IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-518

JIM ERIC CHANDLER,

Petitioner,

v.

JAMES V. CROSBY, JR,

Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves a petition for a writ of habeas corpus filed in light of the recent decision by the United States Supreme Court in *Crawford v. Washington*, 158 L. Ed. 2d 177 (2004). References to the record in this brief shall be as designated in Mr. Chandler's habeas petition. References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Chandler has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Chandler, through counsel, accordingly urges that the Court permit oral argument.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

Respondent refused to accept Petitioner's Statement of the Case. Instead, Respondent quotes from prior opinions from this Court addressing Mr. Chandler's previously raised legal issues. Noting that Mr. Chandler raised his Confrontation Clause claim in his appeal from his re-sentencing, Respondent cryptically comments, "Thereafter, Chandler filed a motion for postconviction relief as well as an original habeas petition in this Court. Chandler did not seek any further review of the hearsay issue." Answer Brief at 3. To the extent that the State is attempting to suggest that a failure to "seek any further review of the hearsay issue" is somehow noteworthy as to the issue on which this Court sought briefing, this Court rejection of the merits of Mr. Chandler's Confrontation Clause claim constituted *res judicata* precluding further review of the claim. *Denson v. State*, 775 So. 2d 288, 290 (Fla. 2000); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992); *Mills v. Dugger*, 574 So. 2d 63, 65 (Fla. 1990). Only new law meeting the test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), can overcome the *res judicata* bar, and only this Court can determine the *Witt* test is met.

ARGUMENT IN REPLY

This Court requested briefing on "whether the petition for writ of habeas corpus should be dismissed for failure to comply with Rule 3.851 (d)(2)(B) or Rule

3.851 (d)(3)." In its Answer Brief, the State sets forth that "[b]ecause the rules of criminal procedure do not permit Chandler to file this successive habeas petition, it must be dismissed." Answer Brief at 7. At its essence, the State's argument is that Mr. Chandler was stripped of his right to seek habeas relief from this Court by the decision in *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001), a proceeding to which Mr. Chandler was not a party.

In *Mann v. Moore*, this Court considered an argument advanced by the State that Rule 9.140(b)(6)(E)[1] precluded the filing a petition for writ of habeas corpus with this Court by a first-time petitioner in a capital case after the filing of the initial brief in an appeal of the denial a Rule 3.850 motion. However, this Court had previously construed this provision in *Robinson v. Moore*, 773 So. 2d 1, 2 n. 1 (Fla. 2000), in a contrary fashion. In *Robinson*, this Court stated:

> We deny the State's Motion to Dismiss on Procedural Bar wherein the State argues that Robinson failed to file his habeas writ simultaneously with his Rule 3.850 motion, in violation of Florida Rule of Criminal Procedure 3.851(b)(2). Rule 3.851(b)(2) requires that all petitions for extraordinary relief be filed simultaneously with the initial brief in the appeal of the circuit court's denial of the death-sentenced prisoner's rule 3.850 motion. However, this restriction applies to death-sentenced individuals whose convictions and sentences became final after January 1, 1994. *See* Fla. R. Crim. P. 3.851(b)(6). Robinson's conviction and sentence became final when the United States Supreme

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[1]As the State notes, the substance of then Rule 9.140(b)(6) is now found in Rule 9.142(a)(5).

> Court denied certiorari on the appeal of his second direct appeal in October 1991. *See Robinson v. State*, 574 So. 2d 108 (Fla. 1991), *cert. denied, Robinson v. Florida*, 502 U.S. 841 (1991). Robinson's petition is properly before the Court.

Robinson v. Moore, 773 So. 2d at 2 n. 1.

When presented with the State's argument in *Mann* that Rule 9.140(b)(6)(E) "operate[d] to bar Mann's petition," this Court stated:

> We acknowledge that the committee notes from the 1996 revision to rule 9.140 indicate that rule 3.851(b)(2) would stand repealed on January 1, 1997, upon the adoption of rule 9.140(b)(6)(E). We also acknowledge that Florida Rule of Judicial Administration 2.135 provides that the Florida Rules of Appellate Procedure control all proceedings in this Court when there is a conflict in any rules of procedure. Thus, the exception to prisoners convicted and sentenced before January 1, 1994, created by rule 3.851(b)(6) no longer applies. However, rule 3.851(b)(2) has not been deleted from the published rule 3.851, upon which practitioners rely. Given this failure to delete 3.851(b)(2) and our decision in *Robinson*, we believe that there has been sufficient confusion in practical application that to bar a habeas petition brought in reliance upon rule 3.851(b)(2) continuing to apply to death-row prisoners convicted and sentenced before January 1, 1994, would be unjust.

