IN THE SUPREME COURT OF FLORIDA

CASE NO. SCO4-686

McARTHUR BREEDLOVE,

Petitioner,

v.

JAMES V. CROSBY, JR,

Respondent.

ON PETITION FOR WRIT OF HABEAS CORPUS

INITIAL 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. Breedlove's habeas petition. References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Breedlove 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. Breedlove, through counsel, accordingly urges that the Court permit oral argument.

PROCEDURAL HISTORY

Mr. Breedlove was indicted for first-degree murder, attempted first-degree murder, burglary, grand theft, and petit theft (R1-4A). Trial commenced February 27, 1979, and on March 2, 1979, a jury found Mr. Breedlove guilty on all counts except the attempted first-degree murder charge, for which he was acquitted. By an unrecorded vote, the jury recommended death on March 5, 1979, and the trial judge imposed the death sentence ® 183-90). This Court affirmed. *Breedlove v. State*, 413 So. 2d 1 (Fla.), *cert. denied*, 459 So. 2d 882 (1982) [*Breedlove I*].

In 1982, Mr. Breedlove filed a motion for post conviction relief pursuant to Fla. R. Crimp. P. 3.850. The following year, a death warrant was signed, and the trial court stayed the execution. The 3.850 motion was denied on January 4, 1991, without ever affording Mr. Breedlove an evidentiary hearing. This Court affirmed the denial of this motion. *Breedlove v. State*, 580 So. 2d 605 (Fla. 1991) [*Breedlove II*].

After the signing of a second death warrant, Mr. Breedlove filed a second Rule 3.850 motion. The trial court denied the motion without an evidentiary hearing, and this Court affirmed in part and reversed in part for an evidentiary hearing on the ineffective assistance of penalty phase counsel claim. *Breedlove v.*

Singletary, 595 So. 2d 8 (Fla. 1992) [*Breedlove III*].[1] The hearing was conducted on May 5-7, 1992, and relief was denied on May 26, 1992. While Mr. Breedlove's appeal to this Court was pending, the Supreme Court decided *Espinosa v. Florida*, 505 U.S. 1079 (1992). Based on the *Espinosa* decision, this Court stayed Mr. Breedlove's appeal pending resolution of a third Rule 3.850 motion. The circuit court granted Mr. Breedlove *Espinosa* relief, and the State of Florida appealed. In a 4-3 decision, this Court reversed the grant of relief on harmlessness grounds. *State v. Breedlove*, 655 So. 2d 74 (Fla. 1995) [*Breedlove IV*]. Subsequently, the Court affirmed the denial of the remaining issues on appeal. *Breedlove v. State*, 692 So. 2d 874 (Fla. 1997) [*Breedlove V*].

Mr. Breedlove filed a petition for habeas corpus in federal court on April 28, 1998. The petition was denied with no evidentiary hearing on September 8, 1999. *Breedlove v. Moore*, 74 F. Supp. 2d 1226 (S.D. Fla. 1999) [*Breedlove VI*]. On January 17, 2002, the Eleventh Circuit Court of Appeals denied relief as to all issues (although addressing only one of them in its opinion). *Breedlove v. Moore*, 279 F. 3d 952 (11th Cir. 2002) [*Breedlove VII*]. Certiorari was denied by the United States Supreme Court. *Breedlove v. Crosby*, 537 U.S. 1204 (2003).

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[1]In *Breedlove III,* the Court also denied Mr. Breedlove's petition for state habeas corpus relief.

Mr. Breedlove subsequently filed a petition for a writ of habeas corpus in this Court raising issues regarding the application of *Ring v. Arizona,* 536 U.S. 584 (2002). That petition was denied. *Breedlove v. Crosby*, 2003 Fla. LEXIS 1982 (Fla. Oct. 30, 2003). Rehearing was denied on February 4, 2004.

On March 8, 2004, the United States Supreme Court issued its decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004). On April 22, 2004, Mr. Breedlove filed a petition for a writ of habeas corpus in this Court in which he contended that this Court's decisions both on direct appeal and in state habeas must be revisited in light of *Crawford*. On April 29, 2004, this Court issued an order requesting briefing "as to 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). This Initial Brief follows.

SUMMARY OF THE ARGUMENTS

Historically, Fla. R. Crim. P. 3.850/3.851 and the writ of habeas corpus are the vehicles by which a convicted defendant can raise collateral challenges to a final judgment and sentence. Rule 3.850/3.851 and habeas corpus, however, are not interchangeable remedies. Rather, the vehicle by which a defendant raises the deprivation of a constitutional right depends on which stage of the criminal proceedings did the alleged constitutional violation occur–during the proceedings in the trial court or the proceedings in the appellate court. Since the advent of Rule 3.850, it has long been clear that a Rule 3.850 motion is the vehicle by which a convicted defendant can raise a collateral challenge to proceedings over which the trial court has authority and which often requires factual development, whereas a habeas corpus petition is directed to raising constitutional errors over which the appellate court has authority. Because Mr. Breedlove's habeas petition raises a challenge to the correctness of this Court's prior determinations as to his Confrontation Clause issues, habeas corpus is the only available remedy. Were Mr. Breedlove to file a Rule 3.851 motion raising these issues, the circuit court would be required to deny the motion because it raises challenges to this Court's prior decisions.

