IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-686

MCARTHUR BREEDLOVE,

Petitioner,

vs.

JAMES V. CROSBY, JR.,

Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS

BRIEF OF RESPONDENT

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

TABLE OF CONTENTS

TABLE OF CITATIONS iii

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 11

ARGUMENT 12

CONCLUSION 19

CERTIFICATE OF SERVICE 19

TABLE OF CITATIONS

CASES **PAGE**

Anderson v. United States,
417 U.S. 211, 41 L. Ed. 2d 20, 94 S. Ct. 2253 (1974) . . . 3

Baker v. State,
29 Fla. L. Weekly S105 (Fla. Mar. 11, 2004) 16

Bolender v. Dugger,
564 So. 2d 1057 (Fla. 1990) 8

Breedlove v. Crosby,
868 So. 2d 522 (Fla. 2003) 10

Breedlove v. Florida,
459 U.S. 1060 (1982) 6

Breedlove v. Moore,
74 F. Supp. 2d 1226 (S.D. Fla. 1999) 9

Breedlove v. Florida,
459 U.S. 882 (1982) 6

Breedlove v. Florida,
516 U.S. 1031 (1995) 9

Breedlove v. Moore,
279 F.3d 952 (11th Cir. 2002) 10

Breedlove v. Moore,
537 U.S. 1204 (2003) 10

Breedlove v. Singletary,
595 So. 2d 8 (Fla. 1992) 8,16

Breedlove v. State,
413 So. 2d 1 (Fla. 1982) 3,6

Breedlove v. State,
580 So. 2d 605 (Fla. 1991) 6

Breedlove v. State,
692 So. 2d 874 (Fla. 1997) 9

Chapman v. California,
386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) . . . 5

Crawford v. Washington,
124 S. Ct. 1354 (2004) 10

Dixon v. State,
730 So. 2d 265 (Fla. 1999) 18

Dutton v. Evans,
400 U.S. 74, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970) . . . 3

Espinosa v. Florida,
505 U.S. 1079 (1992) 9

Felker v. Turpin,
518 U.S. 651 (1996) 15

Haag v. State,
591 So. 2d 614 (Fla. 1992) 15

Hall v. State,
541 So. 2d 1125 (Fla. 1989) 17

Hunt v. Seaboard Coast Line Railroad Co.,
327 So. 2d 193 (Fla. 1976) 3

Lombardi v. Flaming Fountain, Inc.,
327 So. 2d 39 (Fla. 2d DCA 1976) 3

Mann v. Moore,
794 So. 2d 595 (Fla. 2001) 13

Mills v. Dugger,
574 So. 2d 63 (Fla. 1990) 16

Perry v. State,
146 Fla. 187, 200 So. 525 (1941) 5

Rhodes v. State,
547 So. 2d 1201 (Fla. 1989) 8

Ring v. Arizona,
536 U.S. 584 (2002) 10

Roberts v. State,
568 So. 2d 1255 (Fla. 1990) 8

State v. Breedlove,
655 So. 2d 74 (Fla. 1995) 9

State v. Freber,
366 So. 2d 426 (Fla. 1978) 3

Strickland v. Washington,
466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) . . 8

Williams v. State,
338 So. 2d 251 (Fla. 3d DCA 1976) 4

STATUTES

28 U.S.C. §2244 (b)(2) 15

STATEMENT OF THE CASE AND FACTS

Defendant was charged, in an indictment filed on Case No. 78-17415, for the murder of Frank Budnick, the attempted murder of Carol Meoni, burglary, grand theft, and petit theft. The charges stemmed from the stabbing death of Budnick and the wounding of Meoni, which occurred during the burglary of their dwelling. Defendant was convicted of first-degree murder, burglary of a dwelling with an assault, grand theft and petit theft, but acquitted him of the attempted murder of Carol Meoni.

After the penalty phase, the jury recommended that Defendant be sentenced to death. On March 30, 1979, Judge Fuller sentenced Defendant to death. The court found the existence of three (3) aggravating circumstances: that Defendant had prior convictions for crimes of violence; that the homicide had been committed during the course of a burglary; and that the homicide had been especially heinous, atrocious or cruel. After a lengthy analysis, the court concluded that no mitigating circumstances, statutory or otherwise, applied, and sentenced Appellant to death.

