6-15-98

FILED
SID J. WHITE
MAY 22 1998
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

WILLIAM STEWART STEELE,

Petitioner,

vs.

CASE NO.: 92,950

TERRENCE E. KEHOE,

Respondent.
_____/

INITIAL BRIEF

==========

ON REVIEW FROM THE FIFTH DISTRICT COURT

OF APPEAL'S CERTIFIED QUESTION IN **STEELE V. KEHOE**, 23 FLW [D]771 (FLA. 5TH DCA 3/20/98).

==========

Petitioner, **pro se**:

WILLIAM STEWART STEELE, DC#346856
Tomoka Correctional Institution
3950 Tiger Bay Road, AN-102
Daytona Beach, Florida 32124

Respondent, counsel:

STEVEN G. MASON, P.A.
1643 Hillcrest Street
Orlando, Florida 32803

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PRELIMINARY STATEMENT

Herein Petitioner, William Stewart Steele, the Appellant in the District Court of Appeal and Plaintiff in the Trial Court shall be referred to herein as Petitioner unless quoted from the record differently and Respondent, Terrence E. Kehoe, the Appellee in the District Court of Appeal and Defendant in the Trial Court shall be referred to herein as Respondent unless quoted from the record differently. The Fifth District Court of Appeal will be referred to herein as the Lower Court and the Ninth Judicial Circuit Court will be referred to herein as the Trial Court.

The record will be reference to by the letter R from the Trial Court docketing index prepared for appeal; subsequent appellate briefs and opinions will be referenced to by their date and title respectively throughout herein. The 3/20/98 Rehearing Motion is referenced repeatedly herein and has been attached hereto as an appendix for easy location by the parties on appeal

SUMMARY OF ARGUMENT

Exceptional circumstances of this case and prior holdings warrant entertaining untimely motion for postconviction relief outside the two year limitation where delay was attributed to attorney negligence, state action, or situations beyond prisoner's control and due process and demands of justice require review be afforded under rights to access the Courts for redress, due process, and habeas corpus relief; whereafter, if successful, the prisoner may sue for damages if injury manifest for causation.

STATEMENT OF THE CASE

Petitioner was charged with and convicted of First Degree Murder in the Orange County Ninth Judicial Circuit Court whereafter the Honorable Alice Blackwell White, Circuit Judge, sentenced him to life in prison with a 25 year minimum mandatory term. Private counsel, Respondent was retained by Petitioner's mother in a joint contract to represent him on an appeal which affirmed the judgment and sentence in **Steele v. State**, 609 So.2d 50 (Fla. 5th DCA 1992)(table case #91-1769). At no additional charge, and in addition to the contract, Respondent agreed to represent Petitioner in an unrelated battery appeal which was affirmed in **Steele v. State**, 609 So.2d 50 (Fla. 5th DCA 1992)(table case #91-1845); R 11-12 & 37-39.

Prior to the murder appeal rehearing being denied Respondent came to the County Jail and advised Petitioner that, at no additional charge, he would prepare and file a post-conviction Rule 3.850 motion on his behalf. R 11 (I will meet with you in person to discuss what remedies are left). Over a two year period that followed Petitioner corresponded heavily with Respondent (R 13-26) and Respondent in return advised him that he had not forgotten about his case and would be getting with him to go over that matter. R 29-31. Petitioner was never advised of the actual date the mandate was issued.

Petitioner was given portions of the record from appeal which were missing substantial and crucial sections. R 9 & 10. As the time drew near Petitioner's mother--who paid Respondent's fee, and brother called Respondent's office over a two-and-a-half month period trying to confirm that such post-conviction motion was being prepared and would be filed.

R 32-36. Respondent on every occassion these calls were made was in and not available or not in and asked to return the call. Respondent did not return any calls and later maintained he "was under no duty to return those calls." R 70, at ¶ 5; p. 5 of 6/30/95 letter from Respondent. On December 9, 1994 Respondent mailed Petitioner the whole complete record from appeal and a letter claiming to never having agreed to file a motion for post-conviction relief. R 4, at aver. 15.

December 5, 1994 Rose Steele called the Orange County Courthouse to inquire of the date the mandate was issued and was informed it was December 11, 1992. Petitioner was advised by Rose Steele that the date of the mandate was December 11, 1992 on December 5, 1994 and he promptly prepared a motion for post-conviction relief with what record was available and filed the motion on December 12, 1994; the weekday after the two year deadline. 3/25/98 Rehearing Motion, at exhibit A.

The Mandate was issued on December 7, 1992 and stamped as being filed on December 11, 1992; the Courthouse personnel looked at the wrong date when inquiry was made by Rose Steele. 3/25/98 Rehearing Motion, at exhibit C. As a result the Trial Court denied the December 12, 1994 motion for post-conviction relief as being untimely which was affirmed by the Appellate Court in **Steele v. State**, 645 So.2d 1175 (5th DCA), rev. granted & relief den., **Steele v. Dausch**, 662 So.2d 343 (Fla. 1995).

Petitioner filed another motion for post-conviction relief which was denied as untimely and affirmed in **Steele v. State**, 671 So.2d 800 (Fla. 5th DCA 1996). A Petition For Writ of Habeas Corpus challenging representation by Respondent on direct appeal from the Murder conviction and post-conviction was filed and denied without opinion in **Steele v. State**, case no. 96-583 (Fla. 5th DCA 3/28/96). On July 8, 1996 Petitioner filed a

Federal Petition For Writ of Habeas Corpus directed at the Murder Conviction which is still pending in the Middle District Orlando Division United States District Court in **Steele v. Crosby, et al.**, case no. 96-754-CIV-ORL-18C.

Stemming from a May 25, 1995 dated Florida Bar Complaint against Respondent the Supreme Court of Florida Grievance Committee rendered a written reprimand with determinations that, while findings did not warrant formal discipline, his conduct was not condoned and advice was given for him to improve aspects of his professional activity. 3/25/98 Rehearing Motion, at exhibit F. These determinations and suggestions directly reflect upon Respondent's malpractice and thwarting Petitioner's intention to have a post-conviction motion filed in a timely manner. **Id.**

On December 28, 1995 Petitioner executed the Professional Malpractice Complaint giving rise to this action. R 1-39. Respondent and Petitioner briefed the issue (R40-59), oral arguments were scheduled (R 61-105), the matter was dismissed by the Trial Court (R 148-150) and a timely appeal followed. R 151-154. Respondent and Petitioner briefed the issues (11/8/96 Pet. Initial Brief, 1/2/97 Resp. Answer Brief, & 1/12/97 Reply Brief) before the Appellate Court rendered its opinion affirming the Trial Court's dismissal, issuing alternative relief of an evidentiary hearing on Repondent's extent of representation in the Rule 3.850 proceeding, and, if found to have been so representing, to reach the merits of a motion for post-conviction relief outside the two year time limitation, the propriety of which was certified to this Court in **Steele v. Kehoe**, 23 FLW [D]771 (Fla. 5th DCA 3/20/98).

On December 15, 1997 **Johnson v. Singletary**, case no. 97-4018 (Fla. 2d DCA 12/15/97)(Unpublished opinion); 3/25/98 Rehearing Motion, at exhibit D, whereafter Petitioner invoked Florida Rule of Appellate Procedure 9.140(j) and filed a Petition For Writ of Habeas Corpus challenging Respondent's representation and seeking as a relief granting of the writ entitling him to file and have heard a Rule 3.850 motion outside of the two year limitation. March 19, 1998 the Lower Court denied relief in **Steele v. State**, case no. 98-308 (Fla. 5th DCA 3/19/98), reconsideration denied April 20, 1998.

