted he was unaware of the available grounds when filing the first 3.850 motion: at the hearing, the Defendant asserted that his appellate counsel on the direct appeal was likewise unaware of the procedural deficiencies at the suppression hearing. The State has not contested that the Defendant was unaware of these grounds during his prior 3.850 motion. The facts asserted therefore support the conclusion that the instant grounds were not intentionally withheld from the prior 3.850 motion. There certainly has been no findings of fact, and indeed only limited factual development, concerning whether the Defendant was inexcusably neglectful in failing to raise the instant grounds in the prior 3.850 motion. Under these circumstances, "[i]t is obvious that the procedure followed in the District Court in the instant proceeding precluded a proper development of the issue of the allegedly abusive use of the habeas corpus writ." Id. at 293.

Numerous Federal cases have likewise recognized the need to conduct an evidentiary hearing on the abuse issue. See, e.g., Resendez v. McKaskle, 722 F.2d 227 (5th Cir. 1984); Baker v. Estelle, 715 F.2d 1031 (5th Cir. 1983), cert. denied, 104 S.Ct. 1609 (1984); Sockwell v. Maggio, 709 F.2d 341 (5th Cir. 1983); Vaughan v. Estelle, 671 F.2d 152 (5th Cir. 1982); McShane v. Estelle, 683 F.2d 867 (5th Cir. 1982); Potts v. Zant, 638 F.2d 727 (5th Cir.), cert. denied, 454 U.S. 877 (1981); Haley v. Estelle, 632 F.2d 1273 (5th Cir. 1980). See also cases cited in Potts v. Zant, 638 F.2d 727, 748 n.26 (5th Cir.), cert. denied, 454 U.S. 877 (1981) (court cites twelve decisions in which cases have been remanded to District Courts for an evidentiary hearing on the issue of bypass). Stated differently, the Federal courts have held an evidentiary hearing is required unless the District Court determines as matter of law that the petitioner has "no chance" of justifying the successive petition. See, e.g., Rudolph v. Blackburn, 750 F.2d 302, 306 (5th Cir. 1984); Jones v. Estelle, 722 F.2d 159, 164 (5th Cir. 1983), cert. denied, 104 S.Ct. 2356 (1984).

Because the Defendant was unaware of the grounds asserted in the present 3.850 motion until subsequent to the filing of the prior 3.850 motion, the Defendant has raised a prima facie defense to an abuse assertion. Prior to dismissing this 3.850 motion for abuse of the Rules, the Defendant should, in accordance with the authorities cited above, be provided an evidentiary

hearing to determine whether the Defendant purposefully withheld the present grounds from the first 3.850 motion, or whether the Defendant was inexcusably neglectful in failing to assert the present grounds in the prior motion. This ruling is particularly appropriate given the magnitude of the lower court's order. See, e.g., Potts v. Zant, 638 F.2d 727, 752 (5th Cir.) cert. denied, 454 U.S. 877 (1981) ("The fact that a man's life is at stake is relevant" to decision to permit hearing on abuse issue). A remand on the issue of abuse preserves Appellant's opportunity to have the merits of his claim heard.

ISSUE V: 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 paragraph on abuse in Rule 3.850, effective January 1, 1985, in part codified existing case law, and in part created new law. Numerous Florida cases have held that if a second 3.850 motion asserted grounds which had been asserted in a prior 3.850 motion, and those grounds had been determined on their merits, then the Court need not consider those grounds in the subsequent 3.850 motion. See, e.g., McCrae v. State, 437 So.2d 1388 (Fla. 1983). No body of law had developed, however, concerning a procedural bar to claims neglectfully or purposefully omitted from an earlier 3.850 motion. The Rule 3.850 amendment concerning the failure to assert grounds in a prior motion constitutes a change in Rule 3.850 law. Because Appellant's Rule 3.850

proceedings were instituted long before the amendments became effective, the retroactive application of the "failure ... to assert those grounds in a prior motion" to Appellant's second 3.850 motion is suspect.

Innumerable motions under Rule 3.850 and its predecessor have been filed since their original promulgation. Many, such as the initial 3.850 motion in this case, were filed without the prisoner needing to consider if all of his grounds for relief had been asserted. Whether caused by the lack of legal knowledge of the motion drafter, the time constraints imposed in preparing the 3.850 motion, the desire to limit asserted claims to a manageable number, the need to present the strongest claims first, the drafter's lack of awareness concerning the legal significance of certain aspects of his case, or a myriad of other reasons, numerous 3.850 motions have either neglectfully or purposefully not included certain grounds which could have been asserted. With the passage of the instant amendment, and the failure to provide a window period allowing for the raising of previously unasserted grounds for relief, numerous prisoners were suddenly barred from seeking relief based on the unasserted grounds.