This Court has a long history of accepting jurisdiction in habeas corpus

proceedings when death-row inmates have sought, based on newly-decided law, to challenge this Court's prior determinations of a constitutional issue. Indeed, this Court has noted on several occasions that it has exclusive jurisdiction to review all types of collateral proceedings in death penalty cases. Mr. Breedlove's case falls squarely within the class of cases in which the Court has repeatedly exercised its habeas corpus jurisdiction. Because habeas corpus, and not Rule 3.851, is the appropriate vehicle to raise the constitutional issues presented by Mr. Breedlove, neither Rule 3.851 (d)(2)(B) nor Rule 3.851 (d)(3) is implicated and this cause should not be dismissed. Otherwise, the Court would have to overrule decades-old precedent in order to reach the conclusion that Mr. Breedlove's challenge to this Court's prior decisions is properly raised in a Rule 3.851 motion.

If the Court were to depart from history and its longstanding practice, it must not do so in a way to arbitrarily extinguish Mr. Breedlove's access to the courts, for to do so would result in an unconstitutional suspension of the writ of habeas corpus.

Dismissal of his petition for failure to comply with Rule 3.851 (d)(2)(B) or Rule 3.851 (d)(3) would also result in a denial of due process and equal protection. Non-capital defendants are not bound by the provision of Rule 3.851 (d)(3), and thus can raise *Crawford* claims via habeas corpus without concern over 3.851

(d)(3). Were this Court to dismiss Mr. Breedlove's petition for failure to comply with Rule 3.851 (d)(3), this result would thus violate equal protection.

ARGUMENT

THIS COURT HAS AUTHORITY TO ENTERTAIN MR. BREEDLOVE'S PETITION FOR A WRIT OF HABEAS CORPUS, AND RULE 3.851 (d)(2)(B) AND/OR RULE 3.851 (d)(3) ARE NOT IMPLICATED UNDER THE CIRCUMSTANCES PRESENTED HEREIN.

I. INTRODUCTION.

On March 8, 2004, the United States Supreme Court issued its decision in *Crawford v. Washington*, 158 L. Ed. 2d 177 (2004). In *Crawford*, the Supreme Court held that, in accordance with the dictates of the longstanding understanding of the Sixth Amendment, the Sixth Amendment requires actual physical confrontation of a witness when the State seeks to introduce out-of-court testimonial evidence of that witness if that witness was available and the defendant had not been provided a prior opportunity for cross-examination of that witness. In other words, when the State attempts to introduce testimonial evidence through another witness, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." *Crawford*, 158 L. Ed. 2d at 203. In light of these longstanding principles, the *Crawford* Court overruled the "reliability" test it announced in *Ohio v. Roberts*, 448 U.S. 56 (1980), in favor of enforcement of what the Confrontation Clause actually requires:

confrontation. *Crawford*, 158 L. Ed. 2d at 203.

Based upon the decision in *Crawford*, Mr. Breedlove filed a petition for writ of habeas corpus, detailing the Confrontation Clause violations which had occurred at his guilt and penalty phases, how those violations had been objected to in a timely fashion, and how those violations were raised and addressed in this Court both on direct appeal (where the guilt phase violation was addressed) and in his first petition for a writ of habeas corpus (where the penalty phase violation was addressed). Mr. Breedlove's petition went on to explain that "*Crawford* now demonstrates several errors in this Court's analysis of Mr. Breedlove's confrontation issues both on direct appeal and in state habeas" and argued that "[t]his Court must revisit that decision in light of *Crawford* and order a new trial and a penalty phase at which the Confrontation Clause will be honored" (Petition at 32, 38).

Following the filing of Mr. Breedlove's petition, the Court entered an order *sua sponte* requesting 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)." The current version of Rule 3.851(d)(2), effective on October 1, 2001, provides:

> (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
>
> * * *
>
> (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.

The current Rule 3.851 (d)(3) provides:

> (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 should be observed that the prior version of Rule 3.851 is still in effect and governs "all motions and petitions" pending on October 1, 2001.

In this Brief, Mr. Breedlove provides an historical analysis under Florida law of the postconviction remedies available through a petition for writ of habeas corpus and a motion to vacate the judgment and sentence pursuant to Rule 3.850/3.851. Through this historical analysis, Mr. Breedlove demonstrates that this Court has held that it has exclusive authority to entertain habeas petitions when new case law issues and calls into question the correctness of this Court's prior resolution of direct appeals or prior appeals of the denial of postconviction relief.

Accordingly, Mr. Breedlove argues that to deny him his only remedy to present this constitutional challenge would constitute an unconstitutional suspension of the writ of habeas corpus. *See* Art. I, §13, Fla. Const.

Moreover, Rule 3.851 applies only to Florida inmates under a sentence of death. To use Rule 3.851 to strip only capital defendants of the ability to present constitutional challenges to prior appellate rulings violates the guarantees to due process and equal protection.

II. MR. BREEDLOVE'S HABEAS PETITION SEEKS TO ADDRESS AND VINDICATE ERRORS IN THE APPELLATE PROCESS AND IS THEREFORE APPROPRIATELY RAISED IN HABEAS AND NOT IN A RULE 3.850/3.851 MOTION.

1. Habeas Corpus versus Rule 3.850/3.851.

The remedy of habeas corpus and the remedy available via a motion for postconviction relief under Fla. R. Crim. P. 3.850/3.851 are both traditional remedies for seeking postconviction relief in criminal cases. *See generally Richardson v. State*, 546 So. 2d 1037 (Fla. 1989). Despite this commonality of purpose, habeas corpus and Rule 3.851 often seek to vindicate the constitutional rights of convicted defendants in different stages of the criminal process. Thus, habeas corpus and Rule 3.850/3.851 are not always interchangeable remedies for the vindication of deprivations of constitutional rights. Rather, the vehicle by which

a defendant raises the deprivation of a constitutional right depends on the stage of the criminal process affected by the alleged constitutional violation–during the proceedings in the trial court or the proceedings in the appellate court.