Petitioner appealed his convictions and sentences to this Court, raising six issues:

I.

THE SUPPRESSION BY THE PROSECUTION OF FAVORABLE EVIDENCE INCLUDED IN AN UNDISCLOSED POLICE REPORT VIOLATED THE DUE PROCESS CLAUSE OF THE FOURTEENTH

AMENDMENT, AND THE REFUSAL OF THE TRIAL COURT TO ORDER PRODUCTION OF ALL POLICE REPORTS WHICH INCLUDED STATEMENTS OF WITNESSES LISTED BY THE PROSECUTION IN ITS DISCORVER [sic] RESPONSES DENIED DEFENDANT THE RIGHTS VOUCHSAFED BY RULE 3.220(a) OF THE FLORIDA RULES OF CRIMINAL PROCEDURE AND OF HIS SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM, ENTITLING HIM TO A NEW TRIAL.

II.

THE TRIAL COURT ERRED IN DENYING MOTIONS TO SUPPRESS TANGIBLE AND TESTIMONIAL EVIDENCE OBTAINED IN VIOLATION OF THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

III.

THE ADMISSION INTO EVIDENCE OF PREJUDICIAL HEARSAY STATEMENTS DENIED DEFENDANT HIS RIGHT OF CONFRONTATION AND DEPRIVED HIM OF A FAIR TRIAL, AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THE TRIAL COURT THEREFORE ERRED IN ADMITTING THE HEARSAY INTO EVIDENCE AND IN DENYING THE MOTIONS FOR MISTRIAL BASED UPON ITS INTRODUCTION AND UPON THE PREJUDICIAL COMMENTS THEREON DURING THE CLOSING ARGUMENT OF THE PROSECUTOR.

IV.

THE DELIBERATE MISCONDUCT OF THE PROSECUTOR IN CLOSING ARGUMENT DENIED DEFENDANT A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

V.

THE CONVICTION AND SENTENCE IMPOSED UPON DEFENDANT FOR THE OFFENSE OF ROBBERY IS INVALID UNDER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 9 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

VI.

THE APPLICATION OF SECTION 921.141, FLORIDA STATUTES 91977) TO DEFENDANT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNTIED STATES.

Initial Brief of Appellant, Case No. 56,811. This Court affirmed

his convictions and sentence of death. *Breedlove v. State*, 413 So. 2d 1 (Fla. 1982). This Court specifically rejected issue three on the grounds that the State had not presented any hearsay evidence and that the comments in closing were harmless:

> At trial Detectives Ojeda and Zatrepalek testified regarding Breedlove's statement of the 21st. In relating what he said to them, both recited or alluded to the substance of a conversation they had with Breedlove's mother and brother. Neither the mother nor the brother testified at trial, and Breedlove now claims improper introduction of hearsay and violation of the confrontation clause.
>
> Hearsay is an out-of-court statement, other than one made by a declarant who testifies at the trial or hearing, offered in court to prove the truth of the matter contained in the statement. *Lombardi v. Flaming Fountain, Inc.*, 327 So. 2d 39 (Fla. 2d DCA 1976). n7 Hearsay is inadmissible for three reasons: 1) the declarant does not testify under oath; 2) the trier of fact cannot observe the declarant's demeanor; and 3) the declarant is not subject to cross-examination. *State v. Freber*, 366 So. 2d 426 (Fla. 1978). " The hearsay rule does not prevent a witness from testifying as to what he has heard; it is rather a restriction on the proof of fact through extrajudicial statements." *Dutton v. Evans*, 400 U.S. 74, 88, 27 L. Ed. 2d 213, 91 S. Ct. 210 (1970). In *Dutton* the Court went on to say that "the mission of the Confrontation Clause is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.' *California v. Green*, 399 U.S. at 161." 400 U.S. at 89. On the other hand, "[o]ut-of-court statements constitute hearsay only when offered in evidence to prove the truth of the matter asserted." *Anderson v. United States*, 417 U.S. 211, 219, 41 L. Ed. 2d 20, 94 S. Ct. 2253 (1974). Merely because a statement is not admissible for one purpose does not mean it is inadmissible for another purpose. *Hunt v. Seaboard Coast Line Railroad Co.*, 327