In sum, those prisoners who filed a Rule 3.850 motion prior to the present amendments, and in reliance on the state of the law as it existed when they filed their motions, have now been prejudiced by these amendments: viable grounds for relief which, but for the amendments, would be able to be

asserted, can no longer be asserted. These inequitable results can be avoided only by giving the amendment strictly prospective application.

The Florida Supreme Court has, on numerous occasions, addressed the retroactive/prospective application of new statutory provisions. In general, statutory changes in substantive law must be given prospective application unless the legislative body clearly indicates its intentions to the contrary. See, e.g., State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). The Florida Supreme Court has likewise held, however, that changes in procedural law are to be applied retroactively. See, e.g., Walker & LaBerge, Inc. v. Halligan, 344 So.2d 239, 243 (Fla. 1977).

Although Rule 3.850 is classified as a rule of criminal procedure, clearly the "abuse" amendment acts to immediately foreclose substantive grounds for relief. Regardless of its classification, however, the "abuse" amendment significantly affects substantive rights. The instant amendment is thus substantially similar to a shortening of a statute of limitations without an accompanying savings clause; this amendment effectively eliminates potential causes of action without providing an adequate substitute.

The injustice of this result is patent. For this reason, Florida courts have refused to apply amendments shortening the Statute of Limitations retroactively unless a contrary manifest legislative intent is present. See, e.g., Foley v. Morris, 339 So.2d 215 (Fla. 1976); Garofalo v. Community

Hospital of South Broward, 382 So.2d 722 (Fla. 4th DCA 1980). See also Colhoun v. Greyhound Lines, Inc., 265 So.2d 18 (Fla. 1972) (Statute of Limitations is procedural); Pledger v. Burnup & Sims, Inc., 432 So.2d 1323 (Fla. 4th DCA 1983); cert. denied, 446 So.2d 99 (Fla. 1984) (Statute of Limitations is procedural).

The Florida Supreme Court should apply these rules of statutory interpretation to Rule 3.850. Nowhere in Rule 3.850 is there any indication that the "abuse" amendment should be given retroactive effect. Because the amendment immediately forecloses an otherwise available ground for relief, a consistent application of the interpretive precepts laid down by the Florida Supreme Court requires that the amendment should be given prospective effect only. Indeed, the reasons for providing strictly prospective application is even more compelling in the amendment to Rule 3.850 than in the amendments to statutes of limitations: while a potential plaintiff may be barred from a suit for damages, a Rule 3.850 movant will be barred from release from prison, and, in the instant case, be barred from relief from a death sentence. Clearly, if the ends of justice are served by preserving grounds for damages, the ends of justice are served by preserving grounds for relief from a death sentence.

Moreover, not only is an intended retroactive application of the "abuse" absent from the amendment, but instead a contrary intention is apparent. The

amendment to Rule 3.850 imposed its own previously absent "statute of limitations" by requiring all 3.850 motions to be filed within two years of judgment. The Florida Supreme Court, apparently concerned with the automatic foreclosure of all prisoners sentenced prior to January 1, 1983, provided a one year window period for all movants to file 3.850 motions. See, e.g., Carpenter v. Florida Central Credit Union, 369 So.2d 935 (Fla. 1979) (inclusion of "savings clause" in amendment reducing the limitations period indicates legislative intent that amendment is to be retroactively applied, and imparts retroactivity upon statute). The amendment requiring all 3.850 motions to be filed within two years of judgment and sentencing is clearly intended to be retroactive.

In contrast, there is no such savings clause concerning the immediate foreclosure of a prisoners' rights to assert previously unasserted grounds. When the Florida Supreme Court wanted to clarify the retroactivity of a 3.850 amendment which bars further 3.850 relief (immediate limitation on 3.850 filings to two years after judgment), it did so with clarity. The Florida Supreme Court could likewise have indicated with equal clarity its desire to apply retroactively an amendment which bars further 3.850 relief (grounds not previously asserted are no longer available grounds for relief). Because the Court did not manifest its plain intent to retroactively apply the instant amendment to Rule 3.850, the presumption mandated is that the amendment was to operate prospectively only.

Indeed, the classifications created by a ruling that the "abuse" amendment is to be applied retroactively are inequitable and suspect. Under this construction, the Rule would provide greater rights to a prisoner sentenced in 1960, and who has delayed filing any 3.850 motion, than to a prisoner convicted in 1978 who promptly sought to present his known 3.850 grounds to the courts, but who inadvertently failed to include all his grounds in that motion. The first prisoner could seek Rule 3.850 relief in 1985; the second prisoner is foreclosed from 3.850 relief in 1985. The second prisoner has not "abused" the 3.850 motion, and certainly has not "abused" the 3.850 motion to a greater extent than prisoners who sat on their rights for 25 years.