As this Court explained in *State v. Wooden*, 246 So. 2d 755 (Fla. 1971):

> Following the decisions of the United States Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Miranda v. Arizona*, 384 U.S. 436 (1966), and numerous others, the habeas corpus remedy in Florida underwent a virtual rebirth among practitioners who discovered it to be the most useful tool available to remedy constitutional errors at trial level. At the same time, however, habeas corpus proved to be a cumbersome tool for the appellate courts to work with, primarily because the majority of habeas corpus petitions required factual determinations which the appellate courts were not equipped to make without appointment of a commissioner and temporary relinquishment of jurisdiction.
>
> It was primarily as a remedy for this problem that Rule 1.850 was promulgated. *See Roy v. Wainwright*, 151 So. 2d 825 (Fla. 1963); *Reddick v. State*, 190 So. 2d 340 (Fla. App. 2nd 1966); *Tolar v. State*, 196 So. 2d 1 (Fla. App. 4th 1967), and *Smith v. State*, 176 So. 2d 383 (Fla. App. 3rd 1965). Essentially, the Rule provides a method by which allegations formerly raised by petition for habeas corpus directed to the appropriate District Court may now be raised in the trial court which entered the judgment and sentence; if an evidentiary hearing is necessary, it is a simple matter for a trial judge to provide one. *Johnson v. State*, 184 So. 2d 161 (Fla. 1966), rehearing, 185 So. 2d 466 (1966).

In view of the acknowledged purpose of Rule 1.850 to facilitate factual determinations, it will be supposed that therein lies the distinction between proceedings under the Rule and petitions for habeas corpus. But such is not the case. On petition for habeas corpus an appellate court may still appoint a commissioner to make factual findings of that measure is found to be necessary. A case in point frequently arises where a petitioner alleges deprivation of his right to direct appeal. *See Hollingshead v. Wainwright*, 194 So. 2d 577 (Fla. 1967); *Baggett v. Wainwright,* [229 So. 2d 239 (Fla. 1969)], and *State ex rel. Gaines v. Wainwright*, 233 So. 2d 174 (Fla. App. 2nd 1970).

In reality, the limitation on the scope of Rule 1.850 with which we are concerned here, is jurisdictional. A trial court may consider under the Rule those fundamental errors which it has the power to correct, errors arising in the trial process itself. Stated another way, a trial judge may correct any error going to the validity of the judgment and sentence. If an error invalidating a judgment and/or sentence is discovered, the trial judge has power under the rule to vacate and set aside the judgment and sentence and to order a new trial or discharge the prisoner.

But what is a trial judge to do if he discovers that a defendant's right to a direct appeal has been frustrated? Clearly, he cannot enter an order granting a delayed appeal in the appropriate District Court or the Supreme Court, because he has no power over these courts and such an order would not be binding upon them. Nor can he set aside the judgment and sentence aside because a finding of frustration of direct appeal does not bring into question the validity of the judgment and sentence.

> *However, the appellate court which would have been empowered to hear the direct appeal could clearly grant a defendant a delayed appeal in appropriate circumstances through the remedy of habeas corpus. Baggett v. Wainwright, supra.*

Wooden, 246 So. 2d at 756-57 (emphasis added).

While it is correct that the remedy available in habeas corpus is not available in those situations where Rule 3.850/3.851 is also available, *Wooden*, 246 So. 2d at 757; *State v. Bolyea*, 520 So. 2d 562, 563 (Fla. 1988), it is not the case that habeas corpus has been completely supplanted by Rule 3.850/3.851. As the Court explained in *Wooden*, Rule 3.850/3.851 is the appropriate vehicle to seek vindication of rights which directly affect the judgment and sentence entered by the trial court, a procedure which oftentimes requires factual development. *See also Richardson*, 546 So. 2d at 1039 ("The procedure under rule 3.850 logically places fact questions in the trial court first, where they belong"). However, where a defendant seeks to vindicate a right that affects the *appellate process*, habeas corpus remains the appropriate vehicle, as the trial courts have no power or authority over appellate courts. *See Baker v. State*, 2004 Fla. LEXIS 314 at *15 (Fla. March 11, 2004) (noting that habeas corpus is the appropriate remedy in those circumstances where the petitioner is not seeking to collaterally attack a final criminal judgment of conviction and sentence, or where the original sentencing

court would not have jurisdiction to grant the collateral postconviction relief requested even if the requirements of the rule had been timely met).[2]

This Court has long recognized that "allegations of ineffectiveness of appellate counsel are not cognizable under a Rule 3.850 motion because they do not relate to anything done by or transpiring before the trial court. Such allegations . . . should be addressed to the appellate court by means of a petition for habeas corpus." *Francois v. Klein*, 431 So. 2d 165, 166 (Fla. 1983). In *Knight v. State*, 394 So. 2d 997 (Fla. 1981), this Court was faced with a habeas corpus petition filed by a death-row prisoner in which the prisoner alleged ineffective assistance of appellate counsel. *Id*. at 998-999. The Court originally transferred the petition to the circuit court "and directed that it be treated as a motion for post-conviction relief." *Id*. The trial court, however, concluded that it could not address the issues