Mann v. Moore, 794 So. 2d at 598 (footnote omitted).

However, the Committee Notes to Rule 9.140(b)(6)(E), actually stated that "Rule 9.140(b)(6)(E) adopts Florida Rule of Criminal Procedure 3.851(b)(2)." *In re Amendment to Fla. R. of App. Pro.*, 685 So. 2d 773, 807 (Fla. 1996). Thus according to this Court in *Mann*, Rule 9.140(b)(6)(E), by "adopt[ing] Florida Rule

of Criminal Procedure 3.851(b)(2)" changed its operation by making it applicable to individuals previously exempted from its scope. Recognizing that the resulting change as to first time habeas petitioners may result be "unjust," this Court indicated that it would "recede" from its holding in *Robinson v. Moore* effective January 1, 2002, thus allowing those first time habeas petitioners a window to file their petitions.[2] In *Mann*, there was no indication by this Court that it intended to preclude successive habeas petitions under Rule 9.140(b)(6)(E).[3]

The State argues that, under the construction in *Mann v. Moore*, the current version of Rule 3.851 effective October 2001,[4] Mr. Chandler's habeas petition must be dismissed (Answer Brief at 7-9). According to the State, because Rule

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[2]Meanwhile, Rule 3.851 was replaced in its entirety on October 1, 2001. However, the new Rule 3.851 was made to apply prospectively to new motions not yet filed as of October 1, 2001.

[3]Oddly, the State argues that, "[b]ecause the rules of criminal procedure do not permit Chandler to file this successive habeas petition, it must be dismissed." Answer Brief at 7. However, the rules of criminal procedure have never explicitly authorized the filing of a successive habeas petition. Nevertheless, it is undisputed that this Court has heard numerous successive habeas petitions. It is unclear how silence in the past did not bar successive habeas petitions, but suddenly silence precludes successive petitions.

Further, as this Court noted in *Mann v. Moore*, the rules of criminal procedure do not govern proceedings in this Court – the rules of appellate procedure do.

[4]The State ignores the fact that actually, *Mann v. Moore* construed Rule 9.140(b)(6)(E).

3.851 (d)(3) "requires that *all* petitions for writ of habeas corpus be filed simultaneously with the initial brief on appeal from the circuit court's order on the defendant's *initial* motion for postconviction relief," the rule requires that "Mr. Chandler's successive habeas petition" be dismissed because the rule "makes no provision for successive habeas corpus petitions" (Answer Brief at 8) (emphasis in original).

The State's reliance on Rule 3.851(d)(3) is misplaced.[5] In fact, this Court in *Mann v. Moore* observed that "Florida Rule of Judicial Administration provides that the Rules of Appellate Procedure control all proceedings in this Court when there is a conflict in any rules of procedure." *Mann v. Moore*, 794 So. 2d at 598. If Rule 9.140(b)(6)(E) conflicts with Rule 3.851(d)(3), Rule 9.140(b)(6)(E) controls. So the question really is whether this Court in adopting Rule 9.140(b)(6)(E) intended its silence as to a death sentenced petitioner's ability to file a successive petition to mean that such successive petitions were precluded and

[5]The State does assert that Rule 9.140(b)(6) "essentially 'mirrors' (*Mann*) the filing requirements for habeas petitions as set out in Rule 3.851(d)(3)" (Answer Brief at 8 n. 1). Since Rule 9.140(b)(6) came first, surely it is Rule 3.851(d)(3) that reflects the provision contained therein. The State does not argue that Rule 3.851(d)(3) was adopted to make a change.

"unauthorized."[6]

Following the adoption of Rule 9.140(b)(6)(E) in 1996, numerous successive petitions for extraordinary writs were filed by capital petitioners and considered by this Court. *See e.g. Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997); *Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999). No argument was ever advanced by the State in those cases that Rule 9.140(b)(6)(E), precluded those petitions as unauthorized. History clearly demonstrates that no one, not the State, not this Court, understood Rule 9.140(b)(6)(E) to have rendered successive petitions for extraordinary relief in capital cases "unauthorized," and thereby precluded. To bootstrap some preclusion of successive habeas petitions into some loose language in a rule adopted eight years ago that has not been so construed previously, amounts to a trap for the unwary. To be valid, state procedural bars must be regularly and consistently applied. *Johnson v. Mississippi*, 486 U.S. 578, 585-86 (1988). Clearly precluding Mr. Chandler's successive petition as unauthorized on the basis of rule in existence for eight years that has not been applied to preclude any other capital petitioner from filing a successive petition for extraordinary relief

[6]Since Rule 9.140(b)(6)(E) only applies in capital cases, the State's argument must justify how such a rule does not violate equal protection given that non-capital petitioners are not precluded from filing successor petitions. The State makes no effort to defend its argument against such an equal protection challenge.

would be the height of irregularity and inconsistency.