Petitioner filed a Notice of Appeal toward the instant action and May 8, 1998 this court ordered a briefing schedule. While the certified question is presented by the Lower Court, Petitioner seeks relief from the style of relief granted and claims error in omissions of the Lower Court and erroneous conclusions of law inconsistent with the United States Supreme Court rulings based upon similar circumstances.

GROUND I

ERRONEOUS EXONERATION PREREQUISITE TO LEGAL MALPRACTICE ACTION ARISING FROM CRIMINAL CONVICTION.

Drawing upon other States' authorities the Lower Court erroneously establishes exoneration as a prerequisite to a legal malpractice suit against an attorney when such representaion stems from a criminal conviction or prosecution. **Steele v. Kehoe**, 23 FLW [D]771, at 772 (Fla. 5th DCA 3/20/98). This exoneration establishment is based upon inconsistent standards contrary to the United States Supreme Court decision in **Heck v. Humphrey**, 512 U.S. 477, at 489, 114 S.Ct. 2364, at 2372, 129 L.Ed.2d 383 (1994), which makes a prerequisite to suit that Petitioner "must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."

Situtations prevail where a negligent attorney pleads a client to a third degree felony and more than five years is imposed whereafter the client acquires relief from an illegal sentence after serving more than five years imprisonment. Where a client is guilty of a secondary offence yet convicted of a primary offense due to attorney negligence and the client corrects the conviction and lesser sentence is imposed and he has served additional years imprisoned than he should have. Under such circumstances the Lower Court's exoneration prerequisite would not allow a legal malpractice suit, but under **Heck v. Humphrey**, suit would be available. Therefore, the exoneration prerequisite must fail and comply with the United States Supreme Court's standard.

GROUND II

A STANDARD BASED UPON THE EXCEPTIONAL CIRCUMSTANCES PRESENTED SHOULD BE ESTABLISHED TO AFFORD DUE PROCESS AND PROTECT THE RIGHT TO COLLATERAL REVIEW BEYOND THE TWO YEAR LIMITATION OF RULE 3.850.

Petitioner maintains that under the exceptional circumstances presented below a standard should be established to hear Rule 3.850 claims beyond the two year limitation when justice and due process demand. This standard is already established and utilized by the Fourth District to hear belated Rule 3.850 appeals under **Hollingshead v. State**, 194 So.2d 577, at 578 (Fla. 1967), which provides:

> In certain exceptional circumstances when orderly appellate remedy has been rendered unavailable and an appeal within the period and in accordance with the procedure provided by law for appeals has not been afforded, yet justice demands appropriate remedy, we have held due steps must be taken to avoid deprivation of due process.

Accord, **Davis v. Singletary**, ___ So.2d ____ [23 FLW [D]506](Fla. 4th DCA 2/18/98) and **Offen v. State**, 662 So.2d 742 (Fla. 4th DCA 1995). Such a standard would be consistent with the United States Supreme Court opinion in **Fallen v. United States**, 378 U.S. 139, 144, 84 S.Ct. 1689, 1692-93, 12 L.Ed.2d 760 (1964) where belated proceedings are entertained when the prisoner has "done all that could reasonably be expected" under the circumstances. Adopted in **Houston v. Lack**, 487 U.S. 266, 108 S.Ct. 2378, 101 L.Ed.2d 245 (1988) and **Haag v. State**, 591 So.2d 614 (Fla. 1992).

The Lower Court limited the circumstance to attorney error only and thereby precluded the other exceptional circumstances implicated and

brought forth below by holding:

> It is the defendant's right to have meaningful access to the judicial process that we urge is a due process right. If the defendant is denied the right to attack a presumptively valid criminal judgment because of counsel error and is instead limited to money damages because of an invalid conviction, he has been denied due process. **Id.** **Steele v. Kehoe**, 23 FLW [D] 771, at 773 n. 4 (Fla. 5th DCA 3/20/98)

Once such a remedy as post-conviction is granted, its operation must conform to the due process requirements of the 14th Amendment. See **Easter v. Endell**, 37 F.3d 1343, 1345 (8th Cir. 1994)(citing **Evitts v. Lucey**, 469 U.S. 387, 400-01, 105 S.Ct. 830, 838-39, 83 L.Ed.2d 821 (1985)). The denial of a State to afford the Petitioner a full and fair hearing on his federal claims would violate due process under the circumstances presented below. **Keeney v. Tamayo-Reyes**, 504 U.S. 1, 10 n. 5, 112 S.Ct. 1715, 1720-21 n. 5, 118 L.Ed.2d 318 (1992); **Chambers v. Mississippi**, 410 U.S 284, 289-90 & n. 3, 93 S.Ct. 1038, 1043 & n. 3, 35 L.Ed.2d 297 (1973).

In addition to the due process concerns there is the right to habeas corpus relief protected under Article I, § 13 of the Florida Constitution and Article I, § 9 of the United States Constitiution which has been subplanted by Rule 3.850. After implementation of Rule 3.850 the right to challenge effectiveness of trial counsel under Constitutional standards under habeas corpus no longer exist. This concept is contrary to the concurring opinion of Justice Sharp in the Lower Court. **Steele**, 23 FLW at 773 (the rule did not replace habeas corpus).

The Second District, in **Johnson v. Singletary**, case no. 97-4018 (Fla. 2d DCA 12/15/97), found Johnson's Rule 3.850 to be a right as is

protected under the Florida and United States Constitutions for habeas corpus remedies:

> Appellate counsel has agreed that petitioner did not receive timely notification of the affirmance of his conviction, and it is through no fault of petitioner that he **had been effectively denied his right to file a motion attacking his conviction pursuant to Florida Rule of Criminal Procedure 3.850.** **Id.** 3/25/98 Rehearing Motion, at exhibit D (Unpublished opinion w/emhasis added).

This decision was premised upon the argument by Johnson, to wit:

> The Florida Supreme Court, **State v. Bolyea**, 520 So.2d 563 (Fla. 1988), admitted that "Rule 3.850 is a procedural remedy otherwise available by writ of habeas corpus...", and in **Haag v. State**, 591 So.2d 614, 616 (Fla. 1992), the Court noted that "[they] must be mindful that the right to habeas relief protected by article 1, section 13... is implicated [in 3.850 cases]." Rule 3.850 was taken nearly word-for-word from the federal habeas corpus statute." **Id.** 3/25/98 Rehearing Motion, at exhibit E p. 6.

Therefore, the concept of protecting due process and habeas corpus entitlement as guaranteed under the Constitutions should prevail to the exceptional circumstances rendering Rule 3.850 motions inadequate or ineffective because of situations beyond the control of individual prisoners. See as suggested in **Steele**, 23 FLW at 773 (the use of habeas corpus in this situation is supported, if not authorized, by rule 3.850(h)), and implemented in **Davis** and **Offen** explained below under the **Hollingshead** standard. **Haag**, 591 So.2d at 616 (simplicity and fairness are equally promoted by the right to habeas relief that emanates from the Florida Constitution and has been partially embodied within Rule 3.850). Petitioner will present his own exceptional circumstances to promote re-

lief while evolving an acceptable standard for entertaining Rule 3.850 claims outside of the two year filing restraint within narrow perimeters inclusive of few cases:

A. RESPONDENT FRUSTRATED PETITIONER'S RIGHT TO COLLATERAL REMEDY.

The initial use of attorney negligence warranting issuance of a writ was established in **State v. Meyer**, 340 So.2d 440, 443 (Fla. 1983). This was subsequently applied in **Ward v. Dugger**, 508 So.2d 778-79 (Fla. 1st DCA 1987) where an attorney frustrating a client's intention to file a motion for post-conviction relief in a timely manner by withholding records stated a preliminary based for relief in accepting an untimely Rule 3.850 motion. Next, the Court in **Johnson** found that counsel failure to notify of the mandate's issuance frustrated Johnson's right to file a motion attacking his conviction pursuant to Rule 3.850. See 3/25/98 Rehearing Motion, at exhibit D. Finally, we come to the instant case where the Lower Court found attorney negligence in failing to file a motion for post-conviction relief, if agreed to do so, would constutute hearing a belated Rule 3.850 motion outside the two year limitation. **Steele**, 23 FLW at 772.