So. 2d 193 (Fla. 1976); *Williams v. State*, 338 So. 2d 251 (Fla. 3d DCA 1976). The hearsay objection is unavailing when the inquiry is not directed to the truth of the words spoken, but, rather, to whether they were in fact spoken. *Id.*

In the examination of Detective Ojeda the court sustained defense counsel's objection to his relating what Breedlove's mother said at her residence. Ojeda went on to testify that in talking with Breedlove on the 21st he told Breedlove what his brother had said about the bicycle. The court overruled the defense objection to this, stating that "it is not being offered for the truth of what was said." Other comments made by the mother and brother came in the same way; objections were overruled or sustained as needed. A side bar conference on hearsay was held, following which the judge gave the jury a cautionary instruction on Ojeda's testimony. Prior to cross-examination another side bar conference was held, wherein the defense said it would go into the Gibsons' statements because they had been received for an impermissible purpose. The court cautioned that defense would have to live with what this approach elicited. A similar course of events occurred during Detective Zatrepalek's testimony.

In closing argument, defense counsel brought up the Gibsons' comments and wondered why they had not been called to testify. The state also brought up these comments, referred to their sworn statements (not introduced at trial), said that they told the truth in those statements, and then tied their formal statements to the detectives' testimony.

Defense counsel used these statements by the prosecutor to move for a mistrial because of "putting the truth of Elijah and Mary Gibson's statements in issue," and also asked that the jury be told to disregard the detectives' testimony regarding what the Gibsons had said or else be given another cautionary instruction. Defense counsel also asked that the jury be told to disregard the state's closing argument. The court found the state's argument proper and refused to reinstruct, referring to his earlier cautionary instruction. Defense again referred to the mother and brother in its final argument.

The court properly admitted the detectives'

testimony about what the Gibsons said because it came in to show the effect on Breedlove rather than for the truth of those comments. The informal statements, therefore, were not hearsay and could be admitted into evidence. The judge cautioned the jury on how to use this testimony.

In their last motion for a new trial defense counsel cited the prosecutor's argument, alleging prejudicial error. The court denied the motion. mistrial should be declared for prejudicial error which will vitiate the trial's result. *Perry v. State*, 146 Fla. 187, 200 So. 525 (1941). If the alleged error does no substantial harm and causes no material prejudice, a mistrial should not be declared. *Id.* Improper remarks can be cured by ordering the jury to ignore them unless they are so objectionable that such instruction would be unavailing.

The judge refused to renew his cautionary instruction regarding the use of testimony referring to the Gibsons' statements and included no such instruction in those given before the jury retired to deliberate. The questions, therefore, are whether the prosecutor's comments transformed the nonhearsay material into hearsay and whether those comments were so prejudicial that this Court cannot say beyond a reasonable doubt that they had no effect on the verdict. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967).

It appears that the prosecutor's remarks were improper. These remarks, however, were no worse than, and possibly not as harmful as, defense counsel's remarks concerning the Gibsons' statements. On rebuttal defense counsel mentioned the stolen bicycle being found at the Gibson home. He went on to say that the bicycle

> could have been ridden by the other four adults in that house, and what about those people? What did they do? They pointed the finger at my client.
>
> Sure it is his mother and brother. I do not like mothers and brothers testifying like that against my client. They said, "He did it. He is the one."

> Mr. Godwin would have you believe we can call people like that.
>
> (Emphasis added.) It appears that defense counsel admitted that those statements were true. Considering the totality of the circumstances, we find the prosecutor's statements not so prejudicial as to require a new trial.

Breedlove, 413 So. 2d at 6-7.

Defendant sought certiorari review in the United States Supreme Court from the direct appeal. The Court denied certiorari on October 4, 1982. *Breedlove v. Florida*, 459 U.S. 882 (1982). Rehearing was denied on November 29, 1982. *Breedlove v. Florida*, 459 U.S. 1060 (1982).

On November 30, 1982, Defendant filed his first motion for post conviction relief, raising the following two (2) issues: 1) denial of the right to be present at critical stages of trial; and, 2) State's suppression of impeachment evidence of police officers' unrelated criminal conduct, in violation of constitutional rights. The motion was summarily denied on January 4, 1990, after Defendant withdrew the first claim. Defendant appealed the denial of this motion to this Court, which affirmed. *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991).

