IN THE SUPREME COURT OF FLORIDA

WILLIAM STEWART STEELE,
Petitioner,

v. **CASE NO.: 92,950**

TERRENCE E. KEHOE,
Respondent.

_____/

REPLY 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)

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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 as the Petitioner unless quoted from the record differently. Respondent Terrence E. Kehoe, the Appellee in the District Court of Appeal and Defendant in the Trial Court shall be referred to herein as the Respondent unless quoted from the record differently. The State of Florida as amicus curiae shall be referred to herein simply as the State and the Brief of Amicus Curiae will be referenced by the letters "SB" and then page(s) for location.

Petitioner's Initial Brief was filed without the benefit of the docket index prepared by the Lower Court, i.e., Fifth District Court of Appeal. This Record shall be referenced herein by the letter "R" followed by appropriate page(s) for location. The record of appeal from the Ninth Judicial Circuit Court (hereafter Trial Court) shall be referenced herein by letters "TR" followed by the approrpiate page(s) for location.

Petitioner's Initial Brief will be referred to by the letters "IB" accompanying appendix as "App" and Respondent's Answer Brief by the letters "AB" respectively followed by the appropriate page(s) for location.

Petitioner relies upon the Statement of the Case set forth in the Initial Brief and rejects and contests Respondent's Prologue and Statement of the Case and Facts insofar as it is argumentative and conflicts with the facts and history of this cause.

SUMMARY OF ARGUMENT

Petitioner invokes as an alternative remedy in the malpractice complaint allowance to file a belated Rule 3.850 motion or its equivalent in habeas corpus remedy at the Trial Court and Lower Court levels of review. This issue is properly before this Court and the Trial Court, Lower Court and this Court have inherent equity powers to provide relief if the law does not clearly provide a remedy.

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 beyong 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.

GROUND I

ERRONEUS EXONERATION PREREQUISITE TO LEGAL MALPRACTICE ACTION ARISING FROM CRIMNIAL CONVICTION

Respondent adopts the **HECK V. HUMPHREY**, 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d. 383(1994) standard while the state argues nothing should be afforded Petitioner because other remedies in law and equity are available, i.e., Federal habeas corpus and State clemency proceedings. AB at 12-13 & SB at 3 n. 1. However, in light of **MARTIN V. PAFFORD**, 583 So.2d. 736 at 738 (Fla. 1st DCA 1991), Petitioner "was not required to have succeeded in obtaining collateral relief from [his] criminal conviction before [he] could civilly sue [his] attorney for malpractice." Indeed, Florida law under **MARTIN V. PAFFORD** and the statute of limitations for bringing suit required Petitioner to sue Respondent when he did.

Respondent belabors the Court with scenarios where a defendant sued his attorney after being afforded postconviction proceedings denied on their merits, each confessed guilt at one or more stages of the criminal proceedings and then sued for malpractice. In these cases, while Petitioner who steadfast maintains innocence and had a jury trial, the courts specifically limited the holding "to situations in which the malpractice plaintiff pleads guilty and does not speak of the somewhat different situation where a criminal defendant maintains his innocence throughout a criminal trial." **ORR V. BLACK**, 876 F.Supp. 1270 (M.D. Fla. 1995).

The State's argument that Petitioner has other state and federal remedies to safeguard an actual innocent claim thereby curcumventing use of the Rule 3.850 procedure is unavailing. First, the State cites an unrelated challenge in Federal Court toward a marijuana conviction in **STEELE V. SINGLETARY**, case #97-481-CIV-ORL-19. Second, in Petitioner's Federal habeas proceeding challenging the murder conviction in **STEELE V. CROSBY**, case #96-754-CIV-ORL-18C, Ms. Parrish argued for the State, to wit: "While Petitioner's claims under grounds 2-7 [ground 1 argued procedure] have been exhausted, Respondents assert Petitioner is barred from raising those claims of federal habeas due to his procedural default in state court." Quoting 12/6/96 Response to Petition at p. 10 compare AB at 12-13 & SB at 3-4.

According to Federal law a Federal "Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independant of the federal question and adequate to support the judgement. This exhaustion requirement is also grounded in principles of comity; in a federal system, the states should have the first opportunity to address and correct allegated violations of state prisoner's federal rights. The independant and adequate state ground doctrine ensures that the state's interest is in correcting their own mistakes is respected in all federal habeas courts." **COLEMAN V. THOMPSON**, 501 U.S. 722, 729-32, 111 S.Ct. 2546, 2553-55, 115 L.Ed.2d. 640 (1991)(citations omitted & pertinent part qouted).