At its essence, the State's position is that Mr. Chandler had the right to successively petition this Court for habeas relief, the day his conviction and sentence of death became final. He had the right every single day he was on death row until *Mann v. Moore* receded from *Robinson v. Moore*, and construed an ambiguous Rule 9.140(b)(6)(E) in a fashion contrary to the effect given Rule 3.851(b)(2), the very rule that the Committee Notes indicated that Rule 9.140(b)(6)(E) was intended to adopt and incorporate into the rules of appellate procedure. According to the State, suddenly on January 1, 2002, Mr. Chandler lost the right to petition this Court for habeas relief because there was no explicit authorization to file a successive habeas petition.[7]

Overlooked by the State, Art. I, § 13 of the Florida Constitution provides:

> The writ of habeas corpus shall be grantable of right, freely and without cost. It shall be returnable without delay, and shall never be suspended unless, in the case of rebellion or invasion, suspension is essential to the public safety.

Art. I, § 13, Fla. Const. The State sidesteps the obvious constitutional deprivation by asserting:

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[7]Of course, there had never been an explicit authorization to file a successive habeas petition; yet, the ability to file such successive petitions was long recognized by virtue of the Florida Constitution.

> The right to habeas relief, however, "like any other constitutional right, is subject to certain reasonable limitations consistent with the full and fair exercise of the right." *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992).

Answer Brief at 11.[8] But in lifting this quotation from *Haag v. State*, it would appear that the State stopped reading this Court's opinion too soon. At issue in *Haag v. State* was whether the two-year time limitation contained in Rule 3.850 precluded consideration of a motion to vacate that was mailed five days before the two-year deadline, but was received and filed by the clerk of court "four days after the time limit had run." *Haag v. State*, 591 So. 2d at 616. While addressing this issue, this Court noted that "[a] basic guarantee of Florida law is that the right to relief through the writ of habeas corpus must be 'grantable of right, freely and without cost.'" *Id*. This Court went on to state:

> However, nothing in our law suggests that the two-year limitation must be applied harshly or contrary to fundamental principles of fairness.
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> * * *
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> Indeed, both simplicity and fairness are equally promoted by the right to habeas relief that emanates from the Florida Constitution and has been partially embodies in Rule 3.850. Art. I, § 13, Fla. Const.; *[State v.] Bolyea*, 520 So. 2d [562,] 563 [(Fla. 1988)]; Fla. R. Crim. Pro. 3.850. The fundamental guarantees enumerated in Florida's Declaration of Right should be available to all through simple and direct means, without needless complication or impediment, and

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[8]Of course what is at issue here is not a "limitation" on the scope of the right to petition for habeas relief. Here, the State asserts that on January 1, 2002, Mr. Chandler forever lost his right to petition this Court for habeas relief.

> should be fairly administered in favor of justice and not bound by technicality.

Id. at 616.[9]

The State also attempts to analogize its argument that Mr. Chandler's right to successively petition for habeas relief was implicitly terminated on January 1, 2002, to the federal statutory restrictions on successive federal habeas corpus petitions (Answer Brief at 11). First, the manner in which the United States Congress has fashioned the writ of habeas corpus has nothing to do with the Florida Constitution. *See generally Allen v. Butterworth*, 756 So. 2d 52, 63 (Fla. 2000). Moreover, federal habeas challenges to state court convictions are qualitatively different than state court post-conviction challenges to state convictions. *Id*. at 64 n. 5. Congress, in imposing limitations of the ability of a state prisoner to seek the federal writ of habeas corpus, "obviously intended for state prisoners' claims to be handled by the state court system and come to the federal system only in

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[9]In *State v. Bolyea*, 520 So. 2d at 564, this Court stated:

> Thus, since respondent clearly is entitled to relief by habeas corpus, Rule 3.850 is an appropriate vehicle for him to challenge his conviction or sentence. In so holding, we reaffirm the long-standing policy of this state, expressed in article I, section 13 of its constitution and implemented by statute, section 79.01, Florida Statutes (1985), that habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree.

extraordinary circumstances." *Id*. at 64 n.5. This Court rejected in *Allen* the States's effort to rely upon the federal provisions contained in the Anti-Terrorism and Effective Death Penalty Act (AEDPA) that govern federal habeas review of state court convictions: "there are significant distinctions between the balance of power in the federal system and the balance of power in this state." *Id*. at 63.