The premise of the Lower Court was to punish the attorney and not the client who is helpless to control the situation his attorney has created: "should an attorney abuse the 3.850 process by not filing or improperly filing such motion in order to extend the time for reconsideration, severe penalties should follow." **Id.** This keeping is in harmony with the United States Supreme Court decision in **Evitts v.**

Lucey, 469 U.S. 387, 399, 105 S.Ct. 830, 837, 83 L.Ed.2d 821 (1985):

> To the extent that a State believes its procedural rules are in jeopardy, numerous courses remain open. For example, a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client. Such a course may well be more effective than the alternative of refusing to decide the merits of an appeal and will reduce the possibility that a defendant who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction. If instead a state court chooses to dismiss an appeal when an incompetent attorney has violated local rules, it may do so if such action does not intrude upon the client's due process rights.

Applying this principle to the facts of this case is not without comparable authorities supporting relief on every aspect presented:

(i) Failing To Timely File Such A Motion As Agreed.

Petitioner's claim is that Respondent agreed to, but did not, file a motion for post-conviction relief. Supporting documentation was the numerous correspondences Petitioner sent to Respondent (R 13-26) and two correspondences from Respondent to Petitioner which provide in part:

> As for your murder conviction, I have not forgotten about it. It has been put on the back burner while some appeals and trials have taken precedence. I will be in touch with you as soon as possible concerning that matter. **Id.** R 29 (7/14/93 letter).
>
> I have not forgotten about your case. I am trying to clear a day in June so that I may come and visit you at Tomoka and discuss matters with you. When I know a day I will be available, I will contact your classification officer and request visitation. **Id.** R 30 (6/1/94 letter).

These letters can be interpreted only as meaning Respondent was

representing Petitioner in the Rule 3.850 proceeding since the direct appeal had been denied sometime in late 1992. Respondent's failure to prepare and timely file the Rule 3.850 motion, or respond to requests that he did not intend to prepare and file such a motion, frustrated Petitioner's intention to timely file the motion. "Even if a defendant is not necessarily entitled to appointed counsel, still if one is appointed for him or if he is able to obtain his own, he should be able to rely on such counsel's at least filing within the time period." **Steele**, 23 FLW at 772.

"Justice requires that some relief be provided. Therefore, the real issue before us now is what due process rights a convicted defendant has in post-conviction matters when he relies on his attorney to pursue remedies designed to prove his innocence and to obtain his freedom and the attorney fails to file within the limitation period." **Id.** Petitioner maintains that under the exceptional circumstances standard of **Hollingshead** coupled with the opinion of the Lower Court justice demands he be given an opportunity to prove his innocence via Rule 3.850 proceeding and then, if prevailing, to sue his attorney for the injury of imprisonment continued by virtue of Respondent's negligence.

(ii) WITHHOLDING RECORDS NECESSARY TO PREPARE A MEANINGFUL MOTION.

Petitioner was very clear in his claim that Respondent withheld the record on appeal and provided incomplete volumes excluding exhibits from the trial. R 2, at aver. 7. Respondent has never denied this fact pertaining the denial of the record on appeal. R 42-54. Two years

and two days after the mandate's issuance Respondent sent Petitioner the whole record on appeal. R 4, at aver. 15. This effectively frustrated Petitioner's good intention of filing a motion himself, aside from the fact that Respondent had agreed to file the motion for him.

Accordingly, as in **Ward**, Respondent's withholding of the complete record on appeal might entitle him to file a belated motion for post-conviction relief if the actions of Respondent had frustrated his intentions to file such a motion in a timely manner. Petitioner did file a motion with what documents were available although the motion was not a meaningful motion by virtue of Respondent providing portions of the record missing crucial portions of key episodes during the trial process and all exhibits utilized to bring about the conviction.

B STATE ACTION CAUSED THE POST-CONVICTION MOTION TO BE FILED FOUR DAYS OUT OF TIME.

The Lower Court's opinion recognized Petitioner's previous attempts at gaining relief through Rule 3.850 proceedings and the allegations upon which he sought to have the motions heard. **Steele**, 23 FLW at 771. What the Lower Court failed to acknowledge was the State action which caused the initial post-conviction motion to be filed four days out of time. However, the Lower Court did acknowledge that "state action" was a basis for having belated appeals heard. **Id.** at 773.

Petitioner provided an affidavit of Rose M. Steele which provided, in pertinent part:

> On December 5, 1994, I called the Orange County Courthouse to inquire on William S. Steele's behalf the date of the mandate

> in Steele v. State, case #91-1796, which was to my understanding handed down form the District Court of Appeal, Fifth District of Florida. The Clerk or person or who I talked to informed me that the mandate was December 11, 1992. I relayed this information to William S. Steele on December 5, 1994. **Id.** 3/25/-98 Rehearing Motion, at exhibit A aver. 5.

Under the standard announced by the United States Supreme Court as recognized in **State v. Meyer**, 340 So.2d 440 (Fla. 1983) State interference by State Officials which makes compliance with a procedural rule impractical would excuse a defaulted or untimely filed collateral poceeding. See **Murray v. Carrier**, 477 U.S. 478, 488, 106 S.Ct. 2649, 2645, 91 L.Ed.2d 397 (1986). Under the **Hollingshead** standard the Fourth District has been applying this same State Action exemption to procedural default in Rule 3.850 appeals where the exceptional circumstances have rendered the ordinary appellate process unavailable and that justice demands a remedy.

For example, in **Offen**, Offen had been transferred to a medical facility by the Department of Corrections where his mail was unavailable for the entire 30 day period after rendition of the order he seeks to appeal. **Id.** 662 So.2d at 743. In **Davis**, the Court stated:

> Petitioner alleged under oath that his appeal was frustrated by the DOC's sudden transfer of the certified inmate law clerk who was assigned to handle Petitioner's legal matters the day after he entrusted the law clerk with all his legal papers, including the order to be appealed, which he did immediately upon receipt of the order in question. Although Petitioner immediately took steps to get his legal papers back, he did not receive them until August 15, 1997, after the time for filing an appeal has run. On August 19, he moved the trial court for a belated

> appeal; following denial for lack of jurisdiction, he filed the instant petition with this court.
>
> Mere lack of timely access to a law library does not entitle a petitioner to a belated appeal, see **Jordan v. State**, 549 So.2d 805 (Fla. 1st DCA 1989), and thus lack of access to an inmate law clerk likewise should not. However, we view Petitioner's sudden deprivation of all his legal papers as a result of the Department of Corrections' transfer to be an exceptional circumstance beyond Petitioner's control. **Id.** 23 FLW at [D]506.

Likewise, Petitioner's exwife being advised of the wrong date of the mandate by the Courthouse personnel constituted State Action which was beyond his control and an exceptional circumstance warranting the entertaining of his motion for post-conviction relief out of time. The evidence that Petitioner was misled concerning the date of the mandate's issuance is reflected in the Trial Court's denial of the Rule 3.850 motion in question:

> Defendant's motion is untimely. Despite Defendant's sworn allegation (contained in Paragraph 9 of his motion) that the Mandate of the Fifth District Court of Appeal was dated December 11, 1992, the record reveals that the Mandate was dated December 7, 1992. [See copy attached hereto.] Therefore, the two-year time limitation for filing the Motion for Post Conviction Relief ran on December 7, 1994. The "mailbox rule" upon which Defendant relies for the alleged timeliness of his motion is inapplicable since Defendant did not sign or mail his Motion for Post Conviction Relief until December 12, 1994. **Id.** 3/25/98 Rehearing Motion, at exhibit B.

