OA 2.1086

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.: 67,492

RONNIE E. CHAPLIN,

Respondent.
_____/

PETITIONER'S BRIEF ON THE MERITS

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TOPICAL INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

OTHER

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PRELIMINARY STATEMENT

Ronnie E. Chaplin, the appellant and criminal defendant below, will be referred to herein as Respondent. The State of Florida, the appellee and prosecution below, will be referred to herein as Petitioner.

The record on appeal consists of twelve pages of pleadings and documents and a supplemental record containing a transcript of Respondent's original sentencing proceeding. To avoid confusion, Petitioner has included in the appendix attached hereto pertinent portions of said twelve page record and will indicate citations thereto as "A" with the appropriate page number(s). Citations to the sentencing transcript will be indicated parenthetically as (T) with the appropriate page number(s).

The decision of the lower tribunal is reported as **Chaplin v. State**, 473 So.2d 842 (Fla.1st DCA 1985) (A 1-3).

STATEMENT OF THE CASE AND FACTS

Respondent was found guilty by a jury of two counts of armed robbery on October 13, 1983. He elected to be sentenced under the guidelines, and a scoresheet was prepared. The scoresheet, containing a scoring error, indicated a recommended range of 9-12 years (the correct range should have been 7-9 years), and the trial court sentenced Respondent to a term of 12 years on each count of armed robbery, to run concurrently. Respondent did not raise the scoring error on his direct appeal of his convictions. **Chaplin v. State, supra,** at 842,843. The cause was affirmed. See **Chaplin v. State,** 449 So.2d 981 (Fla.1st DCA 1984).

On September 27, 1984, Respondent filed a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, asserting as grounds for relief various scoring errors under the sentencing guidelines (A 4-6). On October 3, 1984, the trial court entered its order denying Respondent's motion for post-conviction relief finding that his assertions were without merit and that the matters raised by Respondent could have been raised on appeal (A 7). Thereafter, Respondent timely filed his Notice of Appeal from the trial court's denial of his motion (A 8).

By order of the lower court dated February 25, 1985, Petitioner was requested to submit a brief addressing the propriety of a Rule 3.850 motion as a vehicle for review of sentencing errors under the sentencing guidelines and the propriety of the trial court's scoring of one of Respondent's prior convictions (A 9). In compliance with said order, Petitioner

filed its brief wherein it conceded that the prior conviction had been improperly scored and argued that putative errors under the sentencing guidelines which could have or should have been raised on direct appeal cannot be raised in a Rule 3.850 motion. Petitioner also argued that the error herein did not result in the imposition of a sentence in excess of the legislative maximum prescribed for the offense. (See Brief of Appellee filed below).

In its opinion filed on August 13, 1985, the lower court reversed the trial court's order denying relief, vacated Respondent's sentences, and remanded the cause for resentencing. **Chaplin v. State, supra,** at 842,844. On August 13, 1985, Petitioner timely filed its Notice to Invoke Discretionary Jurisdiction in the lower court (A 10). By Order dated December 5, 1985, this Court accepted jurisdiction of this cause. Petitioner's Brief on the Merits follows.

SUMMARY OF ARGUMENT

Petitioner argues that the lower court's decision herein affording Respondent relief upon a claim that was procedurally barred by Fla.R.Crim.P. 3.850 because it was a matter which could or should bave been raised on direct appeal relied upon clearly erroneous reasoning as basis for circumventing the procedural default provision of Fla.R.Crim.P. 3.850. Petitioner also argues that it is incumbent upon this Court to reverse the lower court because a contrary result would totally eliminate finality of Florida judgments, predicated upon the rejection of procedurally barred issues, in terms of their ability to avoid de novo federal habeas review on the merits. Finally, Petitioner strenuously urges this Court not to afford Respondent relief by construing his defaulted scoring error claim as an ineffective assistance of counsel claim because such an approach would lead to the establishment of a state version of the "inadvertence" or "oversight" doctrine which has been almost unanimously rejected by the federal circuit courts of appeal.

ISSUE

THE FIRST DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT PUTATIVE GUIDELINES SCORING ERRORS, THOUGH NOT RAISED ON DIRECT APPEAL, COULD PROPERLY BE RAISED IN A MOTION FOR POST-CONVICTION RELIEF PURSUANT TO FLA.R.CRIM.P. 3.850.