Additionally, the State overlooks the fact that the federal provisions set forth in AEDPA did not preclude a second application for a writ of habeas corpus, and therefore, the writ was not suspended. The United States Supreme Court specifically noted "that the Act does not preclude this Court from entertaining an application for habeas corpus relief, although it does affect the standards governing the granting of such relief." *Felker v. Turpin*, 518 U.S. 651, 654 (1996).[10] "The added restrictions which the Act places on second habeas petitions are well within the compass of this evolutionary process, and we hold that they do not amount to a 'suspension' of the writ contrary to Article I, § 9." *Id*. at 664. Even under the AEDPA, a petitioner can still successively apply for habeas relief.[11]

Here, the State maintains that the petition is "unauthorized" and that habeas

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[10]The State attempts to rely on *Felker*, apparently unaware that the right to apply for habeas relief was not foreclosed under the AEDPA, in stark contrast to the position advocated by the State here.

[11]Restrictions on a right are quite different than the termination of a right.

relief is simply not available, and that the petition may not be entertained. This argument if accepted would constitute a suspension of the writ in violation of Art. I, § 13.[12]

Not only does the Florida Constitution guarantee that right of habeas corpus

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[12]To be clear, the State makes no argument that the habeas claims under Florida law asserted by Mr. Chandler can now be presented in a Rule 3.851 motion. The State makes a feeble to address the line of cases set forth in Mr. Chandler's Initial Brief that indicate that only this Court has the power to entertain challenges to this Court's prior disposition of appellate claims, *see e.g. Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002); *Shere v. State*, 742 So. 2d 215, 218 n.7 (Fla. 1999); *Sireci v. State*, 773 So. 2d 34, 40 (Fla. 2000); *Eutzy v. State*, 536 So. 2d 1014, 1015 (Fla. 1988). The State argues that at issue in *Foster* was "this Court's harmless error review." Answer Brief at 9. Of course, the error being reviewed to determine whether a reversal was warranted was error in the trial court. The distinction made by the State further ignores the principle of *res judicata*. Issues raised on direct appeal before this Court are *res judicata*, and thus, procedurally barred. *Denson v. State*, 775 So. 2d 288, 290 (Fla. 2000); *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992); *Mills v. Dugger*, 574 So. 2d 63, 65 (Fla. 1990). Only new law meeting the test set forth in *Witt v. State*, 387 So. 2d 922 (Fla. 1980), can overcome the *res judicata* bar, and only this Court can determine the *Witt* test is met. Therefore, issues decided on direct appeal, even if alleged trial errors, face a procedural bar in a Rule 3.850 proceedings

The State does also disingenuously challenge what constitutes a habeas claim. "The fact that the trial court's rulings may have been affirmed on appeal by this Court cannot convert these issues into appellate issues which only this Court may address." (Answer Brief at 9). According to the State, Mr. Chandler's claims arise "from the trial court's evidentiary ruling" (Answer Brief at 9). "[T]hey are issues which may be raised by Chandler, if at all, only by way of a motion for postconviction relief filed in the original trial court, and not by way of a habeas petition in this Court" (Answer Brief at 9). But later, the State argues that Mr. Chandler cannot raise his claim in a successive motion for postconviction relief (Answer Brief at 11 n. 2).

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shall not be suspended, so does due process. One convicted of a crime and incarcerated in the State of Florida has a liberty interest vested in that right to petition for a writ of habeas corpus. Yet, the State never addresses due process implications of stripping Mr. Chandler of a liberty interest that attached the day his judgment and sentence became final. The right to pursue collateral remedies was a substantive right attaching at the moment of finality which could not subsequently be negatively altered or terminated. *See Evitts v. Lucey*, 469 U.S. 387 (1985); *Bounds v. Smith*, 430 U.S. 817 (1977).[13] Due process precludes the summary termination of a right in which a convicted defendant possesses a liberty interest.