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[2]In *Baker*, the Court was addressing the issue of non-capital defendants who were raising challenges to their convictions and sentences directly to this Court via habeas corpus writs. The ultimate holding in *Baker*, however, on its face does not apply in the context of capital defendants. *Baker*, 2004 Fla. LEXIS 314 at *6 n.3 ("nothing in this opinion should in any way be interpreted as placing any limitations on this Court's mandatory jurisdiction to review the propriety of a first-degree murder conviction and resulting sentence of death"). As a result, it would appear that the briefing ordered by the Court in Mr. Breedlove's case is an effort to address in the capital context the same matters discussed in *Baker* in the non-capital context. Thus, the recognition in *Baker* that petitions for writs of habeas corpus remain the proper means of raising constitutional claims over which the trial court has no jurisdiction to entertain in Rule 3.850 proceedings is particularly significant here, as explained *infra*.

as they did not the trial process over which the circuit court had legal authority, a conclusion approved by this Court:

> The trial judge in considering the petition properly determined that since petitioner's claim for relief is predicated on the assertion of ineffective assistance of appellate counsel, *such relief can only be granted by habeas corpus in the appellate court unless it was caused by an act or omission of the trial court. The ineffective assistance of counsel allegations stem from acts or omissions before this Court, and therefore we have jurisdiction and will consider the petition for habeas corpus on its merits.*

Id. at 999 (emphasis added). *See also Powe v. State*, 216 So. 2d 446 (Fla. 1968) (noting that habeas corpus, not motion for postconviction relief, is proper vehicle to assert deprivation of counsel for appeal); *Baggett v. Wainwright*, 229 So. 2d 239 (Fla. 1969) (same); *Rhome v. State*, 293 So. 2d 761 (Fla. 3d DCA 1974) (same).

Within the area of capital collateral litigation, this Court has historically exercised its authority to entertain issues brought by not only by death-sentenced inmates but also by the State of Florida in a variety of collateral procedural postures. Indeed, this Court has noted that it has "*exclusive* jurisdiction to review *all types of collateral proceedings in death penalty cases.*" *State v. Fourth District Court of Appeal*, 697 So. 2d 70, 71 (Fla. 1997) (emphasis added). *See*

also State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998); *Trepal v. State*, 754 So. 2d 702 (Fla. 2000). Thus, the Court has entertained a variety of matters brought both by capital defendants and the State, including (a) interlocutory appeals brought by both capital defendants and the State, *see Trepal, supra*; *State v. Lewis*, 656 So. 2d 1248 (Fla. 1994); *State v. Kokal*, 562 So. 2d 324 (Fla. 1990); (b) petitions by capital defendants to reconsider matters addressed on direct appeal, *see Hill v. State*, 643 So. 2d 1071 (Fla. 1994); (c) petitions by the State to "review" the "application" of an aggravating circumstance in a particular case, *see Johnston v. Singletary*, 640 So. 2d 1102 (Fla. 1994); (d) out-of-time motions for rehearing of a previously decided Rule 3.850 motion, *see Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995); (e) State's challenge to trial court's granting motion for rehearing and evidentiary hearing, *see State v. Salmon*, 636 So. 2d 16 (Fla. 1992); (f) challenges to Florida's electric chair, *see Provenzano v. Moore*, 744 So. 2d 413 (Fla. 1999); *Jones v. Butterworth*, 691 So. 2d 481 (Fla. 1997); and (g) death-sentenced inmates' challenges to the correctness of this Court's repeated determinations that the Florida capital sentencing scheme comported with the Sixth Amendment right to trial by jury in light of *Ring v. Arizona*, 536 U.S. 584 (2002), *see Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002). Given that this Court exercised jurisdiction in these cases and this Court's jurisdiction to entertain petitions for

extraordinary relief is limited to "where the original sentencing court would not have jurisdiction to grant the collateral postconviction relief requested, *Baker*, 2004 Fla. LEXIS 314 at *15, these cases demonstrate the scope of this Court's jurisdiction.[3]

Particularly in the exercise of its habeas corpus jurisdiction, this Court has, in capital cases, entertained not only allegations of ineffectiveness of appellate counsel in habeas petitions, but also other types of challenges which do not necessarily affect the trial process but rather affect the appeals process or other matters within the Court's exclusive jurisdiction over capital collateral proceedings. *State v. Fourth District Court of Appeal*, 697 So. 2d at 71. The Court has entertained the merits of successive habeas corpus petitions brought by capital defendants challenging (a) the erroneous standard of review applied by the Court in their prior Rule 3.850 appeals, *see Johnston v. Moore*, 789 So. 2d 262 (Fla. 2001) (concluding that *Stephens v. State*, 748 So. 2d 1028 (Fla. 1999), did not qualify for retroactive application under *Witt v. State*, 387 So. 2d 922 (Fla. 1980); *Diaz v. Moore*, 797 So. 2d 585 (Fla. 2001) (decision without published opinion) (same);

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[3]Because jurisdiction is an either/or proposition–either the Court has it or does not–this Court's exercise of jurisdiction in these above situations demonstrates a determination that the trial court lacked jurisdiction. Decisions from this Court in circumstances where it did not have jurisdiction would be void. Surely, in these above proceedings, this Court determined that it had jurisdiction before issuing the opinions cited above.

