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**FILED**

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JUL 8 1993

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. 81,912

WILLIAM E. SHEARER,

Respondent.

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ON CERTIFIED QUESTION FROM THE  
DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This case is before this Court on a question certified to be of great public importance by the District Court of Appeal, Fifth District. The question is whether section 92.525, Florida Statutes (1991) provides an alternative to the specific oath adopted by this court as part of rule 3.850. Fla.R.Crim.P. 3.987. The court is posed it as follows:

IS THE WRITTEN DECLARATION FOUND IN  
SECTION 92.525 FLORIDA STATUTES  
(1991) AN ACCEPTABLE ALTERNATIVE  
OATH WHICH MAY BE USED IN A RULE  
3.850 MOTION IN PLACE OF THE NOTARY  
SIGNATURE REQUIREMENT OF RULE  
3.987?

Petitioner respectfully requests this honorable Court to answer this question in the negative.

The essential facts of the underlying conviction are that Mr. Shearer stole suitcases from the Orlando International Airport and sold a camera and other property he found inside the bags. He was found guilty after a jury trial. The trial transcript is attached to the trial court's order of summary denial, and is part of the record in this case.

On direct appeal, the court vacated his conviction for petit theft of the suitcases, due to his conviction for dealing in the same stolen property. Shearer v. State, 582 So. 2d 28 (Fla. 5th DCA 1991). The remaining conviction and sentence was affirmed. Mandate issued August 7, 1991.

Mr. Shearer filed his motion for postconviction relief on or about January 31, 1992, seeking review of a conviction for

dealing in stolen property and sentence of fifteen years' incarceration as an habitual offender. (R 2) The trial court summarily denied Shearer's motion for postconviction relief by order entered September 18, 1992. (R 1)

The motion for postconviction relief raised several claims which were determined to be "either procedurally barred or so vague as to be legally insufficient." Shearer v. State, 18 Fla. L. Weekly D 650, D1196 (Fla. 5th DCA May 7, 1993) Petitioner has no quarrel with that conclusion.

The fifth district found it necessary to reach the merits of the case because it determined that the oath used by Shearer at the conclusion of his 3.850 motion was legally sufficient. "We hold that the 'written declaration' found in section 92.525(2), Florida Statutes (1991) is an acceptable form of the oath required for a Rule 3.850 motion." Id.

Upon the state's motion for clarification, the appellate court added the certified question quoted above. Notice to Invoke this Court's jurisdiction was timely filed on June 3, 1993. Fla.R.App.P. 9.030(a)(2)(A)(v).

SUMMARY OF ARGUMENT

This Court has already determined that the specific language contained in rule 3.987 is the sole form of oath which is acceptable in a motion for postconviction relief. Gorham, infra. Since rule 3.850 is the only procedural vehicle to collaterally attack a judgment and sentence, and since this Court is the sole arbiter of procedural rules, a general statute cannot amend or alter a specific court rule of procedure. The oath contained in respondent's motion for postconviction relief failed to conform to the requirements of the rule and so the trial court correctly entered an order summarily denying the motion. The district court failed to adhere to the well established principle that the Supreme Court of Florida, and not the legislature, creates and amends procedural rules.

ARGUMENT

THE OATH REQUIREMENT IN RULE 3.987  
IS PART OF THIS COURT'S RULE AND  
CONTROLS OVER A GENERAL STATUTE  
WHICH PROVIDES AN ALTERNATIVE OATH.

Respondent Shearer filed a motion for postconviction relief<sup>1</sup> that did not contain the required oath which is promulgated as part of the rule governing 3.850 motions. Mr. Shearer's motion concluded:

OATH F.S. 92.525

Under penalties of perjury, I  
declare that I have read the  
foregoing and the facts stated in  
it are true.

A signature purporting to be respondent's appears below this statement, but it is not notarized. No other person witnessed respondent's alleged signature.

In contrast, rule 3.850 states that a motion for postconviction relief "shall be under oath". The caption of rule 3.850 directs the reader to rule 3.987, which is the "Model Form for Use in Motions for Postconviction Relief Pursuant to Florida Rule of Criminal Procedure Number 3.850". This rule requires that the motion be "signed by the defendant and sworn to before a notary public or other official authorized to administer an oath." When the Supreme Court of Florida adopted rule 3.987, it stated that these rules "shall govern all proceedings within

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<sup>1</sup> The substance of the grounds raised in the 3.850 motion is beyond the scope of the certified question. Burks v. State, 613 So. 2d 441, 444 n. 6 (Fla. 1993).

their scope". In Re Rules of Criminal Procedure, 353 So. 2d 552 (Fla. 1977). (emphasis added) The state contends that the rule provides the only oath for a facially sufficient 3.850 motion.