In its brief, the State makes an unwarranted leap by concluding that the absence of any provision allowing for a successive petition means that the rule expressly forbids the filing of a successive petition. As noted by the State, this provision expressly applies only to the filing of a habeas petition along with the filing of the Initial Brief on appeal from a first Rule 3.851 motion; this schedule was

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[13]Certainly, neither this Court nor the legislature could one day, out of the blue, strip a convicted defendant of his right to direct appeal. Upon a criminal conviction, the right to appeal attaches. Though that right is not constitutionally guaranteed, once it attaches it is protected. *Evitts v. Lucey*, 469 U.S. 387 (1985). The position advocated by the State here, is really an effort to strip Mr. Chandler of one of the rights that attached when he was convicted and sentenced to death – the right to petition this Court for habeas relief on the basis of new law establishing that this Court previous denials of relief were erroneous.

added in order for this Court to address all of a capital defendant's claims for postconviction relief, whether raised in a Rule 3.850 appeal or state habeas. Once before the Court, the Court's practice has been to consolidate both the Rule 3.850 appeal and the state habeas proceedings and issue a joint opinion addressing both proceedings. This is an entirely different procedural scenario than the one in which Mr. Chandler's case arises and the State's attempt to analogize it to this proceeding is unavailing.

As to the extensive discussion in Mr. Chandler's Initial Brief as to the longstanding historical basis for this Court's ability to entertain the writ at issue, the State ignores it arguing instead that "Chandler's request to expand original jurisdiction further is not proper" (Answer Brief at 11). History clearly demonstrates that Mr. Chandler is not seeking to expand this Court's original jurisdiction. Instead, it is the State that is seeking to contract it. This Court cannot arbitrarily adopt a new approach which applies for the first time to Mr. Chandler and forecloses his constitutional right to access to courts, due process, and equal protection. *Johnson v. Mississippi*. For example, notwithstanding the State's present arguments, numerous convicted, capital defendants were permitted to file, and obtain a merits ruling, on successive state habeas petitions filed after January 1, 2002 in light of *Ring v. Arizona*, 536 U.S. 584 (2002). These *Ring* habeas

petitions were filed *subsequent* to this Court's decision in *Mann* and yet this Court entertained the petitions on their merits.[14] This alone establishes the inherent fallacy of the State's position as to the instant habeas petition.[15]

CONCLUSION

The State's arguments effectively leave a defendant such as Mr. Chandler without a legal forum in which to raise habeas claim's premised upon error in this Court's prior resolution of his constitutional claims. In other words, according to the obstinate view espoused by the State, Mr. Chandler is not only prohibited from filing a state habeas, but also from filing a new Rule 3.851 motion unless and until such time as any new law has been held to apply retroactively. The State fails to

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[14]Although this Court did not issue an order requiring a response from the State, the State did not seek to dismiss the petition by way of a motion, which is certainly could have done.

[15]*See, e.g. Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. State*, 808 So. 2d 1237 (Fla. 2002); *Chandler v. Crosby*, 2003 Fla. LEXIS 1723 (Fla. 2003); *Diaz v. Crosby*, 869 So. 2d 538 (Fla. 2003); *Haliburton v. Crosby*, 865 So. 2d 480 (Fla. 2003); *Trepal v. Crosby*, 2003 Fla. LEXIS 2332 (Fla. 2003); *Valle v. Crosby*, 859 So. 2d 516 (Fla. 2003). In a number of these cases, the Court did order a response from the State. For example, in *Diaz*, a response was ordered and the State raised an argument that Mr. Diaz's *Ring* habeas was barred pursuant to *Mann v. Moore*. *See Diaz v. Crosby*, No. SC 03-234. This Court rejected the State's arguments and reached the merits of the claims in its decision denying relief to Mr. Diaz. There is no difference between the authority of this Court to address Mr. Bottoson's *Ring* habeas, Mr. King's *Ring* habeas, Mr. Diaz's *Ring* habeas and the authority of this Court to address Mr. Chandler's habeas.

explain how Mr. Chandler is to ask a court is to re-address an issue that is *res judicata* when new law emanates from this Court or the United States Supreme Court that reveals error in the prior resolution of Mr. Chandler's claims. Reading the rule in the manner articulated by the State would result in a violation of Equal Protection and Due Process. This is not a "reasonable limitation" on the right to access to courts and seek habeas relief, as argued by the State (Answer Brief at 15); this is a suspension on Mr. Chandler's right to petition for the writ of habeas corpus.

Accordingly, this Court should entertain Mr. Chandler's petition and order a response.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Celia Terenzio, Assistant Attorney General, Office of the Attorney General, 1515 North Flagler Drive 9th Floor, West Palm Beach, FL 33401-3432 on July 5, 2004.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this petition is typed using Times New Roman 14-point font.

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