Defendant then filed a second motion for post conviction relief, raising the following three (3) issues: 1) ineffective assistance of counsel at guilt phase; 2) State's failure to

disclose exculpatory evidence; and 3) ineffective assistance of counsel at penalty phase. The trial court summarily denied this motion, and Defendant appealed.

At the same time that he filed the second motion for post-conviction relief, Defendant filed a petition for writ of habeas corpus, raising the following seven (7) issues: "(1) improper penalty-phase prosecutorial argument regarding an uncharged offense, mental health evidence, lack of remorse, and possibility of parole and ineffectiveness of counsel for not raising this matter on appeal; 2) unconstitutionality of the instruction on heinous, atrocious, or cruel and of applying that aggravator to Breedlove's case; 3) improper hearsay admitted in the penalty phase about a prior felony conviction and ineffectiveness of appellate counsel for not raising this claim; 4) improper guilt-phase prosecutorial argument regarding the defense's failure to call certain witnesses and ineffective assistance by appellate counsel for not raising this issue; 5) improper penalty-phase prosecutorial argument that told the jurors they were required to recommend death and that diminished the jurors' sense of responsibility and ineffectiveness of trial counsel for failing to object to this argument; 6) instruction on avoid/prevent arrest aggravator makes flight an improper aggravator; and 7) improper instruction that majority of jurors

must vote for life imprisonment and ineffectiveness of trial counsel for failure to object." *Breedlove v. Singletary*, 595 So. 2d 8, 10 (Fla. 1992).

This Court consolidated the first state habeas petition and the appeal from the denial of the second motion for post conviction relief. This Court denied the state habeas petition, specifically rejecting claim 3:

> Thus, the only issue properly presented in this petition is the third one, which alleges that appellate counsel rendered ineffective assistance by not raising as error allowing hearsay into evidence during the penalty phase. Breedlove had previously been convicted of and served time for sexual battery in California. During the sentencing proceeding, a Los Angeles detective testified, over objection, about that crime and what the victim told him.
>
> Breedlove has not met the substandard performance and prejudice test from *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), and his reliance on *Rhodes v. State*, 547 So. 2d 1201 (Fla. 1989), is misplaced. In *Rhodes* we held that playing a tape recording of the victim's recounting the crime was error because Rhodes could not cross-examine that recording. Here, however, the witness was available for cross-examination. If this issue had been raised on direct appeal, we would have found it to have no merit, and appellate counsel is not ineffective for not raising nonmeritorious issues. *Cf. Roberts v. State*, 568 So. 2d 1255 (Fla. 1990); *Bolender v. Dugger*, 564 So. 2d 1057 (Fla. 1990).

Breedlove, 595 So. 2d at 10-11. This Court also affirmed the summary denial of claims 1 and 2 of the second motion for post conviction relief. *Id.* at 11. However, this Court remanded for an evidentiary hearing on claim 3. *Id.* at 11-12.

On remand, the trial court conducted the evidentiary hearing. It then denied claim 3. Defendant appealed the denial of claim 3.

During the pendency of this appeal, Defendant filed a third motion for post conviction relief. In this motion, Defendant claimed that the HAC aggravator unconstitutionally infected his trial. (R2-75-429) After a hearing on this motion, the trial court granted the motion and ordered a new sentencing hearing, pursuant to *Espinosa v. Florida*, 505 U.S. 1079 (1992). The State appealed, and this Court reversed, finding that although the *Espinosa* issue was preserved, any error was harmless. *State v. Breedlove*, 655 So. 2d 74, 76-77 (Fla. 1995). Appellant sought certiorari review of this decision and the Court denied certiorari on December 11, 1995. *Breedlove v. Florida*, 516 U.S. 1031 (1995).

Thereafter, the appeal of the denial of the second post conviction motion resumed. This Court affirmed the denial of the second motion for post conviction. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997).

Defendant then filed a petition for writ of habeas corpus in the Southern District of Florida, raising the claims regarding the admission of hearsay evidence. The Petition was denied. *Breedlove v. Moore*, 74 F. Supp. 2d 1226 (S.D. Fla.

1999). Defendant appealed to the Eleventh Circuit, again raising these issues, and the Eleventh Circuit affirmed. *Breedlove v. Moore*, 279 F.3d 952 (11th Cir. 2002). Defendant sought certiorari review in the United States Supreme Court, which was denied. *Breedlove v. Moore*, 537 U.S. 1204 (2003).