(b) the constitutionality of the length of their stay on death row and to the clemency process, *see King v. State*, 808 So. 2d 1237, 1246 (Fla. 2002); (c) the propriety of the death sentence following the decision by the Supreme Court in *Hitchcock v. Dugger*, 481 U.S. 393 (1987), *see Johnson v. Dugger*, 520 So. 2d 565 (Fla. 1988) (treating all-writs petition based on *Hitchcock* error as a petition for writ of habeas corpus); (d) the validity of direct appeal decision affirming override of jury's recommendation of life, *see Mills v. Moore*, 786 So. 2d 532 (Fla. 2001) (addressing merits of whether *Keen v. State*, 775 So. 2d 263 (Fla. 2000), required reconsideration of Court's direct appeal affirmance of override). Notably, in none of these settings was there a dispute as to whether the proper vehicle for raising these issues was via a petition to writ of habeas corpus as opposed to a motion for postconviction relief under Rule 3.850/3.851.[4]

In light of a series of cases decided by the Supreme Court in the 1980's, most notably *Hitchcock, supra*, *Lockett v. Ohio*, 438 U.S. 586 (1978), and *Booth v. Maryland*, 482 U.S. 496 (1987), the Court was faced with a number of habeas

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[4]Mr. Breedlove's counsel is aware that a petition for writ of habeas corpus is pending in Wayne Tompkins' case. *Tompkins v. Crosby*, No. SC04-519. In that petition, it was alleged that *Crawford* established that this Court erred in denying Mr. Tompkins' confrontation challenge to his death sentence on direct appeal. Neither this Court nor the State has raised the issue of this Court's jurisdiction to entertain Mr. Tompkins' *Crawford* claim.

corpus petitions–including many in the successive posture. This Court accepted habeas jurisdiction and addressed whether the recently-decided United States Supreme Court decisions should be applied retroactively in Florida. *See, e.g. Riley v. Wainwright*, 517 So. 2d 656 (Fla. 1987) (in habeas proceeding, Court finds *Lockett* qualified for retroactive application in Florida); *Thompson v. Dugger*, 515 So. 2d 173 (Fla. 1987) (in habeas proceeding, Court finds *Hitchcock* qualified for retroactive application in Florida); *Mikenas v. Dugger*, 519 So. 2d 601 (Fla. 1988) (same); *Zeigler v. Dugger*, 524 So. 2d 419 (Fla. 1988) (same).

In *Downs v. Dugger*, 514 So. 2d 1069 (Fla. 1987), the Court was faced with a successive habeas corpus petition brought in light of *Hitchcock*. Noting that Down had previously raised numerous postconviction matters via Rule 3.850 and habeas corpus, the Court nonetheless recognized that *Hitchcock* represented a "substantial change in the law [that] requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges." *Id.* at 1070.

Soon, however, a number of habeas petitions reached this Court in which the petitioner alleged that based upon this Court's prior precedent, trial counsel did not investigate and present substantial nonstatutory mitigation to the penalty phase jury. This Court then held that because many of the *Hitchcock* claims brought in habeas petitions involved factual matters which required evaluation by trial courts,

subsequent *Hitchcock* claims should be brought in a Rule 3.850 motion. *See Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989) ("Appellate courts are reviewing, not fact-finding, courts. We hold, therefore, that *Hitchcock* claims should be presented to the trial court in a rule 3.850 motion for postconviction relief and that, after the filing of this opinion, such claims will not be cognizable in habeas corpus proceedings").

This Court was also called upon to address a habeas petition in which a constitutional claim as to this Court's prior direct appeal opinion was brought pursuant to *Booth v. Maryland*. In *Jackson v. Dugger*, 547 So. 2d 1197 (Fla. 1989), the Court granted sentencing relief noting that where a *Booth* claim had been previously raised and addressed on direct appeal, had been properly preserved at trial, and there were no factual determinations that needed to be made in order to resolve the issue, the Court would entertain the claim in habeas:

> Ordinarily, an issue under *Booth* . . . should be raised by motion under rule 3.850. However, because this Court had specifically approved the introduction of Sheriff Carson's testimony on direct appeal, and because all the pertinent facts are contained in the original record on appeal, we believe that in this instance the issue may be appropriately considered in the petition for writ of habeas corpus.

Id. at 1199 n.2. *Compare Parker v. Dugger*, 550 So. 2d 459, 460 (Fla. 1989)

(refusing to address merits of *Booth* claim in successive state habeas petition because issue had not been objected to at trial, raised on appeal, and addressed by the Court on appeal).

Following the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), capital defendants raised constitutional challenges to Florida's capital sentencing scheme by way of successive habeas corpus petitions filed directly in this Court. *See, e.g. Mills v. Moore*, 786 So. 2d 532, 537 (Fla. 2001); *Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore*, 831 So. 2d 143 (Fla. 2002).[5] At no time was there an issue as to the propriety of those defendants employing the writ of habeas corpus to bring these matters to the Court's attention, irrespective of whether the Sixth Amendment issue decided in *Ring* had been previously raised and addressed by this Court in prior appeals.[6]

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[5]This Court on at least one occasion addressed the merits of a *Ring* claim brought by a capital defendant when neither a habeas petition nor a Rule 3.850 motion had been filed raising that claim, but rather raised the issue in a notice of supplemental authority in a pending habeas proceeding. *See, e.g. Marquard v. State*, 850 So. 2d 417, 431 n.12 (Fla. 2002).

[6]In fact, Mr. Breedlove filed a habeas petition raising a constitutional challenge to his sentence of death based on *Ring*. This was well after Rule 3.851 was re-written effective October 1, 2001. The State did not challenge this Court's jurisdiction to entertain the petition nor did this Court determine that jurisdiction was lacking. Indeed, the Court did not even order the State to respond to Mr.

Importantly for the present posture of Mr. Breedlove's case, this Court also has expressly noted that the proper manner for capital defendants to challenge this Court's prior appeal or Rule 3.850 decisions in light of new case law was via habeas corpus. As noted above, this Court has repeatedly entertained successive habeas corpus challenges after this Court determined that it had misapplied the standards of review for ineffective assistance of counsel claims. *See Johnson v. Moore, supra*; *Diaz v. Moore*, *supra*. Moreover, when new case law emerges from the Supreme Court which requires this Court to "reconsider" issues first raised on direct appeal and/or in prior postconviction proceedings, the Court has also entertained successive habeas petitions. *Downs v. Dugger, supra*.