Jurisdiction should be granted to clarify the issue involving conflicting standards of suit for malpractice without exoneration under **MATIN V. PAFFORD**, exoneration as a prerequisite by the Lower Court at R 5-11, or under the less stringent standard of **HECK V. HUMPHREY**. The Lower Court summed the exoneration conflict in a different light:

> Under the facts of this case, the requirement of exoneration places Steele in a Catch 22 situation. Steele cannot sue his lawyer for malpractice because of the consequences of the alleged malpractice. Justice requires that some relief be provided. **Id.** R 7.

Federal habeas corpus is not available where Petitioner has been procedurally defaulted in the State court as a result of attorney malpractice--IB 5-8, State action caused the post conviction motion to be filed four days out of time--IB 8-11 and clemency is not designed to test trial counsel ineffectiveness causing the conviction of an innocent defendant. Exoneration if required, under any standard still leaves open a style of relief to adequately demonstrate exoneration. "If [Petitioner] can prove that he was improperly convicted, he should be set free. If he is denied the opportunity to offer such proof because of the malpractice of his lawyer [or state action], fundamental due process requires that he have a remedy that will address his future incarceration and not merely compensate him for improperly staying in prison." R 7.

WHEREFORE, Petitioner maintains an exoneration prerequisite under **HECK V. HUMPHREY** and urges relief predicated on ground II as folows:

GROUND II

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

"It is the Defendant's right to have meaningful access to the judicial process that [the Lower Court urged] is a due process right." Id. R 9, at n. 4. Florida has an express access to courts provision in its constitution at Article 1, Section 21. Where, as here, the right is one made express by the constitution, the courts have an even greater duty to protect the right than where the right is one found by implication. **DEMPS V. STATE**, 696 So.2d. 1296, 1298 (Fla. 3d DCA 1997). In **WOLFF V. McDONNELL**, 418 U.S. 539, 579, 94 S.Ct. 2936, 2986, 41 L.Ed.2d. 935 (1974) the Court explained that this right "is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights." SEE 14th Amend., U.S. Const.

Therefore, the "fundamental requirement of due process is the opportunity to be heard and it is an'opportunity which must be granted at a meaningful time and in a meaningful manner.'" **PARROT V. TAYLOR**, 451 U.S. 527, 540, 101 S.Ct. 1908,1915, 68 L.Ed.2d. 420 (1981). It "must be tailored to the capacities and cicurstances of those who are to be heard." **ADAMS V. WAINWRIGHT**, 512 F.Supp. 948,

954 (N.D. Fla. 1981). The Supreme Court "allows the states considerable discretion in assuring that those imprisoned in their jails obtain access to the judicial process." **MURRAY V. GIARRATANO**, 492 U.S. 1, 13, 109 S.Ct. 2765, 2772, 106 L.Ed.2d. (1989).

For example, as the Supreme Court stated in **LEWIS V. CASEY**, 116 S.Ct. 2174, at 2180 (1996): "**BOUNDS V. SMITH**, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d. 72 (1977) affirmed a court order requiring North Carolina to make law library facilities available to inmates, it stressed that was merely 'one constitutionally acceptable method to assure meaningful access to the courts' and that 'our decision hear...does not foreclose alternative means to achieve that goal.'" **BOUNDS**, 430 U.S., at 830, 97 S.Ct., at 1499." Therefore, Respondent's argument that the Lower Court did **not** issue any alternative relief in the form of ordering an evidentiary hearing is remiss. AB 5. The lower court has asked this Court to agree with their position, which was also expressed by the dissenting Justice Griffin "that the most sensible remedy for a privately retained counsel's failure to file a Rule 3.850 motion within the two-year deadline (where he has agreed to do so) is for the trial court simply to hear the motion." R 17 and R 9(the motion should be heard); R12-16(Justice Sharp concurring specially to urge a remedy available under Rule 3.850(h)).