Further corroborating that the Courthouse personnel conveyed the wrong date of the mandate is the face of the mandate being stamped as filed on December 11, 1992 in the upper right hand section and issued on

December 7, 1992 typed in at the lower left hand section. It is clear that the Courthouse personnel simply looked at the date of the mandate was filed, instead of its issuance, and conveyed the wrong date to Rose M. Steele who conveyed such to Petitioner causing the post-conviction motion to be filed a mere four days late. See Mandate — 3/25/98 Re-hearing Motion, at exhibit C.

Such State Action should cause exemption from the time limitation based upon these exceptional circumstances and Petitioner should be allowed an opportunity to have his Rule 3.850 motion[1] heard, without regard to Respondent's negligence in failing to timely file such a motion as he had agreed to do so on Petitioner's behalf.

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[1] Petitioner submits that he is entitled to file an amended motion for postcovniction relief now that he has the whole record from appeal and acquired the State Attorney files after the initial untimely motion was prepared and filed.

CONCLUSION

Petitioner asserts that the fundamental rights to access the Courts under the First Amendment, habeas corpus relief under Article I, § 13 of the Florida Constitution; Article I, § 9 of the United States Constitution, and due process of law under the Fourteenth Amendment are at stake entitling him to have his Rule 3.850 motion for post-conviction relief heard on the merits and if prevailing that Petitioner's time period to sue Respondent for damages acrue from that time.

RELIEF SOUGHT

WHEREFORE, based upon the record and foregoing facts, authorities, arguments, and appendix Petitioner respectfully prays for this cause to be remanded for an evidentiarying hearing as to Respondent's extent of representation in a Rule 3.850 proceeding, or alternatively remand for the motion to be resubmitted and merits reached accordingly based upon State action causing the four day delay, establishment of an exceptional circumstance standard for previewing untimely Rule 3.850 motions, and any and all relief so deemed appropriate by this Court.

DECLARATION/CERTIFICATE OF SERVICE

Having read the foregoing statements of this Intial Brief and having personal knowledge of the facts and matters contained herein I swear and decare under penalties of perjury as set forth in this Initial Brief to be true and correct and hereby certify that a true and correct copy of this Initial Brief has been furnished by U. S. Mail to: Steven G. Mason, 1643 Hillcrest Street, Orlando, Florida 32803, this 19th day of May 1998.

WILLIAM STEWART STEELE, DC#346856
Tomoka Correctional Institution
3950 Tiger Bay Road, AN#102
Daytona Beach, Florida 32124

APPENDIX INDEX

Appendix: 3/25/98 dated "Motion For Rehearing on 3/20/98 Opinion"

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IN THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

WILLIAM STEWART STEELE,

Appellant,

v. CASE NO.: 96-2212

TERRENCE E. KEHOE,

Appellee.
_____/

MOTION FOR REHEARING ON 3/20/98 OPINION

COMES NOW. WILLIAM STEWART STEELE, Appellant, to move this Honorable Court, pursuant to Florida Rule of Appellate Procedure 9.330(a), on rehearing to expand the March 20, 1998 opinion based upon facts and authorities overlooked and/or misapprehended as follows:

The opinion written by Justice Harris for the majority makes exoneration a prerequisite to a legal malpractice action arising from a criminal prosecution by relying upon other States' similar holdings. However, the Court, at page 2, overlooks the United States Supreme Court decision on this very point in Heck v. Humphrey, 512 U.S. 477, 489, 114 S.Ct. 2364, 2372, 129 L.Ed.2d 383 (1994)(must prove that the conviction or sentence has been reversed). This holding is more liberal for exoneration only would preclude a suit where the plaintiff was suing because, while guilty of a crime, he or she was wrongfully convicted of a higher offence than should have been or unconstitutionally sentenced to an erroneous or illegal sentence based upon attorney negligence.

While incoincidental to Appellant's actual innocence claim, est-

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ablishment of law should be in harmony with this Country's highest Court. See 28 U.S.C. § 2254(d)(1)(contrary to, or involved an unreasonable application of, clearly established Federal law as determinded by the Supreme Court. Accordingly, the Court overlooked that this opinion is in harmony with the Supreme Court reasoning in **Evitts v. Lucey**, 468 U.S. 387, at 399, 105 S.Ct. 830, at 837-38, 83 L.Ed.2d 821 (1985), that a State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client who was powerless to obey the rules will serve a term of years in jail on an unlawful conviction. In other words, Appellants "most notable restriction is that if counsel is present, [he] may not act for himself without court approval" and loses control over the power to obey the Rule 3.850 restraints. Majority opinion at page 4 n. 3.

The Court is ambiguous on setting any standard and overlooked the **Hollingshead v. State**, 194 So.2d 577, 578 (Fla. 1967) Standard the Fourth District has utilized in such Rule 3.850 proceeding similar to that presented: "In certain exceptional circumstances when orderly appellate remedy has been rendered unavailable and an appeal within the period and in accordance with the procedure provided by law for appeals has not been afforded, yet justice demands appropriate remedy, we have held due steps must be taken to avoid deprivation of due process." This standard has been used in a variety of similar situations involving post-conviction proceedings, i.e., **Davis v. Singletary**, ____ So.2d ____[23 F.L.W. D506](Fla. 4th DCA 2/18/98)(an exceptional circumstance beyond Petitioner's control); **Offen v. State**, 662 So.2d 742 (Fla. 4th DCA 1995)(denial of postconviction relief was "exceptional

circumstances" *** excused untimely notice of appeal).

The majority opinion seems to stipulate the sole issue as being whether counsel was, in fact, **employed** for the purpose of filing a post-conviction motion. Id. Opinion at page 5. However, this terming of **employment** is misleading and could cause Appellant detrimental consequences on remand for Kehoe was **employed** only to file an appeal in the murder case. This was by contract; however, Kehoe volunteered at no additional charge to represent Appellant in the Rule 3.850 proceeding and in an alien appeal from a battery conviction in Steele v. State, 609 So.2d 50 (Fla. 5th DCA 1992)(Table case #91-1845). This distinction is critical to the Trial Court treatment of the issue on remand.

The court also overlooked and did not alude to the fact that, while providing Appellant with an incomplete appellate record, Kehoe did withhold the whole and complete record from appeal until two-years and two-days after the date of the issuance of the mandate. Likewise, Justice Sharp's concurring opinion, while referring to Ward v. Dugger, 508 So.2d 778 (Fla. 1st DCA 1987), does not alude to Kehoe's withholding of the record on appeal. While withholding of records is an indicator of continued representation in the Rule 3.850 proceeding, as in Ward, such prevented Appellant from preparing on his own behalf a motion of any significance since the portions of the record supplied were missing major and substantial portions. This factor is material and too important to be overlooked during the review of these claims.

Appellant seeks judicial notice of his simultaneoulsy pending Petition For Writ of Habeas Corpus filed in Steele v. State, case no.

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98-308 (Fla. 5th DCA 3/19/98)(Pending on rehearing). This Petition was filed simultaneously with a supplemental authority in this case of **Johnson v. Singletary**, case no. 97-04018 (Fla. 2d DCA 12/15/97)(Unpublished opinion); exhibit D. Judicial notice is also requested for the Florida Bar Grievance Committee for the Supreme Court of Florida determinations as to Kehoe's negligent representation, misleading of Appellant concerning representation in the Rule 3.850 proceeding and inadequate notification of termination and unspecific and unwritten terms of scope of representation; exhibit F. Fla. Stat. § 90.202(5) & (6).