ARGUMENT

The lower court, in its decision herein, found that Respondent failed to raise in his direct appeal from his conviction the putative guidelines scoring errors which he advanced as grounds for relief in his subsequent Rule 3.850 motion. Nevertheless, the lower tribunal decided that such error, though not raised on direct appeal, could properly be raised in a motion for post-conviction relief pursuant to Fla.R.Crim.P. 3.850.

Fla.R.Crim.P. 3.850 was recently amended and now provides in pertinent part:

> This rule does not authorize relief based upon grounds which could have or should have been raised at trial, and, if properly preserved, on direct appeal of the judgment and sentnence.

The foregoing represents codification of the well-established principle that issues which could of should have been raised on direct appeal cannot be raised in a motion for post-conviction relief. See **Ford v. Wainwright,** 451 So.2d 471 (Fla.1984); **Adams v. State,** 449 So.2d 819 (Fla.1984); **Booker v. State,** 441 So.2d 148 (Fla.1983); **McCrae v. Wainwright,** 439 So.2d 868 (Fla.1983); **Armstrong v. State,** 429 So.2d 287 (Fla.1983); **Ford v. State,** 407 So.2d 907 (Fla.1981); **Hargrave v. State,** 396

So.2d 1127 (Fla.1981); **Meeks v. State,** 382 So.2d 673 (Fla.1980); **Adams v. State,** 380 So.2d 432 (Fla.1980); **Henry v. State,** 377 So.2d 692 (Fla.1979); **Graham v. State,** 372 So.2d 1363 (Fla. 1979); **Sullivan v. State,** 372 So.2d 938 (Fla.1979); **Spinkellink v. State,** 350 So.2d 85 (Fla.1977), **cert.den.,** 434 U.S. 960 (1977); **Wahl v. State,** 460 So.2d 579 (Fla.2d DCA 1984);**Harvey v. State,** 383 So.2d 770 (Fla.3rd DCA 1980); **Lazarus v. State,** 412 So.2d 54 (Fla.5th DCA 1982). The lower court had also previously adhered to this principle. See **Watkins v. State,** 413 So.2d 1275 (Fla.1st DCA 1982); **Wood v. State,** 375 So.2d 10 (Fla.1st DCA 1979) (on rehearing); **Williams v. State,** 371 So.2d 110 (Fla.1st DCA 1978), **cert.den.,** 373 So.2d 462 (Fla.1979). Indeed in the case at bar the lower court recognized that "[i]t is true, as the state posits, that post-conviction proceedings may not be used to raise for the first time issues which were or could have been litigated on direct appeal." **Chaplin v. State, supra,** at 843. However, the court circumvented this principle through the employment of what Petitioner submits was erroneous reasoning.

First, the court appears to suggest that relief was appropriate because the sentence imposed was illegal, as a result of the scoring error, thereby making a Rule 3.850 motion a proper vehicle to seek relief since an illegal sentence may be corrected at any time[1]. **Chaplin v. State, supra,** at 843.

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[1] Rule 3.850 specifically provides that "[a] motion to vacate a sentence which exceeds the limits provided by law may be filed at any time." The sentence imposed herein was not in excess of the statutory maximum for Petitioner's offenses. See §775.082, Fla.Stat.

Such reasoning was rejected in **Wahl v. State, supra,** where the court held:

> Section 921.001(5), Florida Statutes (1983), provides for appellate review of any sentence imposed outside the guidelines. If appellant had a complaint concerning the court's departure from the guidelines, he should have filed a direct appeal from the sentence. That portion of Florida Rule of Criminal Procedure 3.850 which authorizes the review of sentences "in excess of the maximum authorized by law," refers to a sentence which is above the legislative maximum for the prescribed crime. **Skinner v. State,** 366 So.2d 486 (Fla.3rd DCA 1979). Since appellant complains of an error which is not of fundamental dimension and which could have been raised by way of appeal, it cannot now be asserted in a motion for post-conviction relief.