Respondent would critisize the application of **HOLLINGSHEAD V. STATE**, 194 So.2d. 577 (1967) concerning the filing of a notice of appeal in a Rule 3.850 case and not applicable to the present situation which deals with Petitioner's effort to file a timely

Rule 3.850 motion. SEE **DAVIS V. SINGLETARY**, _____So.2d._____, [23 FLW [D]506] (Fla. 4th DCA 2/18/98); **OFFEN V. STATE**, 662 So.2d. 742 (Fla. 4th DCA 1995); IB 2-5. In **STATE V. MEYER**, 430 So.2d. 440 (Fla. 1983) the court relied upon the **HOLLINGSHEAD** standard while in **BAGGETT V. WAINWRIGHT**, 229 So.2d. 239 (Fla. 1969) it was acknowledged by reference. The **HOLLINGSHEAD** standard has been utilized in **WARD V. DUGGER**, 508 So.2d. 778-79 (Fla. 1st DCA 1987) by way of **MEYER** and **BAGGETT** to allow entitlement to file a belated motion for post-conviction relief where an attorney had frustrated defendant's intention to file such a motion in a timely fashion.

Respondent wrongfully asserts the Lower Court took a simple appeal, concerning dismissal of a complaint, and added new, unnecessary issues. AB 10. The Lower Court has not "created new issues on appeal" because the issue was briefed by both parties before the Lower Court, i.e., 11/8/96 Initial Brief of Appellant at pp. 8-9; 1/2/97 Mr. Kehoe's Answer Brief at p. 16, & 1/12/97 Appellant's Reply Brief at pp. 5-7 and raised in the 12/28/95 Professional Malpractice Complaint under count II at p. 7, stated as follows:

" Plaintiff [] respectfully seeks relief from this Honorable Court as follows:

a) Permitting Plaintiff to file an untimely motion for post - conviction relief pursuant to Rule 3.850 or its equivalent in habeas corpus petition within a prescribed period of time under Florida Supreme Court's decision in **STATE V. MEYER**, 430 So.2d. 440 (Fla. 1983); **PARKER V. DUGGER**, 660 So.2d. 1386 (Fla. 1995), and

under the rationale of the Court's decision in **WARD V. DUGGER**, 508 So.2d. 778 (Fla. 1st DCA 1987: and

b) Any and all just relief deemed appropriate under the circumstances presented herein." **Id.** at TR 7.

Florida Rule of Appellate Procedure 9.040(c) provides: "If a party seeks an improper remedy, the cause shall be treated as if the proper remedy had been sought; provided that it shall not be the responsibility of the court to seek the proper remedy." This rule that the Trial Court, Lower Court and now this Court shall treat Petitioner's cause as if the proper remedy had been sought if he sought an improper remedy causing the action to be heard by a civil court instead of a criminal court for a proper remedy is mandatory. **PRIDGEN V. BOARD OF COUNTY COM'RS, etc.**, 389 So.2d. 259, 260 (Fla. 5th DCA 1980). "The rule encompasses all 'improper' remedies, whatever their lable or title.'" **Id.**

While dissenting Justice Griffin urges relief, if it is done, it has to be by rule--R 17, and concurring Justice Sharp maintains availability of habeas corpus remedy under Rule 3.850(h)-R 13-14, the Majority was "not concerned with a specific remedy, but only that some remedy is available to address this problem." R 9, at n. 5. "Our courts have inherent equity powers to provide relief if the law does not clearly provide a remedy." **SLAY V. DEPARTMENT OF REVENUE**, 317 So.2d. 744, 746 (Fla. 1975). This principle is eloquently stated by the Court in **SATZ V. PERLMUTTER**, 379 So.2d. 359, 360-61 (Fla. 1980):

Legislative inaction cannot serve to close the doors of the courtrooms of this state to its citizens who assert cognizable constitutional rights.***The judiciary is in a lofty sence the guardian of the law of the land and the Constitution is the highest law. A constitution would be a meaningless instrument without some responsible agency of government having authority to enforce it...When the people have spoken through their organic law concening their basic rights, it is primarily the duty of the legislative body to provide the ways and means of enforcing such rights; however, in the absence of appropriate legislative action, it is the responsiblity of the courts to do so.

Too much emphasis by the Majority of the Lower Court--R 8-10, Respondent--AB-23-25, and the State--SB 5, has been placed upon the **LAMBRIX V. STATE**, 698 So.2d. 247 (Fla. 1996) holding that claims of ineffective assistance of post-conviction counsel do not present a valid basis for relief under Rule 3.850. Lambrix was afforded a postconviction proceeding where he failed to exonerate or otherwise invalidate his conviction or sentence and was denied a second postconviction proceeding as successive and having no right to postconviction counsel absent meeting the criteria of **GRAHAM V. STATE**, 372 So.2d. 1363 (Fla. 1979). In this case, Petitioner has never had the opportunityto be heard on the merits on his postconviction claims.