Most recently, the Court was faced with a capital defendant who raised in his Rule 3.850 motion an issue relating to the correctness of this Court's direct harmless error analysis. Not only did this Court find that Rule 3.850 was not the proper vehicle to raise the challenge, this Court explicitly put capital defendants on notice that such claims were improperly raised in a Rule 3.850 motion and should be raised via habeas corpus because a "postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle

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Breedlove's habeas petition. *See Breedlove v. Crosby*, No. SC03-1096 (Order denying petition on the merits, Oct. 30, 2003).

provided to challenge collateral issues *related to the trial court proceedings, not appellate decisions.*" *Foster v. State*, 810 So. 2d 910, 916 (Fla. 2002). *See also Shere v. State*, 742 So. 2d 215, 218 n.7 (Fla. 1999) (finding that defendant's claim challenging this Court's harmless error analysis on direct appeal cannot be raised in a motion for postconviction relief); *Sireci v. State*, 773 So. 2d 34, 40 (Fla. 2000) (same); *Eutzy v. State*, 536 So. 2d 1014, 1015 (Fla. 1988) (approving denial of Rule 3.850 motion in which defendant improperly sought to challenge constitutionality of conclusions reached by Court on direct appeal). Indeed, in *King v. Moore*, 196 F. 3d 1327 (11th Cir. 1999), the Eleventh Circuit, faced with a federal habeas challenge to this Court's harmless error analysis on direct appeal, noted the State of Florida's concession that "a trial court could not review a supreme court action for constitutionality" and that "Florida law provides King with a viable means of raising this constitutional error before the Florida Supreme Court: an original habeas corpus proceeding before that court. The Florida Supreme Court indeed routinely entertains such petitions in death cases." *Id*. at 1331 (citing cases).

Based on the foregoing discussion, it is thus clear that "there is a history of the Supreme Court of Florida accepting jurisdiction," *Trepal*, 754 So. 2d at 706, in capital cases where defendants are seeking to challenge the prior decision of the Court either on direct appeal or on postconviction appeal when the United States

Supreme Court issues a new decision which, in the defendant's view, establishes that this Court's resolution of a constitutional claim was erroneous. The oft-expressed and longstanding view that Rule 3.850 is a vehicle to challenge errors over which the trial court has authority and jurisdiction to correct, and habeas corpus is the vehicle to challenge errors which affect the appellate process where there are no factual matters to be resolved, establishes that Mr. Breedlove has properly sought to have the prior holdings of this Court on direct appeal and prior state habeas in the instant petition for a writ of habeas corpus.

2. Because Rule 3.850/3.851 is not the appropriate vehicle for the claims raised in the instant case, this case should not be dismissed for failure to comply with Rule 3.851 (d)(2)(B) or Rule 3.851 (d)(3).

In 2001, this Court rewrote Rule 3.851. The new Rule 3.851 (a) provided:

> This rule shall apply 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 and whose conviction and death sentence have been affirmed on direct appeal. It shall apply to all postconviction motions filed on or after October 1, 2001. Motions pending on that date are governed by the version of this rule in effect immediately prior to that date

The new Rule 3.851 included a provision that capital defendants are to file "[a]ll petitions for extraordinary relief in which the Supreme Court of Florida has original

jurisdiction, including petitions for writ of habeas corpus," simultaneously with their initial briefs on the Rule 3.850 appeal. *See* Fla. R. Crim. P. 3.851 (d)(3).[7] Obviously, Rule 3.851 (a), in setting forth the scope of the rule, did not use the phraseology appearing in Rule 3.851 (d)(3), *i.e.*, "[a]ll petitions for extraordinary relief in which the Supreme Court of Florida has original jurisdiction, including petitions for writ of habeas corpus." Certainly, that failure would imply that "petitions for extraordinary relief . . . including petitions for writ of habeas corpus" were not included within the scope of the rule, except as specifically set forth in Rule 3.851 (d)(3).

Given that the previous version of Rule 3.851 (2) first set forth a provision requiring the filing of "[a]ll petitions for extraordinary relief" simultaneously with the filing of the initial brief in a Rule 3.850 appeal,[8] but that version of the rule applied

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[7]Fla. R. App. P. 9.100, which governs original proceedings in an appellate court, was not amended in any corresponding fashion. On its face, Rule 9.100 "applies to those proceedings that invoke the jurisdiction of the courts . . . for the issuance of writs of mandamus, prohibition, quo warranto, certiorari, and habeas corpus, and all writs necessary to the complete exercise of the courts' jurisdiction." Fla. R. App. P. 9.100 (a). As explained in subsection (h), "[i]f the petition demonstrates a preliminary basis for relief, a departure from the essential requirements of law that will cause material injury for which there is no adequate remedy by appeal . . . the court may issue an order directing the respondent to show cause."

[8]Rule 3.851 (2) of the previously-adopted rules, effective January 1, 1994, provided:

to death-sentenced prisoners whose sentences became final after January 1, 1994, confusion arose regarding the effect of the rewritten rule on individuals whose sentence became final prior to January 1, 1994 and who had not yet filed a petition for writ of habeas corpus with this Court. *See* Rule 3.851 (b)(6), as effective on January 1, 1994.[9] In light of ensuing confusion with respect to the applicability of the habeas filing deadline, this Court subsequently clarified that notwithstanding the date of finality of the defendant's conviction, the provision requiring the filing of a habeas petition with the initial brief on the Rule 3.850 appeal applied to all capital defendants who had or would have such an appeal pending before this Court.