These rules of procedure have been promulgated by this Court for the specific purpose of creating a procedural vehicle for prisoners to collaterally attack their conviction. It creates the manner by which a party seeks redress of this alleged injury; it is the method to set in motion the machinery of the judicial process. See, In re Rules of Criminal Procedure, 272 So. 2d 65 (Fla. 1972). It is clear that there is no substantive right to mount a collateral attack on a criminal conviction as a matter of constitutional law. Pennsylvania v. Finley, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The source of 3.850 relief is not grounded in the constitution. See, Johnson v. State, 536 So. 2d 1009 (Fla. 1988). Therefore, the right to file a 3.850 is purely a procedural right.

Since 3.850 motions are creatures of procedure and wholly created by court rule, the court rule is the sole and exclusive expression of the parameters of this right. See, Witt v. State, 387 So. 2d 922 (Fla. 1980). This Court has held that collateral attacks on judgments and sentences may only be brought by motion for postconviction relief under Florida Rule of Criminal Procedure 3.850. Rose v. State, 508 So. 2d 321, 323 (Fla. 1987), cert. denied, 484 U.S. 933 (1988). The district court erred as a matter of law by holding that a general statute amended a specific, procedural court rule. The specific rule of procedure



governs over any general statute. See, Gertz v. Florida Unemployment Appeals Comm., 572 So. 2d 1384 (Fla. 1991).

This Court has already determined that the oath contained in rule 3.987 must be verbatim and no alterations are acceptable substitutes. Gorham v. State, 494 So. 2d 211 (Fla. 1986) As noted by the district court, Gorham was decided after the effective date of section 92.525, Florida Statutes (1986). In that case, this court determined that dismissal of the 3.850 motion was proper because "the oath under review here was not in the form required by rule 3.987 and Scott<sup>2</sup>, and, therefore, the petition was properly dismissed without prejudice by the trial court." Gorham v. State, 494 So. 2d at 212. It is very common for courts to summarily deny 3.850 motions for defects in the oath. See, e.g. Moore v. State, 18 Fla. L. Weekly D 1311 (Fla. May 26, 1993). The district court erred as a matter of law in failing to follow this controlling precedent.

The fourth district has held in other contexts that the 3.850 rule is exclusive, and other statutes' technical requirements are inapplicable. See, Kendall v. State, 18 Fla. L. Weekly D 1435 (Fla. 4th DCA June 16, 1993); Crotty v. State, 568 So. 2d 1328 (Fla. 4th DCA 1990).

There are sound policy reasons for insisting on the specific oath in rule 3.987, and by requiring a notary public or other witness' signature. It would be very difficult to prove that the

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<sup>2</sup> Scott v. State, 464 So. 2d 1171 (Fla. 1986).

defendant's signature at the end of the motion is in fact the movant, or that he was aware of the significance of this "oath". Often prisoners receive the assistance of other inmates in the preparation of their 3.850 motions. Many movants can barely write and some cannot write at all. If all that is required at the end of a 3.850 motion is a bare signature which is not witnessed by another person it is unlikely that anyone could be successfully prosecuted for knowingly false statements contained in the motion. The district court's conclusion that a "Rule 3.850 movant could be convicted of perjury if he or she falsely signed the section 92.525 declaration" is a hollow safeguard given the significant proof problem attendant to an unwitnessed signature. Shearer v. State, 18 Fla. L. Weekly D650 (Fla. 5th DCA March 5, 1993). Without a jurat, the movant's signature is essentially meaningless.

In addition to the proof problem, the formal procedure of swearing to the truth of the factual allegations in the motion insures that the petitioner understands the legal significance of filing the motion. The formality of raising your right hand and swearing that the facts are true is universally understood. The requirement of appearing before a notary or other person authorized to administer an oath ensures that the significance of the procedure is appreciated.

This Court has already determined that the specific language contained in rule 3.987 is the sole form of oath which is acceptable in a motion for postconviction relief. Gorham, supra.

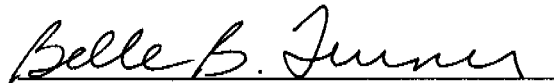
Since rule 3.850 is the only procedural vehicle to collaterally attack a judgment and sentence, and since this Court is the sole arbiter of procedural rules, a general statute cannot amend or alter a specific court rule of procedure. The oath contained in respondent's motion for postconviction relief failed to conform to the requirements of the rule and so the trial court correctly entered an order summarily denying the motion. The district court failed to adhere to the well established principle that the Supreme Court of Florida, and not the legislature, creates and amends procedural rules.

CONCLUSION

Based upon the argument and authority presented, petitioner respectfully requests this honorable court to answer the certified question in the negative.

Respectfully submitted,

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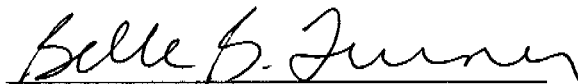


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Brief on the Meritsw has been furnished, by U.S. MAIL to William E. Shearer DC# 100859 at Hendry Correctional Institution, Route 2, Box 13-A, MB # 845, Immokalee, FL, this 6th day of July, 1993.



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