Id. at 580. The **Wahl** court's reasoning is particularly sound because a contrary result would have the effect of turning a recommended sentencing range set forth in a rule of procedure into a substantive sentencing cap, which in turn would amount to usurpation of the Legislature's function of establishing the maximum permissible punishment for a given offense. Consequently, relief for an alleged scoring error not resulting in a sentence in excess of the statutory maximum should not lie via a Rule 3.850 motion on the ground that the sentence was illegal[2].

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[2] While the lower court attempted to distinguish **Wahl** from the instant case, it did not challenge the proposition that an illegal sentence is one in excess of the statutory maximum. **Chaplin v. State, supra,** at 843.

The lower court next looked to its decision in **Dailey v. State,** 471 So.2d 1349 (Fla.1st DCA 1985), **rev.pending,** Case No. 67,381, where it found that certain guidelines sentencing errors not objected to in the trial court were not determinable from the record on appeal, required an evidentiary hearing, and could not be initially raised in that court on direct appeal. The lower court concluded that "[t]his ruling leaves open the possibility that the errors could be raised by way of [a] motion for post-conviction relief which gives the opportunity for an evidentiary determination."[3] **Chaplin v. State, supra,** at 843-844. This reasoning is unsound for two reasons.

First, the reason why the errors were not determinable from the record and required an evidentiary hearing was the absence of a properly specific contemporaneous objection in the trial court which would have yielded a record containing pertinent factual matters and legal argument thereby enabling meaningful appellate review. Speaking directly to the problem of an undeveloped record, the United States Supreme Court refused to address an unpreserved issue holding, in part, that "[q]uestions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with

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3 The Dailey court mentioned no such possibility and had that court thought a Rule 3.850 motion would lie surely it would have rejected Dailey's claim without prejudice to his seeking post-conviction relief. **Dailey v. State, supra,** at 1350-1351.

those questions in mind." **Cardinale v. Louisiana,** 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398, 400 (1969). Similarly, that court, in **Wainwright v. Sykes,** 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), opined:

> A contemporaneous objection enables the record to be made with respect to the constitutional claim when the recollections of witnesses are freshest, not years later in a federal habeas proceeding. It enables the judge who observed the demeanor of those witnesses to make the factual determinations necessary for properly deciding the federal constitutional question.

Id. at 53 L.Ed.2d 609. This rationale was adopted by this Court in **Clark v. State,** 363 So.2d 331, 334 (Fla.1978), where the Court held that a failure to object at trial precluded raising the issue for the first time on appeal.

Concerning the lack of specific contemporaneous objection to an evidentiary question,Chief Justice Boyd observed that:

> If appellant had objected to the evidence on the ground he now relies upon, the trial court could have made a determination of whether there was an adequate reason for excluding the evidence. The court could have inquired into the question of whether the precise quality or substance of the solution used should be a matter of predicate to the admissibility of the test by reason of its effect on the test's reliability. Because appellant did not raise this issue below, the trial court did not have an opportunity to evaluate and rule on this question. An appellate court is in a weak position to rule on the legal issue of admissibility of scientific evidence when, because of the lack of an objection or motion below, there is no unfolding of the factual basis upon which the legal question turns. [Emphasis added.]

Troedel v. State, 462 So.2d 392, 396 (Fla.1984). See also **Tillman v. State,** 10 F.L.W. 305 (Fla.June 6, 1985).

While, as the foregoing decisions indicate, the lack of factually developed record is a significant consideration

militating in favor of rigid application of the contemporaneous objection rule, and by the same token the procedural default provision of Fla.R.Crim.P. 3.850, it is by no means the only consideration. Indeed, the courts have recognized that employment of the contemporaneous objection rule serves to meet the desirable objectives of finality, practical necessity and basic fairness, conservation of judicial resources and concomitantly, elimination of systemic waste. Ironically, the guidelines statute itself explicitly recognizes that the State's resources are finite. Sec. 921.001(3) and (7), Florida Statutes.

In **Wainwright v. Sykes, supra,** the United States Supreme Court recognized that "[a] contemporaneous-objection rule may lead to the exclusion of the evidence objected to, thereby making a major contribution to finality in criminal litigation." Id. at 53 L.Ed.2d 609. This Court has likewise opined that:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, benefiting neither the person convicted nor society as a whole. [Footnotes omitted.] [Emphasis added].

Witt v. State, 387 So.2d 922, 925 (Fla.1980).