The **Johnson** opinion points to appellate counsel ineffectiveness in failing to advise him of the issuance of the denial/mandate on direct appeal frustrating his **right** to file a collateral motion under Rule 3.850 attacking his conviction because by the time he was able to file such motion it was untimely. The Court overlooked the **right** referred to in **Johnson** and emphasized that "fundamental due process requires that he have a remedy that will address his future incarceration." **Id**. Opinion at page 3. There is also a right which this Court overlooked and the concurring opinion of Justice Sharp precludes from applying; concurring opinion at page 2-3(the rule did not replace habeas corpus).

Habeas corpus remedy, as a right under Article I, § 13, of the Floirda Constitution, for ineffective assistance of trial counsel has been totally and completely subplanted by Florida Rule of Criminal Procedure 3.850. This is the **right** **Johnson** refers to and is shown in Petition as Johnson argued:

APPENDIX

"The Florida Supreme Court, State v. Bolyea, 520 So.2d 562, 563 (Fla. 1988), admitted that 'Rule 3.850 is a procedural remedy otherwise available by writ of habeas corpus ...', and in Haag v. State, 591 So.2d 614, 616 (Fla. 1991), the Court noted that '[they] must be mindful that the right to habeas relief protected by article I, section 13 ... is implicated [in 3.850 cases].'" Id. exhibit E, at page 6.

While due process governs, the right to habeas corpus relief as subplanted in Rule 3.850 should not have been overlooked, but should have been acknowledged as coexisting with the due process concerns discussed.

Finally, while Appellant never had an opportunity to argue any merits to having his Rule 3.850 proceeding, prior to this Court's decision; there are other concerns which must also be considered. They may have been apparent to the Court when it reviewed Appellant's attempts to file his own motion outside the time period and consistently claimed that his private attorney negligently failed to fimely file a 3.850 motion, even though the attorney orally agreed to do so. Page 1.

State interference may validate hearing a post-conviction proceeding outside of the two-year limitation. See Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed.2d 397 (1986). The Court overlooked Appellant's claim that on December 5, 1992, Rose Steele, his ex-wife, called the courthouse at Appellant's request to ascertain the date of the mandate. Ms. Steele was advised by the courthouse personnel that the date of the mandate was December 11, 1992 and conveyed this information to him on the same day. See exhibit A, at aver. 5.

APPENDIX

Appellant filed his first Rule 3.850 motion, with what records available and initial briefs from the direct appeal, on December 12, 1994 timely in accordance with the information provided by the courthouse personnel. Appellant sought to amend his Rule 3.850 motion upon receipt of the State Attorney files but on January 4, 1995 the Trial Court, while acknowledging Appellant's reliance upon the date of the mandate being December 11, 1992, denied the motion as untimely and attached the December 7, 1992 dated mandate. See exhibit B & C.

This was the first time Appellant had seen the mandate and it became readily apparent that the courthouse personnel had looked in the upper-right-hand portion of the mandate at the large stamped date of December 11, 1992 which it was filed instead of the smaller typed in December 7, 1992 date of its issuance in the lower-portion. See exhibit C. This State interference caused Appellant to file the motion four (4) days late and under the exceptional circumstances presented in this case of matters beyond his control is similar to those instances warranting relaxing of the time restraint; **Ward**, **Davis**, **Offen**, & **Murray v. Carrier**, **supra**.

WHEREFORE, based upon the foregoing facts, arguments, authorities and attached exhibits, Appellant respectfully prays on rehearing for the March 20, 1998 opinion to be expanded consistent with the matters discussed herein.

WILLIAM STEWART STEELE, DC#346856
Tomoka Correctional Institution
3950 Tiger Bay Road, AN-102
Daytona Beach, Florida 32124

APPENDIX

DECLARATION/CERTIFICATE OF SERVICE

Having read the foregoing statements of this Motion For Rehearing and reviewing the attachments for authenticity, I swear and declare under penalties of perjury all stated herein to be true and correct and hereby certify that a true and correct copy of this Motion has been furnished by U. S. Mail to: Steven G. Mason, 1643 Hillcrest Street, Orlando, Florida 32803, this 25th day of March, 1998.

William Stewart Steele

WILLIAM STEWART STEELE, DC#346856
Tomoka Correctional Institution
3950 Tiger Bay Road, AN-102
Daytona Beach, Florida 32124

APPENDIX

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT IN AND FOR ORANGE COUNTY, FLORIDA CIRCUIT JUDGE ALICE BLACKWELL WHITE

WILLIAM STEWART STEELE,

Defendant,

vs. CASE NO.: CR90-5038

STATE OF FLORIDA,

Plaintiff,

_____/

AFFIDAVIT OF ROSE M. STEELE

I, Rose M. Steele, under the penalty of perjury swear and declare that the statements herein are made of my own free will, based upon my personal knowledge, and truthfully as follows:

1. In May of 1990, I lived with my mother-in-law at 5309 Vance Avenue, Orlando, Orange County, Florida 32810.

2. On May 9, 1990, my mother-in-law, Betty L. Steele placed a 911 call at approximately 10:34 pm. concerning a disturbance.

3. On May 9, 1990, my mother-in-law, Betty L. Steele received a phone call at 11:09 pm. from my husband William S. Steele. Ms. Steele informed me that it was my husband William S. Steele calling who wished to talk with me. I spoke with my husband, William S. Steele, for a few minutes at 11:09 pm. on May 9, 1990.

4. When my husband William S. Steele called at 11:09 pm. on May 9, 1990 a police officer was present and did note in his report the time my husband, William S. Steele called as being 11:09 pm.

5. On December 5, 1994, I called the Orange County Courthouse to inquire on William S. Steele's behalf the date of the mandated in Steele vs. State, case #91-1796, which was to my understanding handed down from the District Court of Appeal, Fifth District of Florida. The Clerk or person on who I talked to informed me that the mandate was December 11, 1992. I relayed this information to William S. Steele on December 5, 1994.

Under the penalty of perjury, having read the forgoing affidavit, I swear and declare all to be true and correct this 10th day of March, 1995.

Rose M Steele 3-10-95

ROSE M. STEELE
5312 Angus Avenue
Orlando, Florida 32810
(407) 578-4760

EXHIBIT A

APPENDIX

IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN
AND FOR ORANGE COUNTY,
FLORIDA

CASE NO. CR 90-5038
DIVISION 12

STATE OF FLORIDA,

Plaintiff,

v.

WILLIAM STEWART STEELE,

Defendant.
_____/

ORDER DENYING MOTION FOR POST CONVICTION RELIEF

THIS CAUSE came on for hearing upon Defendant's pro se Motion for Post Conviction Relief, filed December 19, 1994. Defendant seeks post-conviction relief pursuant to Fla. R. Cr. P. 3.850, citing numerous bases for the requested relief.

Defendant's motion is untimely. Despite Defendant's sworn allegation (contained in Paragraph 9 of his motion) that the Mandate of the Fifth District Court of Appeal was dated December 11, 1992, the record reveals that the Mandate was dated December 7, 1992. [See copy attached hereto.] Therefore, the two-year time limitation for filing the Motion for Post Conviction Relief ran on December 7, 1994. The "mailbox rule" upon which Defendant relies for the alleged timeliness of his motion is inapplicable since Defendant did not sign or mail his Motion for Post Conviction Relief until December 12, 1994.

ca/ dupt

EXHIBIT B

APPENDIX

THEREFORE, it is considered, ordered and adjudged as follows:

1. Defendant's Motion for Post Conviction Relief is denied.

2. Defendant is advised that he has thirty (30) days from the rendition of this order in which to appeal.

3. All documents necessary to determine this cause are attached to this order.

4. The Clerk of Court shall promptly serve a copy of this order upon the Defendant including an appropriate certificate of service.

DONE AND ORDERED in Chambers at Orlando, Orange County, Florida this 24th day of January, 1995.