Petitioner is distinguished from **LAMBRIX** and implications of an evaluation under the **GRAHAM** standard at this stage of the proceeding. Reliance upon the unpublished opinion of **JOHNSON V. SINGLETARY**, case #97-4018 (Fla. 2d. DCA 12/15/97); IB 3-4 & exs. D

& E, should not be easily dismissed as suggested by Respondent. AB 6-7. There are, in addition to **JOHNSON** and **WARD**, **supra**, many examples where exceptional circumstances, with out weight to the

Graham prerequisite showing of merits; not that Petitioner could not meet such a a standard for post-conviction claims of counsel ineffectiveness failing to investigate and present witnesses and evidence toward a location alibi, physical alibi based upon medical disability, five instances of failure to object, refusal to allow-Petitioner to testify (leading to a) insufficient inquiry under **Nelson v. State, 274 So.2d 256 (Fla.3d DCA 1973),** and violation of **Nelson's** forth criteria totally depriving Petitioner of counsel during a critical stage of the criminal proceeding.

Very much on point is this Court's holdings in **Parker v. Dugger, 660 So.2d 1386, 1388-89 (Fla.1995),** and **Breedlove v. Singletary, 595 So.2d 8, 11 (Fla.1992)** chose to overlook the procedural default as it relates to claims of ineffective assistance of counsel. In both of these cases the defendants were 'permitted a period to file untimely and successive postconviction motions. These decisions did not creat a "right" to counsel in their denied intial postconviction proceedings but made the allowance to overlook the procedural default to avail the defendants an opportunity to challenge trial counsel performance, a task trial counsel could not ethically self-evaluate against him-self.

Similarly, in **Irving v. State, 559 So.2d 374-75 (Fla.1st DCA 1990)** the court implied that to "assert any period of continuing or recurring incompetence throughout the time period for filing a motion" under Rule 3.850 would allow acceptance of an untimely motion, Likewise, in **Demps v. State, 696 So.2d 1296 (Fla.3d DCA**

1997), where the defendant was in custody on a concurrent Indiana sentence until after the 2 year limitation was expired and did not have access to Florida law the two-year time period was to9lled for that period of time that he was deprived of access to Florida courts. "Consequently, it would be a violation of Demp's right of access to court under Florida and Federal Constitutions to hold that his motion for postconviction releif is time-barred."

The Court drew upon this Court'd holding in **Haag v. State. 591 So.2d 614, 616 (Fla.1992):**

In reaching this conclusion we are reminded of the supreme court's comments regarding the two-year limit placed on motions filed under Rule 3.850:

> [N]othing in our law suggests that the two-year limitation must be applied harshly or contrary to fundamental principles of fairness
> * * * * *
> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicalit, Art. I, Fla. Const.

Id. Demps, 696 So.2d 1299 n.5

Finally, the Respondent and State refuse to acknowledge the right to habeas corpus remedy eminated from Article I, section 13 of the Florida Constitution and Article I, section 9 of the United States Constitution and embodied in Rule 3.850 proceedings. Rule 3.850 comletely superseded habeas corpus as the means of collateral attack of a judgment and sentence. **Leichtman v. Singletary, 674 So.2d 889, 892 (Fla.4th DCA 1996). Johnson v. Avery, 393 U.S. 483, 485-6, 89 S.Ct. 747, 749 (1969)** held it is

fundamental that access of prisoners to the courts for purpose of presenting their complaints may not be denied or obstructed because postconviction proceedings must be more than a formality and steadfastly insisted that there is no higher duty than to maintain it unimpaired.

The right of access to the courts, upon which **Avery** was premised, is founded in the Due Process Clause and assures that no person will be denied the "**opportunity**" to present to the judiciary allegations concerning violations of fundamental constitutional rights. **Wolff, 418 U.S. at 579, 94 S.Ct. at 2986.** The Supreme Court in **Lewis v. Casey, 116 S.Ct. at 2180-81 & n.3** made an actual injury requirement a prerequisite premised upon the concept of: "Depriving someone of an arguable (though not yet established) claim inflicts actual injury because it deprives him of something of value - - arguable claims are settled, bought and sold. Depriving someone of a frivolous claim, on the other hand, deprives him of nothing at all, except perhaps the punishment of Rule 11 sanctions."

Under **Lewis v. Casey**, Petitioner must go one step further and demonstrate below that the alleged shortcoming of his legal assistance, and in this case State action, hindered his efforts to pursue a legal claim. **Id.** "He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prisioner's legal assistance [and in this case State action], he could not have known." This actual injury standard encompasses civil an criminal proceedings without regard to a right to

counsel determination under **Graham**.