With respect to the objectives of practical necessisty and basic fairness, as well as conservation of woefully finite

judicial resources, the courts have had much to say. The **Sykes** court stated that:

> A defendant has been accused of a serious crime, and this is the time and place set for him to be tried by a jury of his peers and found either guilty or not guilty by that jury. To the greatest extent possible all issues which bear on this charge should be determined in this proceeding: the accused is in the court-room, the jury is in the box, the judge is on the bench, and the witnesses, having been subpoenaed and duly sworn, await their turn to testify. Society's resources have been concentrated at that time and place in order to decide, within the limits of human fallibility, the question of guilt or innocence of one of its citizens. Any procedural rule which encourages the result that those proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification. [Emphasis added.]

Wainwright v. Sykes, supra, at 53 L.Ed.2d 610. Consistent with the foregoing, this Court noted:

> The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually.

Castor v. State, 365 So.2d 701, 703 (Fla.1978). Additionally, this Court in **State v. King,** 426 So.2d 12 (Fla.1982) held that:

> There is good reason for requiring defendants to register their objections with the trial court. A defendant should not be allowed to subject himself to a court's jurisdiction and defend his case in hope of an acquittal and then, if convicted, challenge the court's jurisdiction on the basis of a defect that could have been easily remedied if it had been brought to the court's attention earlier. Neither the common law nor our statutes favor allowing a defendant to use the resources of the court and then wait until the last minute to unravel the whole proceeding. Sawyer v. State, 94 Fla. 60, 113 So. 736 (1927). [Emphasis added.]

Id. at 15. In so holding, our Supreme Court re-articulated the view of the **Sykes** court where it decried the havoc spawned by **Fay v. Noia**, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), and held:

> We think the rule of Fay v. Noia, broadly stated, may encourage "sandbagging" on the part of defense lawyers, who may take their chances on a verdict of not guilty in a state trial court with the intent to raise their constitutional claims in a federal habeas court if their initial gamble does not pay off.

Wainwright v. Sykes, supra, at 609. Finally, in the sentencing context, Justice Ehrlich observed that "[i]t would be wasteful of the court's time and of the limited resources of the appellate system to deny the sentencing judge the benefit of contemporaneous objections to a sentence and the concomitant opportunity to correct errors at the sentencing hearing." **State v. Scott**, 439 So.2d 219, 221 (Fla.1983). In short, no defendant is guaranteed or entitled to two sentencing hearings when one would suffice. So, for the lower court to suggest that putative guidelines sentencing errors may be raised in a Rule 3.850 motion because the record needs evidentiary development as a result of the issue not being properly presented in the trial court and raised on direct appeal, is to suggest that there is no longer a need for the contemporaneous objection rule--a notion clearly belied by the foregoing authority. Procedurally defaulted issues cannot be corrected by the expediency of a Rule 3.850 motion nor was the rule enacted to develop facts that could have or should have been developed at trial or the sentencing hearing--the rule was not intended to serve as a substitute

for a direct appeal. See **United States v. Timmreck,** 441 U.S. 780, 99 S.Ct. 2085, 60 L.Ed.2d 634, 638 (1979). Fla.R.Crim.P. 3.850 was clearly designed to raise claims that could not be raised at trial either legally or because the facts were not known and could not have been discovered through due diligence.

The second reason rendering the lower court's approach unsound lies in the fact that the particular sentencing error complained of here has been recognized by that court as being cognizable on appeal even in the absence of a contemporaneous objection in the trial court. See **Whitfield v. State,** 471 So.2d 633 (Fla.1st DCA 1985), **rev.pending,** Case No. 67,320. Thus, the court's reasoning predicated upon **Dailey v. State, supra,** is wholly inapposite to the instant case and leaves the court without any basis whatsoever to justify circumvention of the procedural default provision of Fla.R.Crim.P. 3.850.