> 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 *rule 3.850 motion.*

Only the italicized portion of this version of the rule was changed in the 2001 rewrite, wherein this provision was designated Rule 3.851 (d)(3). In lieu of the italicized words, this Court inserted "initial motion for postconviction relief filed under this rule."

[9]Certainly, the provision making Rule 3.851, effective January 1, 1994, applicable only to individuals whose sentences became final after the effective date, reflected a concern by this Court that 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).

Mann v. Moore, 794 So. 2d 595 (Fla. 2001).[10]

It is Mr. Breedlove's position that the rewritten Rule 3.851 (d)(3) cannot apply to him given that the issue presented in his habeas petition is not cognizable in a Rule 3.851 motion. As noted in the previous section, the nature of the claim raised by Mr. Breedlove would not be appropriately raised in a Rule 3.851 motion even were Mr. Breedlove filing his first motion for postconviction relief and state habeas petition. *Foster*, 810 So. 2d at 916 (a "postconviction motion is not the proper vehicle to challenge a decision of this Court. Rule 3.850 motions are a vehicle provided to challenge collateral issues *related to the trial court proceedings, not appellate decisions"*) (emphasis added).[11] The right to present a challenge to this Court's resolution of a constitutional issue was a right extended to Mr. Breedlove at the time his conviction and sentence became final. It was a right that this Court did not tamper with when Rule 3.851 was adopted effective January 1, 1994, because the rule on its face did not apply to Mr. Breedlove. It is a right that could not simply have been extinguished on October 1, 2001, as to death-

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[10]It should be noted that Rule 3.850 does not contain a parallel provision requiring a habeas petition challenging the effectiveness of appellate counsel in a non-capital case to be filed simultaneously with the initial brief in a Rule 3.850 appeal.

[11]This Court's decision in *Foster*, a capital case, was after Rule 3.851 was rewritten to be effective October 1, 2001.

sentenced individuals under Rule 3.851, but not as to incarcerated individuals not under a sentence of death. *Evitts v. Lucey*, *supra; Bounds v. Smith, supra*.[12]

Mr. Breedlove has challenged this Court's resolution of his Confrontation Clause challenge at his guilt and penalty phases addressed on both direct appeal and in the prior state habeas decision. Mr. Breedlove could not, consistent with this Court's jurisprudence, present in a Rule 3.851 a challenge to this Court's appellate decision rejecting his Confrontation Clause issues. The circuit court would properly reject consideration of such a challenge to this Court's appellate decision. *Foster, supra*; *Knight*, 394 So. 2d at 999 (approving denial by Rule 3.850 court of challenge to matter addressed to propriety of appeal process, not trial process). Rule 3.851 (d)(3) clearly was meant to require the filing of the initial habeas petition raising ineffective assistance of appellate counsel while the appeal of the denial of Rule 3.851 relief was pending. This was obviously done to permit the Court to achieve judicial economy and consider all of the death-sentenced inmates known issues at one time.[13] Given that Mr. Breedlove's habeas petition raising

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[12]When the Court entertained Mr. Breedlove's habeas petition premised on *Ring*, the Court gave no indication that Mr. Breedlove's right to petition this Court for habeas corpus relief had been terminated on October 1, 2001.

[13]We know this because the provision was first adopted in 1994 by this Court, and the provision was used to stop piecemeal consideration of the initial Rule 3.851 appeal and the initial habeas corpus petition.

appellate ineffective assistance of counsel was litigated and decided long ago, Rule 3.851 (d)(3) has no application to him.

As evidenced by the Court's longstanding jurisprudence, and notably by the position taken by the State and adopted by this Court in cases such as *Sireci*, *Shere*, and *Foster*, it is clear that Rule 3.850/3.851 would not be the appropriate vehicle for Mr. Breedlove to challenge this Court's decision on direct appeal and in the prior state habeas petition on the issues related to the decision in *Crawford*. Thus, Mr. Breedlove submits that the instant habeas petition should not be dismissed for failure to comply with Rule 3.851 (d)(3).[14] As this Court recently indicated in *Baker v. State*, habeas corpus is the appropriate remedy in those circumstances "where the original sentencing court would not have jurisdiction to grant the collateral postconviction relief requested even if the requirements of the rule had been timely met." *Baker*, 2004 Fla. LEXIS 314 at *15. In light of *Baker* and the principles discussed above, to require Mr. Breedlove to file a Rule 3.851 motion raising a claim over which the trial court has no power or jurisdiction to

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[14]Rule 3.851 (d)(3) cannot be read so literally as to provide a capital defendant with one opportunity to file any petition over which this Court has original jurisdiction , including a habeas corpus petition, and limiting that one opportunity to the time when the Initial Brief on appeal is filed. Such a literal reading would lead to absurd results, such as precluding a capital defendant from filing, for example, a writ of mandamus or prohibition in this Court during the pendency of the Rule 3.850 litigation in the circuit court.

entertain and correct would be tantamount to a suspension of the writ of habeas corpus.[15]

For all the above reasons, Mr. Breedlove also submits that the instant habeas petition should not be dismissed for failure to comply with Rule 3.851 (d)(2)(B), which provides that no motion "shall be filed or considered pursuant to this rule if filed beyond the time limitation provided in subdivision of (d)(1)[[16]] unless it alleges that . . . the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." This provision on its face would appear to apply only to motions to vacate filed in circuit court. Because Rule 3.850/3.851 is not the appropriate vehicle to raise the claim being raised by Mr. Breedlove, Rule 3.851 (d)(2)(B) simply has no bearing on this case given its present procedural posture. As noted earlier, even if Mr. Breedlove was in the procedural posture of an initial Rule 3.851 motion, the *Crawford* claim he has now presented would not be

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[15]Because Rule 3.850 does not contain a parallel provision, non-capital prisoners would still be able to petition for relief in light of *Crawford* where an appellate court rejected a direct appeal confrontation clause challenge to the conviction now determined to be meritorious under *Crawford*. As noted later, this results in an equal protection violation as to Mr. Breedlove.