On June 18, 2003, Defendant filed a second petition for writ of habeas corpus with this Court, claiming that he was entitled to relief pursuant to *Ring v. Arizona*, 536 U.S. 584 (2002). Defendant included a claim that *Ring* rendered the admission of the hearsay testimony at the penalty phase erroneous. This Court denied the petition, without requesting a response from the State. *Breedlove v. Crosby*, 868 So. 2d 522 (Fla. 2003).

On April 21, 2004, Defendant filed his third state habeas petition. This petition contends that he is entitled to relief pursuant to *Crawford v. Washington*, 124 S. Ct. 1354 (2004). By order dated April 29, 2004, this Court requested the parties to this action to brief the issue of whether the successive habeas petition should be dismissed for failure to comply with Rule 3.851(d)(2)(B) or Rule 3.851(d)(3). Defendant has filed his initial brief on this issue

This brief follows.

SUMMARY OF THE ARGUMENT

Defendant has filed an out-of-time, successive habeas petition raising claims which are inappropriate for habeas. None of the claims are appropriate for habeas relief. Further, under the rules now applicable to capital post conviction relief, a capital defendant may not file a successive habeas petition, and may not file an out-of-time motion for post conviction relief in circuit court based on "new law" unless that "new law" has been held to apply retroactively. Defendant's habeas is an unauthorized pleading and should be dismissed.

ARGUMENT

This Court has requested the parties to brief the issue of "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). The State's position is that the cited rules no longer allow capital defendants to file successive state habeas petitions, and, additionally, allow capital defendants to file out-of-time 3.850 motions based upon new case law *only* when the alleged "new law" has established a new fundamental constitutional right *and* that new right has been held to apply retroactively.

The current version of Rule 3.851, in effect since 2001, applies "to *all* ***motions*** *and* ***petitions*** *for any type of postconviction or collateral relief* brought by a prisoner in state custody *who has been sentenced to death*." (Emphasis supplied.) Rule 3.851(d)(1) requires that, subject to certain exceptions, a motion to vacate judgment of conviction and sentence must be filed within one year after the judgment and sentence become final. Rule 3.851(d)(2) delineates the exceptions to this time limit:

> (2) No motion shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision (d)(1) unless it alleges that
>
> (A) the facts on which the claim is

> predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (B) the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively, or
>
> (C) postconviction counsel, through neglect, failed to file the motion.

Besides setting time limits for filing motions to vacate judgments of conviction and sentence, Rule 3.851 additionally distinguishes between initial and successive motions, setting forth more restrictive page limits and establishing more rigorous pleading requirements for successive motions. See Rule 3.851(e). Finally, Rule 3.851(d)(3) also establishes a schedule for filing petitions for writ of habeas corpus:

> (3) All petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, *including petitions for writ of habeas corpus*, shall be filed simultaneously with the initial brief filed on behalf of the death-sentenced prisoner in the appeal of the circuit court's order on the initial motion for postconviction relief filed under this rule.

It cannot be disputed that the present version of 3.851, adopted three years before Defendant filed the instant successive habeas petition, applies to Defendant's successive habeas petition. *See Mann v. Moore*, 794 So. 2d 595 (Fla.

2001)(declining to apply former Rule 9.140(b)(6)(E) to Mann because of some confusion in the effective dates of the rules, but announcing that, effective January 1, 2002, "all petitions for extraordinary relief, including habeas corpus petitions, must be filed simultaneously with the initial brief appealing the denial of a rule 3.850 motion").[1] The plain language of Rules 3.851 requires the dismissal of Defendant's successive habeas petition. Rule 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 makes no provision for successive habeas corpus petitions filed long after the appeal on a defendant's initial motion for postconviction relief, and Defendant's successive habeas petition must be dismissed as unauthorized.

Even if the rule did not prohibit successive habeas petitions, Defendant's habeas petition is inappropriate and should be dismissed.

Defendant argues that he must be allowed to file this habeas petition because he is in effect attacking this Court's erroneous

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[1] The substance of former Rule 9.140(b)(6) is now contained in Rule 9.142(a)(5), and essentially "mirrors" (Mann) the filing requirements for habeas petitions as set out in Rule 3.851(d)(3).

prior decisions based on recently-decided law, and only this Court can correct its errors. Thus, he asserts, his only avenue for relief on these issues is habeas corpus, and it would be an unconstitutional "suspension" of the writ of habeas corpus to dismiss his petition.