The lower court's last justification for not applying the procedural default provision of Fla.R.Crim.P. 3.850 is found in its conclusion that the sentencing error complained of sub judice is analogous to those cases which have permitted post-conviction relief for errors in computation of credit for jail time even though such errors could be raised on direct appeal. **Chaplin v. State, supra,** at 844. Petitioner once again submits that the court's reasoning is unsound because the jail-time credit cases relied upon by the court for the proposition that jail time credit errors could be raised on direct appeal or in a Rule 3.850 motion were all decided prior

to the amendment of Fla.R.Crim.P. 3.850, effective January 1, 1985[4], which now provides that a Rule 3.850 motion will not lie upon grounds which, if properly preserved, could or should have been raised on direct appeal. Petitioner therefore contends that the cases relied on by the court below are of dubious validity and cannot stand in light of this Court's adoption of the amended rule, to the extent that they hold that a matter cognizable on direct appeal may also be raised in a Rule 3.850 motion.

Notwithstanding the fact that the lower court's attempts to justify its failure to apply the procedural default provision of Fla.R.Crim.P. 3.850 have fallen far short, reversal of the lower court's decision is mandated by a significantly more urgent concern, to-wit: the very real potential that issues not entertained by Florida courts due to the absence of a contemporaneous objection or the operation of the procedural default provision of Fla.R.Crim.P. 3.850, will nonetheless be visited upon their merits by federal courts in habeas proceedings brought by state prisoners pursuant to 28 U.S.C. §2254.

Currently, the federal courts will not reach the merits of such issues because noncompliance with a state procedural rule generally precludes federal habeas corpus review of all claims as to which, under state law, such failure is an adequate

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4 The Florida Bar Re Amendment To Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla.1984).

ground for denying review. **Straight v. Wainwright,** 772 F.2d 674, 677-678 (11th Cir.1985). This deference is afforded our courts because their consistent application of the contemporaneous objection rule and the now-codified procedural default provision of Fla.R.Crim.P. 3.850 is viewed as constituting an adequate procedural bar. Id at 678. Thus, it is readily apparent that should this Court place its imprimatur upon the decision below, said perceived consistency in application of our State's procedural rules will come to an abrupt halt and the federal courts will no doubt feel free to rush headlong into de novo review on the merits of a host of issues, not just sentencing errors, which could result in the vacating of judgments of conviction upon federal resolution of questions never entertained by our courts. Surely the Court that extolled the virtues of finality in our criminal justice system in **Witt v. State, supra,** is not now prepared to pave the way for rendering our trial courts a forum for a dry run of a federal proceeding ultimately deciding the guilt or innocence of those accused of violating our laws.

As a final note, petitioner is aware that this Court, quited properly, affords pro se litigants like Respondent liberal construction of their pleadings. Recently, this Court afforded relief to such a litigant by construing his procedurally defaulted retention of jurisdiction claim as an ineffectivenesss of counsel claim. See **State v. Stacey,** 10 F.L.W. 563 (Fla.10-17-85), **reh.pending**. To take a similar approach on the facts of this case, this Court would in effect be holding that the conduct

of counsel--here obvious oversight--resulting in a claim being procedurally barred amounts to ineffective assistance of counsel per se which in turn excuses the procedural default and permits a court to reach the merits of any such claim and grant relief notwithstanding the provision of Fla.R.Crim.P. 3.850 and a multitude of this Court's decisions to the contrary. Voicing like concerns, the Third District Court of Appeal in **Anderson v. State,** 467 So.2d 781 (Fla.3rd DCA 1985) refused to find that counsel's failure to preserve an issue for review amounted to ineffective assistance of counsel under the **Knight-Strickland** standard. The court held:

> Assuming wihtout deciding that these comments would have constituted reversible error had the record been properly preserved below, we think counsel's failure to do so cannot, without more, satisfy this element of the aforesaid Knight-Strickland standard for ineffective assistance of counsel. We reach this conclusion for two reasons.
>
> First, any different result would substantially undermine, if not utterly destroy, the preservation of error rule in Florida as applied to criminal cases. Compare Castor v. State, 365 So.2d 701,703 (Fla.1978). If counsel should fail, as here, to preserve for appellate review an otherwise reversible error, it would be of little moment as the conviction would still be subject to being vacated based on an ineffective assistance of counsel claim. The preservation of error rule would have no real consequence as it would apply only when counsel failed to preserve points which would not have merited a reversal in any event. In effect, a "wild card" exception to the preservation of error rule would be created allowing appellate courts to pass on the merits of unpreserved, non-fundamental errors in criminal cases, and to upset criminal convictions based thereon. See Cox v. State, 407 So.2d 633 (Fla.3rd DCA 1981). We cannot accept such a fatal undermining of our preservation of error rule.