ALICE BLACKWELL WHITE
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail/hand delivery to:

State Attorney
Lisa Stewart Steele

STATE OF FLORIDA, COUNTY OF ORANGE
I HEREBY CERTIFY The foregoing is a true ... of the original filed in this office
JOHN CARLTON, Clerk Circuit Court
Dated 1-12-95 By: ... D.C.

Judicial Assistant to
Judge White

EXHIBIT B, p. 2

APPENDIX

APPELLANT NOT ON BOND

M A N D A T E

from

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA

FIFTH DISTRICT

FRAN CARLTON
CLERK OF CIRCUIT COURT
ORANGE COUNTY, FL.

1992 DEC 11 AM 11:33

FILED IN OFFICE
CLERK CIRCUIT COURT

5 SA 12

THIS CAUSE HAVING BEEN BROUGHT TO THIS COURT BY APPEAL AND AFTER DUE CONSIDERATION THE COURT HAVING ISSUED ITS OPINION;

YOU ARE HEREBY COMMANDED THAT SUCH FURTHER PROCEEDINGS BE HAD IN SAID CAUSE IN ACCORDANCE WITH THE OPINION OF THIS COURT ATTACHED HERETO AND INCORPORATED AS PART OF THIS ORDER, AND WITH THE RULES OF PROCEDURE AND LAWS OF THE STATE OF FLORIDA.

1 Judge withdrew

WITNESS THE HONORABLE GILBERT S. GOSHORN, JR. CHIEF JUDGE OF THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, FIFTH DISTRICT, AND THE SEAL OF THE SAID COURT AT DAYTONA BEACH, FLORIDA ON THIS DAY.

DATE: December 7, 1992

FIFTH DCA CASE NO. 91-1796

COUNTY OF ORIGIN: Orange

TRIAL COURT CASE NO. ~~CR90-5098~~

DISTRICT COURT OF APPEAL · FIFTH DISTRICT · STATE OF FLORIDA

Frank J. Habershaw

FRANK J. HABERSHAW
CLERK

EXHIBIT C

APPENDIX

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

DECEMBER 15, 1997

ADRIAN L. JOHNSON, Petitioner(s), v. HARRY K. SINGLETARY, JR., Respondent(s).	)	Case No. 97-04018

BY ORDER OF THE COURT:

Adrian Johnson alleges that his appellate trial counsel's ineffectiveness in failing to advise him of the issuance of this court's opinion on his direct appeal has frustrated his right to file a collateral motion attacking his conviction because by the time he was able to file such motion it was untimely. Appellate counsel has agreed that petitioner did not receive timely notification of the affirmance of his conviction, and it is through no fault of petitioner that he has been effectively denied his right to file a motion attacking his conviction pursuant to Florida Rule of Criminal Procedure 3.850. Accordingly we grant his petition, and direct the trial court to accept as timely filed any rule 3.850 motion he should file within the next 90 days.

DANAHY, A.C.J., and FULMER and NORTHCUTT, JJ., Concur.

EXHIBIT D

APPENDIX

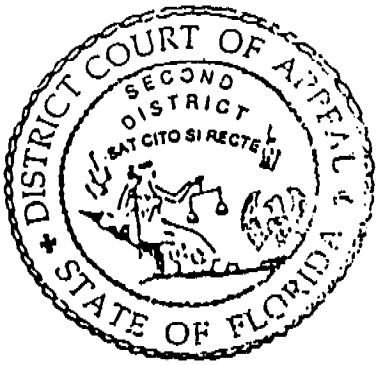
I HEREBY CERTIFY THE FOREGOING IS A
TRUE COPY OF THE ORIGINAL COURT ORDER.

William A. Haddad

WILLIAM A. HADDAD, CLERK

c: Adrian Lenard Johnson
Attorney General

/DM



APPENDIX

EXHIBIT D, p.2

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ADRIAN L. JOHNSON,

Petitioner,

v. CASE NO: 97-04018

HARRY K. SINGLETARY, Sec.,
Fla. Dept. of Corrections,
and ROBERT A. BUTTERWORTH,
Atty. Gen. of Florida.

Respondents.

STATE PETITION FOR WRIT OF HABEAS CORPUS AND ALTERNATIVE "ALL WRIT"

The Petitioner, ADRIAN L. JOHNSON, in proper person, petitions this Court to issue an order allowing belated review of his previously-filed Motion for Belated Post Conviction Relief filed pursuant to Florida Rules of Criminal Procedure. Petitioner states that his motion should be heard belatedly based on ineffective assistance of appellate counsel, and because of the Clerk of this court failure to timely notify him that this court had rendered a decision on Petitioner's direct appeal.

I. JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Art. 1 Sec. 3, Art. 1 Sec. 21 and Art.5 Sec.2 of the Florida Constitution, and Chapter 79.01 et.seq., Florida Statutes.

EXHIBIT E

APPENDIX

II. STATEMENT OF FACTS

On September 8, 1989, Mr. Nestor Castillo, Jr., Esq., filed a Notice of Appeal appealing Petitioner's conviction and sentence. The appeal was affirmed by this Court on August 7, 1991, and the mandate was issued on August 23, 1991. Petitioner was never notified of this Court's ruling, by the Clerk of this Court or by his appellate counsel. See exhibit A of appendix. After waiting to hear something from appellate counsel concerning the appeal, Petitioner wrote two letters of inquiry to Mr. Castillo. See exhibit B of appendix. None were honored. Then Petitioner wrote the Clerk of this Court inquiring about his appeal. The Clerk responded on November 9, 1993 informing Petitioner that his case had been closed for over two years in this Court. See exhibit C of appendix.

Petitioner filed a "Belated" Motion for Post Conviction Relief in Hillsborough County on September 15, 1995. The motion alleged that Petitioner was not informed by the Clerk nor appellate counsel that his appeal had been denied and, as a result, Petitioner's compliance with procedural rules were made impractical through state action and an uncooperative attorney. Petitioner moved the Court to excuse the tardiness on these grounds. See exhibit D of appendix. The trial court denied the motion on July 3, 1996 finding that failure to receive the mandate is not a recognized legal basis to grant belated review under Rule 3.850. See exhibit E of appendix. This Court affirmed on March 14, 1997. As it now stands, Petitioner cannot have the constitutionality of his conviction tested because neither his appellate attorney nor the Clerk of this Court informed him that his direct appeal had been denied.

EXHIBIT E, p. 2

APPENDIX

III. RELIEF SOUGHT

Petitioner seeks the issuance of this writ directing the Circuit Court of Hillsborough County to allow him to proceed on the merits of his 3.850 motion based on ineffective assistance of appellate counsel.

IV. ARGUMENT

Claims alleging ineffective assistance of appellate counsel are properly raised on a habeas corpus petition in the appellate court. See ***Hampton v. Dugger,*** **509 So.2d 1229 (Fla. 1 Dist 1987).** In waging claims of ineffective assistance of appellate counsel, a habeas petitioner must meet the two prong test set forth in ***Strickland v. Washington,*** 466 U.S. 648, 104 S.Ct 2052, 2065, --- L.ED.2d — - (1984), that is, counsel's deficient performance and prejudice resulting therefrom.

A. COUNSEL'S DEFICIENT PERFORMANCE

Petitioner claims that his appellate attorney's performance on direct appeal was deficient as counsel did not inform Petitioner that his direct appeal had been denied. There is no question that an attorney must act in the best interest of his client during the course of representation. See **Rule 4-1.16 (d) Fla.R.Prof.Con.** ***The Florida Bar v. Coutant,*** **569 So.2d 442 (1990).** An attorney acting in the best interest of his client will, among other things, keep the client informed about the status of his case and important developments in the case.