A. Respondent Frustrated Petitioner's Right To Collateral Remedy.

Respondent and the State totally miss the issue laboring under the conceded fact that absent a determination under **Graham** Petitioner has no right to effective assistance of postconviction counsel, especially in the preparation stage before such motion is actually filed. "Even if a defendant is not necessarily entitled to appointed counsel, still if one is appointd for him or if he able to obtain his own, he should be able to rely on such counsel's at least filing within a timely period." **R 8.**

The concept expressed by the Lower Court was that "few 3.850 motions are filed by attorneys" and "should an attorney abuse the 3.850 process by not filing or improperly filing such motion in order to extend the time for considereation, severe penalties should follow." **R 10**; see also **Evitts v. Lucey, 469 U.S. 387, 399, 105 S.Ct. 830, 837, 83 L.Ed. 2d 821 (1985)**(State may certainly enforce a vital procedural rule by imposing sanctions against the attorney, rather than against the client.) The hand full of cases which warrant overlooking a procedure default clearly demonstrate such instances are rare when exceptional circumstances as in **Irving** and **Demps** or an attorney frustrating a defendant right to have a meaningful postconviction proceeding as in **Ward**, **Parker**, and **Breedlove**, are few and warrant somne established standard to ensure uniformity in the judicial realm.

Petitioner maintains the Fourth District's application of

Hollingshead standard is appropiate for such exceptional circumstances but defers to use of habeas corpus, perhaps under Rule 3.850(h) - **R 14**, Florida Statute §79 - **R 13**, or by promulgation of a rule - **R 17** or substantively based upon the facts disclosed below.

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

Respondent insults the intelligence of this Court by implying no oral agreement was made by him to represent Petitioner in a 3.850 poceeding. **AB 2-3 n.1 & AB 22n.4**, An oral agreement is just as binding as written contracts because it is a promise to perform a duty. "The term 'contract' has been defined as a promise for the breach of which the law in some duty recognizes as a duty." **Vol.11, Fla.Jur.2d at p. 291, §1** Generally; definition of "contract" and related term. See also **Welborn v. Kemp, 192 So.2d 469, 141 Fla. 89 (Fla.1939).**

Since Petitioner's appeal - unbeknown to him at the time - was denied whereafter a mandate was issued on **December 7, 1992**, it is ludicrous of Respondent to maintain that no such agreement was made when letters from him over the next two years alerted him Respondent had not forgotten about his murder case and would be in touch with him as soon as possible concerning his case which was put on the back while some appeals and trials have taken precedence. **IB 6 & TR 29 & 30.** Likewise, Respondent's effort to fabricate documents indicating he had informed Petitioner that the mandate was issued on **December 7, 1992** and that a 3.850 motion would not be prepared was thwarted by the prison's accurately logging that petitoner never received such

fictious correspondence.

This case is very similar to that of **Johnson v. Singletary** where "counsel's ineffectiveness in failing to advise him of the issuance of [the Appellate] Court's opinion [synonymous with the date of the mandate's issuance] 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." **App. ex.D. Also** in **Parker** and **Breedlove** this court chose to overlook the untimeliness and successive prohibition to entertain a postconviction motion where the first motion was filed by trial counsel who could not ethically challenge his own effectiveness, **Parker, 660 So.2d at 1388-89; Breedlove, 595 So.2d at 11.**

Petitioner submits that these cases and his exceptional circumstances should afford an opportunity to have a postconviction motion entertained outside the two-year limitation.

(ii) Withholding Records Necessary To Prepare A Meaningful Motion.

Respondent merely implies and does not specifically deny the fact that while petitioner received appellate records without the exhibits - TR 9-10 (Volumes I-IX; AB 7, these records were missing substantial and critical portions on each issue raised on appeal and assorted other pages. Some of the portions of the record missing were quoted in short form throughout the initial appeal briefs. However, while the State argued what issues were not preserved by appellate review the missing portions of the

record-and exhibits Respondent waited two years and two days to furnish-prevented Petitioner from preparing a meaningful postconviction motion.

This exemplified by an exhibit of a mugshot acquired prior to Petitioner's arrest being introduced without objection, references to him in jail the year previous to the murder, involved in drug deals and activities and judicial bolstering of adverse testimony that were not preserved for appellate review and not supplied to Petitioner until two-days after the two-year period to file a postconviction motion expired. These exceptional circumstances are identicle to those in **WARD V. DUGGER**, 508 So.2d. at 778-79 where it was allowed entitlement to file a belated motion for postconviction relief where an attorney had frustrated the defendant's intention to file such a motion in a timely fashion.