Id at 787. Put simply, counsel's failure to preserve a putative

error for review should not operate to excuse the procedural default under the guise of an ineffectiveness claim.

A similar view has been taken by a number of federal appellate courts in rejecting the "inadvertence of counsel" or "oversight" theory as an excuse for procedural default under the **Sykes-Engle** doctrine[5]. See **Lumpkins v. Ricketts,** 551 F.2d 680 (5th Cir.1977), **cert.den.,** 434 U.S. 957; **Tyler v. Phelps,** 643 F.2d 1095 (5th Cir.1981); **Indiviglio v. United States,** 612 F.2d 624 (2d Cir.1979), **cert.den.,** 445 U.S. 933; **Washington v. Estelle,** 648 F.2d 276 (5th Cir.1981), **cert.den.,** 454 U.S. 899; **Sullivan v. Wainwright,** 695 F.2d 1306 (11th Cir.1983), **cert.den.,** 78 L.Ed.2d 266; **Jones v. Jago,** 701 F.2d 45 (6th Cir.1983), **cert.den.,** 104 S.Ct. 274; **Cooper v. Fitzharris,** 586 F.2d 1325 (9th Cir.1978), **en banc, cert.den.,** 440 U.S. 974. Indeed, the only decision of a circuit court of appeals, that Petitioner is aware of, embracing said theory is currently pending review before the United States Supreme Court. See **Carrier v. Hutto,** 724 F.2d 396 (4th Cir.1984), **aff'd on reh., Carrier v. Hutto,** 754 F.2d 520 (4th Cir.1985), **cert. granted sub.nom., Sielaff v. Carrier,** 53 U.S.L.W. 3911(1985)[6]. Particu-

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5 Wainwright v. Sykes, 433 U.S. 72 (1977). Engle v. Isaac, 456 U.S. 107 (1982).

6 It is highly unlikely that the Fourth Circuit's decision on this issue will be allowed to stand in light of the United States Supreme Court's recent reaffirmation of its own contemporaneous objection rule in United States v. Young, 470 U.S. ___, 84 L.Ed.2d 1 (1985) and United States v. Gagnon, 470 U.S. ___, 84 L.Ed.2d 2d 486 (1985).

larly noteworthy are the reasoning and conclusions of the courts in **Lumpkin v. Ricketts, supra,** and **Jones v. Jago, supra.** The **Lumpkin** court stated:

> Second, petitioner has not demonstrated cause for failing to make a timely challenge. His only allegation in this regard is that his trial attorney provided ineffective assistance of counsel in failing to so object. This assertion must be rejected, however, for, if accepted, it would effectively eliminate any requirement of showing cause at all. If a petitioner could not demonstrate any legitimate cause, he would only have to raise the spectre of ineffective assistance of counsel to get his challenge heard. This we refuse to sanction. [Emphasis added.]

Id. at 551 F.2d 682-683. Along these lines the Sixth Circuit in **Jones v. Jago, supra,** held:

> In essence, petitioner contends that competent counsel would have realized that the new statute possibly changed the burden of proving affirmative defenses and would therefore have objected to the jury instruction concerning the burden of proving self-defense. Counsel's failure to do so has resulted in a procedural default which has precluded Jones' due process challenge to the instruction. This failure to protect petitioner's rights allegedly constitutes ineffective assistance of counsel.
>
> This argument is unconvincing. Were it correct, the Supreme Court's holding in Engle v.Isaac would in effect be circumvented because every case like it would become an ineffective assistance of counsel case. We cannot agree that the Supreme Court intended such a result. [Emphasis added.]

Id. at 701 F.2d 47. Likewise, Petitioner herein respectfully urges this Court not to expose the procedural default provision of Fla.R.Crim.P. 3.850 to wholesale evisceration and invite the sure and certain erosion of finality in our criminal justice system that would closely follow.

CONCLUSION

Based upon the foregoing argument and the authority cited herein Petitioner respectfully requests this Honorable Court quash the decision of the First District Court of Appeal and affirm the trial court's denial of Respondent's motion for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits has been forwarded to Mr. Michael Allen, Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 26th day of December 1985.

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