There was absolutely no sound reason for petitioner's appellate counsel to neglect informing him that his case had been ruled on. Under ***Strickland,*** counsel's performance is deficient if, after considering the totality of the circumstances, counsel's conduct can be said to be unreasonable. **104 S.Ct at 2065.** It cannot be said to be reasonable conduct to neglect a simple duty of informing a client

EXHIBIT E, p.3

APPENDIX

that a court has rendered a decision in a case. See *State v. Meyers*, 403 So.2d 440 (Fla. 1983)(dereliction of duty not easily excused for attorney to neglect matters entrusted to them by client). Thus, it is unquestionably clear that counsel not informing Petitioner about the resolution of his appeal was deficient conduct under *Strickland*.

B. PREJUDICIAL EFFECT OF THE ERROR

The only reason Petitioner's 3.850 motion was tardy in the trial court was because appellate counsel refused to inform him that his case had been denied. In belated appeal cases where counsel frustrates a defendant from filing a timely appeal, prejudice is conclusive. The same is true here where counsel frustrated Petitioner from filing a timely postconviction motion. Only one case in Florida has been confronted with a similar issue. In *Ward v. Dugger*, 508 So.2d 778 (Fla. 1 Dist. 1987), the Clerk of the First District Court of Appeal received a letter from Sharon Ward. Her letter complained that her appellate attorney would not cooperate with her by not sending her materials necessary to file a timely 3.850 motion in the trial court, and that she was concerned about being procedurally barred. The letter was given to a panel of the Court. The Court construed the letter as a habeas corpus, dismissed it and gave Ward leave to file a "belated" post conviction motion in the trial court "**if the actions of her attorney frustrated her intentions on filing a timely 3.850 motion**". The Court relied on the rationale under the belated appeal jurisprudence operative in Florida to accord Ward her relief. **508 So.2d at 779, fn. 2.**[1]

---

[1] The *Ward* Court apparently found it to be constitutionally proscribed to procedurally bar Ms. Ward from testing the constitutionality of her conviction merely because her attorney would not cooperate. This is evident in the belated appeal doctrine the Court relied on to grant Ward belated post - conviction review. It follows that Petitioner here would suffer State and Federal due process, equal protection and access to court provisions if he is not allowed to proceed on the merits of his motion like Ms. Ward.

Since counsel's deficient performance in the instant case frustrated Petitioner from filing a timely 3.850 motion, Petitioner urges this Court to follow *Ward* by dismissing this habeas corpus petition and giving the trial court jurisdiction to reach the merits of his 3.850 motion belatedly.

C. CONSTITUTIONAL IMPLICATIONS

Petitioner alternatively claims that to apply Rule 3.850's time limitation based on facts of this case would constitute a denial of due process under both state and federal constitutions.

Perhaps the most essential fact to consider is that petitioner never received notice of this court's mandate from direct appeal. Before petitioner could file a 3.850 motion, the mandate had to be "issued" from this Court. *Amazon v. State*, 537 So.2d 120 (Fla. 2 Dist. 1989). In legal terms the mandate was never issued and therefore, petitioner should not be barred from having his constitutional claims given due consideration.[2] This position is not only rooted in the legal definition of issue; rather, it is primarily rooted the constitutional right to due process.

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[2] The meaning of the term "issue" has never been defined regarding criminal appeals or post-conviction matters. In the area of commercial instruments, however, it has been concluded that "[t]he *first delivery*...is generally the basis of the effectiveness and validity of an instrument." *Fla. Jur. 2d. Words & Phrases* (A-K) pp. 745-46 (1992); see also *Mize v. County of Seminole* 229 So.2d 841, 845 (Fla. 1969)("Issue means the first delivery of the instrument to...a person who *takes it as the first holder")*; *Richwagen v. Lilienthal*, 386 So.2d 247, 48 n.2 (Fla. 4 Dist. 1980)("We concur with the conclusion that implicit in 'issuance' is delivery".).

The definition of issue as defined in *Black's Law Dictionary* (6th Ed. 1990)brings the point closer to this case:

> **Issue**, v. To send forth, to emit; to promulgate; as an officer issues orders, process issues from a court...When used with reference to writs, process and the like the term is ordinarily construed as **importing delivery to the proper person**...p. 830

Consistent with the legal definition of issue, because the mandate was never delivered to petitioner, his time should run from the date in which notice of the mandate was issued to him--November 9, 1993.

EXHIBIT E, p. 5 APPENDIX

Due process, under both constitutions, has at its core the concept of fundamental fairness. *State v. Smith,* 547 So.2d 131, 134 (Fla. 1989); *Trustees of Dartmouth College v. Woodard,* 17 U.S. (4 Wheat) 518, 580-82, 4 L.Ed. 629, 645 (1819). The requirement that notice is given is one of the safeguards erected to ensure the application of fundamental fairness. See *Polatnick v. Fla. Dept of Commerce, Div. of Employment Security,* 349 So.2d 203 (Fla. 3 Dist. 1977). Unlike equal protection claims, "[t]here is no set, inflexible test by which courts determine whether the requirements of procedural due process have been met. *Dept. of Law Enforcement v. Real Property,* 588 So.2d 957, 960 (Fla. 1991). In any procedural due process claim, the central inquiry focuses on the basic fairness of the complained-of action. The central inquiry for this court then is whether it is fundamentally fair to bar petitioner's motion even though he never recieved this court's mandate.

Let it first be noted that petitioner has a right to file a 3.850 motion and have his motion duly considered pursuant to Art. 1 sec. 13 of the Florida Constitution. The Florida Supreme Court, *State v. Bolyea,* 520 So.2d 562, 563 (Fla. 1988), admitted that "Rule 3.850 is a procedural remedy otherwise available by writ of habeas corpus...", and in *Haag v. State,* 591 So.2d 614, 616 (Fla. 1991), the Court noted that "[they] must be mindful that the right to habeas relief protected by article 1, section 13...is implicated [in 3.850 cases]". Rule 3.850 was taken nearly word-for-word from the federal habeas corpus statute. Since Florida's implementation, our high court has given Rule 3.850 the same "broad scope" as its federal counterpart in construing Rule 3.850. 520 So.2d at 563. In this regard, viewing federal applications to its habeas corpus statues and procedural rules will be instructive.

- *Federal Applications of its Procedural Bar Rules.* In its postconviction jurisprudence, the federal courts has set limits to procedurally defaulted petitioners; at the same time, however, federal courts have consistently developed exceptions to its procedural rules such as the newly announced "gateway exception" in *Schulp v. Delo*, — U.S. —, 115 S.Ct 851 (1995); the "ends of justice" exception in *Sanders v. United States*, 373 U.S. 1, 83 S.Ct 1068 (1963); the "actual innocence" exception explained in *Sawyer v. Whitley*, 505 U.S. —, 112 S.Ct 2514 (1992); the "fundamental miscarriage of justice" exception explained in *Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct 2546, 2565 (1991); the "government interference" exception in *Murray v. Carrier*, 477 U.S. 478, 106 S.Ct 2693 (1986); and the "cause and prejudice" exception established in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct 2497 (1977).

These different exceptions available for procedurally defaulted petitioners practices the concept of due process. They are usually erected when defaulted litigants enter the courts with facts and circumstances not yet contemplated by law, or when procedural disobedience should be excused because of a compelling constitutional interest, such as "actual innocence", due process or the right to be free from unlawful restraint. This Court is now being confronted with facts and circumstances not yet contemplated by Rule 3.850, coupled with compelling constitutional interests, that is, the right to habeas relief and due process.

In application, "cause and prejudice" has recognized ineffective assistance of counsel as sufficient 'cause' for a procedural default. 477 U.S. at 488-89, 106 S.Ct at 2645. *Cuyler v. Sullivan*, 446 U.S. 335, 344, 100 S.Ct 1708, 1716 (1980). *Murray* has also reiterated that procedural rules should be excused when state action makes compliance with procedural rules impractical. *Id.* See also

EXHIBIT E, p. 7

APPENDIX

Brown v. Allen, 344 U.S. 443, 73 S.Ct 397, 422 (1953). Rule 3.850 has not yet developed any of these types of exceptions. Given federal precedent and the facts of this case, the time has come for 3.850 to do so.

