IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. WILBERT E. BOLYEA, Respondent.	)	CASE NO. 70,720

DISCRETIONARY REVIEW OF THE DECISION OF
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

REPLY BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

The STATE OF FLORIDA was the Appellee in the Second District Court of Appeal and will be referred to as Petitioner in this brief. WILBERT E. BOLYEA was the Appellant in the Second District Court of Appeal and will be referred to as Respondent in this brief. The record on appeal will be designated by the letter "R" followed by the appropriate page number.

ARGUMENT

Respondent relies upon this Court's decisions in Ex Parte Bosso, 41 So.2d 322 (Fla. 1949); Gideon v. Wainwright, 153 So.2d 299 (Fla. 1963); and State v. Barber, 301 So.2d 7 (Fla. 1974) to support his proposition that probationers have standing to seek review of their convictions by way of Fla.R.Crim.P. 3.850. Petitioner submits those cases do not compel such a conclusion.

In Ex Parte Bosso, this Court held that a probationer's liberty was sufficiently restrained by the order of probation to permit testing of the validity of that order by habeas corpus. The State is not seeking, by this appeal, to foreclose that avenue to probationers. Rather, it is the State's petition that habeas corpus is the appropriate vehicle for raising such claims.

Relief under Rule 3.850, on the other hand, has historically been made available only to "prisoner[s] in custody under sentence . . . claiming the right to be released. . . ." Fla.R.Crim.P. 3.850; Gideon v. Wainwright, 153 So.2d at 300. The need for an expeditious procedure for review of such claims is critical where an individual is incarcerated.

In State v. Barber, 301 So.2d at 10, this Court stated that custody is a predicate for relief under Rule 3.850. However, the Court permitted a parolee to seek relief under Rule 3.850. Petitioner submits there is a distinction between a parolee and a probationer. That is, a parolee is "under sentence," whereas sentence has never been imposed upon a defendant who is under

order of probation. See, Fla.R.Crim.P. 3.790. Furthermore, Petitioner would note that in its opinion, the Court in Barber equated a parolee's status with that of a probationer seeking relief by habeas corpus while on porbation. Petitioner submits this language supports the State's view that habeas corpus is the means by which a probationer must challenge the validity of his conviction.

Rule 3.850 did not abolish the relief available under habeas corpus. It simply created a procedure whereby prisoners could seek expeditious review of the validity of their convictions in a convenient forum. Gideon v. Wainwright, 153 So.2d at 300. The rule, as promulgated, was available only to prisoners in custody, under sentence, claiming a right to be released from custody. Porbationers are neither in custody nor under sentence. This Court should not expand Rule 3.850 to give standing to individuals who are under order of probation.

CONCLUSION

Based on the foregoing arguments and authorities and those presented in Petitioner's initial brief on the merits, the decision of the Second District Court of Appeal should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to PAUL C. HELM, Assistant Public Defender, Hall of Justice Building, P. O. Box 1640, Bartow, Florida 33830 this 19 day of August, 1987.

Kim W. Munch

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