[16]The time provision provided in subdivision (d)(1) is one-year after the judgment and sentence become final.

appropriately raised in a Rule 3.851 motion as it seeks to challenge this Court's prior decisions in his case addressing the Confrontation Clause issues and to have this Court address whether *Crawford* can be applied to his case.

3. Dismissal for failure to comply with Rule 3.851 (d)(2)(B) and/or Rule 3.851 (d)(3) would result in an unconstitutional suspension of the writ of habeas corpus, and/or a violation of due process and equal protection.

Given the fact that the circuit could would have no authority to correct the error that Mr. Breedlove contends has now been established in this Court's prior dispositions of his Confrontation Claims, dismissing this cause for failing to comply with Rule 3.851 (d)(3) and (d)(2)(B) would be tantamount to not only an impermissible Catch-22 but an unconstitutional suspension of the writ of habeas corpus. Art. I, §13, of the Florida Constitution provides that the right to relief through habeas corpus must be "grantable of right, freely and without cost." This right to habeas corpus is a "basic guarantee of Florida law." *Haag v. State*, 591 So. 2d 614, 616 (Fla. 1992). As this Court has explained:

> Indeed, both simplicity and fairness are equally promoted by the right to habeas corpus relief that emanates from the Florida Constitution and has been partially embodied within Rule 3.850. Art. I, §13, Fla. Const.; *[State v.] Bolyea*, 520 So. 2d at 563. 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

technicality.

Haag, 591 So. 2d at 616.

Moreover, dismissing this cause for failure to comply with Rule 3.851 (d)(3) or (d)(2)(B) would violate due process and equal protection. In postconviction proceedings, this Court has ensured that "the defendant has meaningful access to the judicial process." *State ex rel. Butterworth v. Kenny*, 714 So. 2d 404, 408 (Fla. 1998). *Accord Allen v. Butterworth*, 756 So. 2d 52 (Fla. 2000). Because Rule 3.851 is not the appropriate mechanism to challenge prior decisions of this Court, dismissal of this case under these circumstances would violate due process by depriving Mr. Breedlove of meaningful access to the judicial process.

Finally, as noted above, Rule 3.850 does not contain a provision similar to that set forth in Rule 3.851 (d)(3). Because a non-capital defendant would have the opportunity to file a writ of habeas corpus in light of *Crawford* without concern over Rule 3.851 (d)(3), which applies solely to capital defendants, application of Rule 3.851 (d)(3) to Mr. Breedlove would violate equal protection. *Allen*, 756 So. 2d at 52 (striking Death Penalty Reform Act in part on equal protection grounds because "the successive motion standard applies only to capital prisoners in violation of the principles of equal protection).

In sum, Mr. Breedlove submits that his habeas petition should not be

dismissed but rather entertained on its merits. In the event that the Court determines that habeas corpus is not the appropriate vehicle, however, this Court would also have jurisdiction over this case under the Court's All Writs jurisdiction and thus, in light of the Court's "constitutional responsibility to refrain from dismissing a cause solely because an improper remedy has been sought," *Spaziano v. State*, 660 So. 2d 1363, 1365 (Fla. 1995), the case should still proceed before this Court. Should the Court alter its longstanding history of accepting jurisdiction via habeas corpus when a defendant seeks to challenge a prior decision of this Court, then the Court should nonetheless entertain Mr. Breedlove's habeas petition and put other defendants on notice that, in the future, any claims based on *Crawford* should be filed in a Rule 3.850 motion. *See Hall v. State*, 541 So. 2d 1125, 1128 (Fla. 1989); *Jackson v. Dugger*, 547 So. 2d 1197, 1199 n.2 (Fla. 1989).[17] In the alternative, if the Court determines that jurisdiction does rest with the circuit court, then Mr. Breedlove requests that the Court transfer the petition to the circuit court with directions that it be treated as a Rule 3.851 motion. *See*

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[17]In so doing, however, the Court would have to overrule cases such as *Foster*. Otherwise, circuit courts will erroneously dismiss or deny *Crawford* claims on the basis of *Foster* and this Court will have to reverse and remand for the circuit court to entertain the merits of the claim before this Court can review the circuit court's legal resolution of whether this Court's direct appeal opinion was erroneous in light of *Crawford*.

Spaziano, supra.

CONCLUSION

Based on the foregoing arguments and authorities, Mr. Breedlove submits that his petition for writ of habeas corpus should not be dismissed, but rather considered and addressed on the merits. In the alternative, to the extent that this Court rejects precedent and hold that the circuit court has jurisdiction to hear a claim that this Court erred in rejecting Mr. Breedlove's Confrontation Clause claims on direct appeal and in the prior state habeas decision, he asks the Court remand jurisdiction to the circuit court for a determination on the merits of Mr. Breedlove's claims.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to Sandra Jaggard, Assistant Attorney General, Office of the Attorney General, 444 Brickell Avenue, 9th Floor, Miami, Florida, 33131, this 19th day of May, 2004.

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CERTIFICATE OF COMPLIANCE

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

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