The Colorado Supreme Court noted that a time limit with no exception for justifiable excuse violates due process. *People v. Germany*, 674 P.2d 345 (Colo. 1983). Florida courts have reached the same conclusion, see e.g., *Polatnick*, 349 So.2d at 204-5 (Polatnick did not receive notice of the appeals referee decision until after the time limit for administrative appeal expired. The court stated: "we find that the denial of an appeal under the facts of this case...amounts to a denial of due process".); *Gay v. Moreland*, 450 So.2d 1270, 1273 (Fla. 5 Dist. 1984)("The appellant was never served with a rule to show cause issued by the trial court...and was therefore denied procedural due process".), and so has the U.S. Supreme Court:

> In *Memnonite*, a mortgagee of property that had been sold and on which the redemption period had run complained that the State's failure to provide him with actual notice of these proceedings violated due process. The Court agreed, holding that 'actual notice' is a *minimum constitutional precondition* to a proceeding which will adversely affect the liberty or property of any party...

***Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 476, 487, 108 S.Ct 1340, 1345 (1988)**(emphasis supplied).

The unfair manner in which 3.850's two year limit has been applied in this case was what the *Haag* Court sought to avoid by stating that 'nothing in our law suggests that the two year limit should be applied harshly or contrary to principals of fairness..." **591 So.2d at 616.** The Court, given Haag's facts, took action to ensure that pro se inmates would not have the two year limit applied contrary to

EXHIBIT E, p. 8

APPENDIX

principals of fairness by adopting the mailbox rule.[3] Based on the same principal, petitioner urge this court to adopt the following standard to be known as Florida's "no-fault" exception:

> When an untimely 3.850 motion reaches the trial court, the defendant must allege, as an independent ground, that the tardiness significantly resulted from circumstances under which the movant had no control. If the allegations cannot be refuted an evidentiary hearing should be held. If the claim still cannot be refuted, the merits of the motion should be reached. Ignorance of the law should not be a viable "no-fault" excuse. Further, this exception should be confined to defendants proceeding from direct appeals into 3.850 review.

Because 3.850 movants are usually in a restrictive environment, they can often times be subjected to limitations on movement and activity that could very possibly result in adverse court rulings. For example, an inmate could be diligently working to secure the timely filing of his motion that is due in one week. A riot erupts at the prison causing all movement to cease (including to and from the law library) for one week. The prisoner, pursuant to the two year limit will be procedurally barred.

Another example: in 1992 Hurricane Andrew caused the immediate evacuation of Dade Correctional Institution. Inmates were quickly scattered to other prisons leaving behind legal materials, among other things, some of which were destroyed. If a defendant was hampered from filing a timely

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[3] The "mailbox rule" rule holds that when a pro se inmate gives a document to prison officials for mailing to court, the document is deemed filed. Haag handed his document to prison officials timely but it arrived in court late. In reversing the trial court's order denying the motion as untimely, the Court noted the restrictions faced by prisoners as opposed to other litigants and adopted the federal mailbox rule.

motion due to this Act of God[4], the proposed "no-fault" exception would provide him a remedy. No such remedy exists in Florida at present.

It should be noted that this "no-fault" exception will rarely, if ever, be asserted. For it is a rarity that both appellate court clerks and attorneys will neglect to inform a defendant of a court's ruling. Riots and hurricanes will rarely, if ever, *significantly* interfere with obedience to procedural rules. As a basic constitutional matter, however, when pro se litigants, like all litigants, are tardy they should be treated fairly by the courts if a justifiable reason caused the tardiness. The new no-fault exception will facilitate the accomplishment of that basic constitutional goal.

Finally, provided that this court can provide relief, ***Shay v. Florida Department of Revenue,*** **317 So.2d 744, 745 (Fla. 3 Dist. 1977)**("[c]ourts have inherent equity powers to provide relief if the law does not clearly provide an adequate remedy..."), it should unreluctantly do so, ***Satz v. Parlmutter,*** **379 So.2d 359 (Fla. 4 Dist. 1980)**("[l]egislative inaction cannot serve to close the doors of the state courtrooms to its citizens who assert cognizable constitutional rights".).

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[4] An Act of God is an unusual, extraordinary sudden and unexpected manifestation of the forces of nature which man cannot resist...[or] which does not result from, or is contributed to, by human agency..." *Florida Jur.2d Words & Phrases* (A-K) pp. 24-25 (1992).

EXHIBIT E, p. 10

APPENDIX

D. CONCLUSION

The failure of appellate counsel and the clerk of this court to serve petitioner notice of this court's mandate, which in turn caused his 3.850 motion to be tardy in the trial court, cannot constitutionally bar the motion as untimely. Therefore, petitioner should have his motion heard in the trial court belatedly.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing Writ of Habeas Corpus has been forwarded to Harry K. Singletary, Sec. of Fla D.O.C., 2601 Blairstone Road, Tallahassee, Florida 32399, and Robert A. Butterworth, Attorney General, 2002 N. Lois Ave, Tampa, Florida, 33602, via U.S. Mail, this 22nd day of September, 1997.

Adrian L. Johnson # 117404
Tomoka Correctional Inst.
3950 Tiger Bay Road
Daytona Beach, FL 32124

EXHIBIT E, p. 11

APPENDIX

IN THE SUPREME COURT OF FLORIDA
(Before a Grievance Committee)

IN RE: Complaint by William Stewart Steele
Against Terrence Edward Kehoe,
Case No. 95-31,857 (09C)

NOTICE OF NO PROBABLE CAUSE AND LETTER OF ADVICE TO ACCUSED

The grievance committee has found no probable cause in the referenced matter against you and the complaint has been dismissed.

The committee wants to make it clear, however, that its finding does not indicate that it condones your conduct in this matter. While your conduct in this instance did not warrant formal discipline, the committee believes it was not consistent with the high standards of our profession. The committee hopes this letter will make you more aware of your obligations to uphold these professional standards, and that you will adjust your conduct accordingly.

This letter of advice does not constitute a disciplinary record against you for any purpose, and it is not subject to appeal by you. Rule 3-7.4(k).

The committee hopes that as a result of this letter of advice, you will improve the following aspects of your professional activity:

YOU ARE ADVISED TO USE AND OBTAIN WRITTEN RETAINER AGREEMENTS FROM EACH CLIENT. THE AGREEMENT SHOULD DEFINE THE SCOPE OF LEGAL REPRESENTATION AND CLEARLY AND SIMPLY OUTLINE THE LEGAL SERVICES TO BE PROVIDED.

FURTHER, IF THE REPRESENTATION IS TERMINATED, IT IS ADVISABLE TO NOTIFY THE CLIENT IN WRITING BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, AND HAVE A COPY SENT BY REGULAR MAIL.

IT WAS APPARENT THAT MR. STEELE HAD A MISCONCEPTION THAT YOU WERE REPRESENTING HIM IN THE 3.850 MOTION. WHEN SUCH SITUATIONS ARISE, IT IS ADVISABLE THAT YOU DOCUMENT IN WRITING YOUR CLARIFICATION OF THE SCOPE OF REPRESENTATION WITH THE CLIENT.

Dated this 1st day of February, 1996.

EXHIBIT F

APPENDIX

NINTH JUDICIAL CIRCUIT
GRIEVANCE COMMITTEE "C"

TIMOTHY W. TERRY, CHAIR

cc: Ms. Frances R. Brown, Assistant Staff Counsel
Ms. Elizabeth C. Wheeler, Investigating Member
Mr. Jeffrey Suberman, Investigating Member
Mr. William Stewart Steele, Complainant

EXHIBIT F, p. 2

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