The tools **Bounds** requires to be provided are those that inmates need in order to attack their sentences and convictions, directly, or collaterally. **LEWIS V. CASEY**, 116 S.Ct. at 2182. In ruling thereis no right to postconviction counsel in the preparetion stage, the Court in **ROSS V. MOFFITT**, 417 U.S. 600, 615, 94 S.Ct. 2473, 2446, 41 L.Ed.2d. 341(1974), made the distinction that at that stage the defendant "will have, at the very least, a transcript or other record of trial proceedings, a brief on his behalf in the Court of Appeals setting forth his claims of error, and in many cases an opinion by the Court of Appeals disposing of his case" which will assure the indigent defendant an adequate opportunity to present his claims fairly." **417 U.S. at 616, 94 S.Ct. 2447.**

Without the exhibits, critical portions of the record not

timely supplied and State Attorney files subsequently acquired after Respondent acknowledged such motion had not been prepared and filed Petitioner's intention to have the motion timely filed with the assistance of retained counsel was frustrated and the fundamental opportunity to be heard on constitutional claims undermining the murder conviction have been denied. Under these exceptional circumstances presented due process and the demands of "Justice requires that some relief be provided." **R 7.**

B. State Action Caused The Post-Conviction Motion To Be Filed Four Days Out Of Time.

In the cases to which **Bounds** traced its roots, the Supreme Court had protected the constitutional right to access the Courts by prohibiting State officials from actively interferring with prisoners attempts to prepare or file legal documents. **Lewis v. Casey, 116 S.Ct at 2179.** In **Davis** and **Offen** State action caused exceptional circumstances beyond Petitioner's control warranting relaxing of a procedural default. **Davis, 23 FLW at [D]506; Offen, 662 So.2d at 743, see Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed. 2d 397 (1986).**

In Petitioner's case, he has manifestly demonstrated that the clerk of the trial court, upon request, provided the date of the mandate's filing, December 11, 1992, instead of the date its issuance, December 7, 1992. Under **Murray v. Carrier** and **State v. Meyer** this incorrect information is an objective factor externally inpeding Petitioner's effort to comply with the State's procedural two-year limitation on filing a postconviction

motion. This creates a cause for the procedural default and and the prejudice resulted when his postconviction motion was denied as untimely without having the merit of the claims addressed. See **IB 8-11; App. 5-6 & exs. A-C.**

The exceptional circumstances prevail a remedy be open to Petitioner. As expressed in **Ex parte Welles, 53 So.2d 708, at 711-12 (Fla.1951):**

> The very essence of judicial [system] is a search for the truth of the controversy. When the truth is discovered, the pattern are governed by rule of Court, the criteria by which it is determined being fairness, reasonableness and justice . . . [T]his court should not quibble over trifles in devising a formula to correct the injustice. The strength of our jurisprudence is due to the fact that it readily accommadates itself to all classes of controversies. Justice is its dominating purpose and we are led to that by rules of procedure. They are not sacrosanct, in fact, when they fail to lead to justice, the time for change has arrived. **(quoting in part).**

CONCLUSION

Petitioner asserts that the fundamental rights to access the courts, habeas corpus remedy subplanted by rule 3.850, and due process as protected by Article I, section 9, 13 & 21 of the Florida Constitution and the First and Fourteenth Amendments and Article I, section 9 of the United States Constitution are at stake and this court has inherent equity powers to provide relief if the law does not clearly provide a remedy under the exceptional circumstances presented by the facts of this case.

RELIEF SOUGHT

WHEREFORE, based upon the foregoing and record Petitioner prays for relief so deemed appropiate which would avail him an opportunity to file a postconvction motion or petition challenging trial counsel ineffectiveness.

DECLARATION/CERTIFICATE OF SERVICE

Having readthe foregoing statements of this Reply Brief, I declare under penalties of perjury all stated herein to be true and correct based upon personal knowledge and hereby certify accurate copies of this Reply Brief have been furnished by U.S. Mail to: Stephen G. Mason, 1643 E. Hillcrest Street, Orlando, Florida 32803 and Carolyn M. Snurkowski, Asst. Deputy Attorney General, The Capitol, Suite, Suite PL-01, Tallahssee, Florida 32399-1050, this 4th day of August 1998.

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