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). Defendant has made no demonstration that any of the limitations on out-of-time and successive motions for relief contained in Rule 3.851 are constitutionally unreasonable.[2] Habeas corpus is

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[2] Capital defendants in federal court face similar time limits for filing habeas petitions and their right to file successive habeas petitions is likewise limited. Further, the restrictions on out-of-time motions contained in Rule 3.851(d)(2)(B) are very similar to the restrictions on successive federal habeas petitions contained in 28 U.S.C §2244 (b)(2), which provides, in part:

> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

The United States Supreme Court has held that these provisions do not act as a suspension of the writ. *Felker v. Turpin*, 518

not a substitute for an appropriate motion for post conviction relief in the trial court, and is not "a means to circumvent the limitations provided in the rule for seeking collateral postconviction relief" in the original trial court. *Baker v. State*, 29 Fla. L. Weekly S105 (Fla. Mar. 11, 2004).

Defendant argues, however, that his grievance is with this Court's prior rulings in this case, and that his challenges to these prior rulings should be raised in this Court, and not in the trial court. However, Defendant's claims all relate to issues arising out of, and errors allegedly occurring during, the original trial.[3] The fact that the trial court's rulings may have been affirmed on appeal by this Court cannot convert these issues into appellate issues that only this Court may address. Thus, habeas corpus does not lie for redress of these claimed grievances. *Breedlove v. Singletary*, 595 So. 2d 8 (Fla. 1992); *Mills v. Dugger*, 574 So. 2d 63 (Fla. 1990). On the contrary, they are issues that may be raised by Defendant, if at all, only by way of a motion for post conviction relief filed in the original trial court, and not by way of a habeas petition in this

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U.S. 651 (1996).

[3] Defendant claims that his rights under the Confrontation Clause were violated by the alleged admission of hearsay at the guilty and penalty phases of his trial.

Court, as subsections (d)(2)(B) and (d)(3) of Rule 3.851 clearly contemplate.

Defendant argues that this Court has, in the past, sanctioned habeas corpus as a vehicle to challenge prior decisions of this Court rendered either on direct or collateral appeal. He acknowledges, however, that this Court has experienced practical difficulties with this approach. *See Hall v. State*, 541 So. 2d 1125 (Fla. 1989)(directing that, in the future, claims under the then recently decided case of *Hitchcock v. Dugger*, 481 U.S. 393 (1987), would not be cognizable in habeas proceedings, and should be presented in a Rule 3.850 motion). Moreover, regardless of past history, this Court recently adopted a new approach, which limits a capital defendant to one habeas proceeding, and places severe limits on successive, out-of-time motions for post conviction relief. Thus, Defendant may not seek out-of-time relief via a successive petition for writ of habeas corpus, and he may not file an out-of-time, successive motion for post conviction relief in the circuit court based upon alleged new law unless he can demonstrate *both* that the "fundamental constitutional right asserted was not established" previously, *and* that the newly-created right "has been held to apply

retroactively." Rule 3.851 (d)(2)(B).[4]

[4] The rules contemplate that issues of retroactivity may be litigated in initial motions for post conviction relief, but may not be litigated in the first instance in out-of-time successive motions. *See Dixon v. State*, 730 So. 2d 265 (Fla. 1999)(noting that retroactive application of new law is a "relatively rare occurrence," and that time limit for filing successive 3.850 based on new law is calculated from the date of the mandate of the case determining that a new right is fundamental and retroactive).

CONCLUSION

For all the foregoing reasons, Defendant's successive habeas petition should be dismissed as unauthorized.

Respectfully submitted,

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

_____
SANDRA S. JAGGARD
Assistant Attorney General
Florida Bar No. 0012068
Office of the Attorney General
Rivergate Plaza -- Suite 950
444 Brickell Avenue
Miami, Florida 33131
PH. (305) 377-5441
FAX (305) 377-5654

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Todd G. Scher, 5600 Collins Avenue, #15-B, Miami Beach, Florida 33140, this 14th day of June, 2004.

_____
SANDRA S. JAGGARD
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is type in Courier New 12-point font.

_____
SANDRA S. JAGGARD
Assistant Attorney General