The 3.850 amendment concerning "abuse" should therefore be applied prospectively only. First, it is inequitable to foreclose grounds for relief previously available without providing a window period for the assertion of those grounds. Second, although nominally procedural, clearly the "abuse" provision of Rule 3.850 forecloses the assertion of significant substantive rights, and the general rule of retroactivity applying procedural rules is inapplicable. Instead, the 3.850 amendment is akin to an amendment shortening a statute of limitations, and therefore, like amendments shortening a statute of limitation, the instant amendment should not be given retroactive application. Third, drafters of the amended Rule 3.850 were clearly capable of providing an indication that certain provisions should be applied

retroactively, as they provided a "savings clause" to the two-year limitation on filing motions. Such a manifested intent of retroactive application is conspicuously absent from the "abuse" amendment, and the required specificity of the intended retroactivity is absent. Finally, the inequities created among equally diligent prisoners by applying the amendment retroactively further compels the conclusion that the amendment was intended to have prospective application only.

CONCLUSION

Appellant's 3.850 motion below asserts substantial serious constitutional violations. His rights against self incrimination were impermissibly infringed upon at the confession suppression hearing herein: a "confession" was ruled admissible without the appellant being able to testify at the hearing. The failure to testify was caused by the trial court's failure to rule on the later admissibility of appellant's hearing testimony, and by Appellant's trial counsel's ignorance of the law on the issue of the later admissibility of the testimony.

Herein, Appellant is simply asking this Court to permit the merits of his claims to be heard. Appellant has not "abused" the 3.850 procedures. He was unaware of the present grounds at the time of the filing his prior motion. Appellant cannot be faulted for the failure of his prior 3.850 counsel to recognize the significant claims asserted in this second 3.850 motion. The

appellant has a right, and indeed justice demands, for these claims to be heard. Appellant should, at a minimum, be permitted to rebut the conclusion that he has abused the 3.850 procedures. Appellant's lack of knowledge concerning these grounds has not been contested by the state. The factual conclusion that appellant abused the 3.850 procedure is suspect and the appellant should be permitted an opportunity to present evidence to rebut such a conclusion.

Finally, appellant's 3.850 proceedings were instituted long before the instant amendments were instituted. The amendments, therefore, should not be applicable to the present 3.850 motion. Indeed, precepts of legislative interpretation which have long been recognized and applied by this Court compel a decision that the amendment concerning successor motions should be applied prospectively only. This amendment to an allegedly procedural rule has foreclosed significant substantive rights. As with statute of limitation amendments, the instant amendment should not be applied retroactively absent a manifest intent. Such an intent is conspicuously absent from the present amendment, and thus the amendment should be given strictly prospective application.

Permeating the issues presented herein, of course, is the uniqueness of the penalty being challenged. The finality of this Court's decision is a factor which cannot be ignored. Unlike many other prisoners, Appellant will

have his opportunities to contest the constitutional validity of his conviction permanently terminated. This is not to say that death sentenced inmates should be excepted from the procedural bars to asserting substantive grounds for relief from judgment. The finality of a death sentence, however, does require that meritorious claims should be procedurally barred only where the evidence strongly shows that the movant has abused the procedure. Obviously, such a determination cannot be made without providing the movant an opportunity to establish that he has not abused the procedure. Only after the full facts have been developed and the Court has determined, with due consideration for the finality of its ruling, that the claims should be procedurally barred, should a rule of procedure act to foreclose a death sentenced inmate from having meritorious claims fully and fairly decided.

Mr. Christopher simply seeks an opportunity to tell his side of the story concerning his confession. He has not had an opportunity to do so in these proceedings. This omission was not Mr. Christopher's fault. His counsel, ignorant of the law, wrongly advised him. Moreover, the Court conducting the hearing was also in error, as it refused to rule on whether Mr. Christopher could testify at the hearing without risking self-incrimination. These judicial and counselor errors should not foreclose Mr. Christopher's rights to bar the introduction of a confession obtained in violation of his constitutional rights. Until he has an opportunity to testify concerning the

circumstances surrounding his confession, this Court cannot be certain that Mr. Christopher's conviction complies with the mandates of the United States and Florida constitutions. This cloud of doubt must be removed prior to the imposition of the ultimate punishment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to WILLIAM E. TAYLOR, ESQ., Assistant Attorney General, Park Trammel Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602; WILLIAM D. CHRISTOPHER, 066706, R-1-N-13, P.O. Box 747, Starke, Florida 32091; DONALD PELLECCHIA, Assistant State Attorney, P.O. Drawer 1007, Naples, Florida 33939; and to JOSEPH L. DAYE, ESQ., 318 S.E. 8th Street, Fort Lauderdale, Florida this 25 day of JULY, 1985.

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