**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**

---

# REPLY BRIEF OF APPELLANT

---

**TODD G. SCHER**
**SPECIAL ASSISTANT CCRC-SOUTH**
**Florida Bar No. 0899641**
**LAW OFFICE OF TODD G. SCHER, P.L.**
**5600 COLLINS AVENUE #15-B**
**MIAMI BEACH, FL 33140**
**(305) 861-9252**

**CCRC-SOUTH**
**101 N.E. 3D AVENUE, SUITE 400**
**FORT LAUDERDALE, FL 33301**
**(954) 713-1284**

**COUNSEL FOR PETITIONER**

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## ARGUMENT IN REPLY

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). The briefing in this case was ordered *sua sponte* by the Court, which 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 brief, the State offers a potpourri of arguments which, at their essence, advance the notion that Mr. Breedlove has no vehicle whatsoever to raise the issues he has in his petition for a writ of habeas corpus. The State's unyielding position is contrary to law, common sense, and history of capital litigation in this Court, and must therefore be rejected.

The State argues that, under the current version of Rule 3.851, in effect since 2001, and *Mann v. Moore*, 794 So. 2d 595 (Fla. 2001), Mr. Breedlove's habeas petition must be dismissed (Answer Brief at 12-14). According to the State, because 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," Mr. Breedlove's "successive habeas petition must be dismissed as unauthorized" because the rule "makes no provision for successive habeas corpus petitions" (Answer Brief at 14)

(emphasis in original). However, 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[1] 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 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. The Court's practice is to then 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. Breedlove's case arises.

The bottom line inherent in the State's argument is that Mr. Breedlove has no mechanism whatsoever to challenge this Court's prior decision on direct appeal with respect to his Confrontation Clause issues.[2] On the one hand, the State argues

---

[1]Or, in the words of the State, a "schedule for filing petitions for writ of habeas corpus" (Answer Brief at 13).

[2]In an attempt to distance itself from the unrefuted line of cases indicating 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 disingenuously suggests that Mr. Breedlove's claims "all relate to issues arising out

that Rule 3.851 (d)(3) does not allow for successive habeas petitions to be filed. As noted above, Rule 3.851 (d)(3) does not expressly prohibit a successive habeas petition; it simply sets forth a "schedule" by which a defendant, in initial postconviction litigation, raises claims to this Court in a writ of habeas corpus. On the other hand, the State argues that Mr. Breedlove may not file an "out-of-time, successive motion for post conviction relief in the circuit court" 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" (Answer Brief at 17-18). Moreover, the State posits that the issue 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" (Answer Brief at 18 n.4).

These arguments effectively leave a defendant such as Mr. Breedlove without a legal forum in which to raise a *Crawford* claim in a timely fashion. In other

---

of, and errors allegedly occurring during, the original trial" (Answer Brief at 16). The State chooses to ignore the fact that these errors were raised on direct appeal and it is *this Court's* analysis on direct appeal that Mr. Breedlove is seeking to challenge in light of *Crawford*. Under this Court's jurisprudence, a lower court in a Rule 3.850 proceeding would be without authority to overrule this Court's assessment of Mr. Breedlove's direct appeal Confrontation Clause claims. *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").

words, according to the obstinate view espoused by the State, Mr. Breedlove 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 *Crawford* has been held to apply retroactively. The State fails to explain how Mr. Breedlove is to ask a court is to address *Crawford* and its retroactive application if he is prohibited from filing either a state habeas petition or a Rule 3.851 motion at this time.[3] Courts do not *sua sponte* issue decisions regarding retroactive application of new decisions issued by the United States Supreme Court; nor does the Supreme Court, when it decides a case, determine at that time the retroactivity of the decision. Rather, retroactivity of a particular decision is litigated by a party alleging that the particular decision is retroactive. However, the State's position in Mr. Breedlove's case is that he may not even seek to raise his *Crawford* claim and argue for its retroactive application to him unless and until the issue of *Crawford*'s retroactivity is addressed by this Court. This is the epitome of a Catch-22 which cannot be countenanced. As noted in Mr. Breedlove's Initial Brief, no such Catch-22 would exist in a non-capital case because Rule 3.850 does not contain a provision similar to Rule 3.851

[3]Certainly, one cannot imagine that it is the State's position that Mr. Breedlove's sentence should be carried out while the issue of *Crawford*'s retroactivity remains for some other defendant to litigate, given the unseemly specter of a situation were Mr. Breedlove's sentence to be carried out and a court were to later conclude that *Crawford* was indeed retroactive.

(d)(3). *See* Initial Brief at 6-7; 33-34. As such, reading the rule in the manner suggested 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 these rights.[4]

The State ignores the extensive discussion in Mr. Breedlove's Initial Brief as to the longstanding historical basis for this Court's ability to entertain the writ at issue, and relies solely on what is calls the "new approach" of applying "severe limits" on successive proceedings (Answer Brief at 17) (arguing that Mr. Breedlove's petition should be dismissed "regardless of past history"). History, however, cannot be ignored, and this Court cannot arbitrarily adopt a "new

---

[4]The State's attempt to analogize this situation to the federal habeas corpus statute's restrictions on successive habeas petitions is unavailing (Answer Brief at 15 n.2). 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). As the Court noted in *Allen*, "there are significant distinctions between the balance of power in the federal system and the balance of power in this state." *Id*. at 63. Moreover, the Court observed that 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 extraordinary circumstances." *Id*. at 64 n.5. Ironically, the State's position on Mr. Breedlove's attempt to seek habeas corpus review of his *Crawford* issue is even more restrictive than the provisions of the Death Penalty Reform Act that this Court struck down on constitutional grounds in *Allen*.

approach" which applies solely to Mr. Breedlove and forecloses his constitutional right to access to courts, due process, and equal protection. For example, notwithstanding the State's present arguments, Mr. Breedlove was permitted to file, and achieve a merits ruling, on a state habeas petition filed in light of *Ring v. Arizona*, 536 U.S. 584 (2002). Mr. Breedlove filed this *Ring* habeas *subsequent* to this Court's decision in *Mann* and the enactment of the new Rule 3.851 (d)(3) yet this Court entertained the petition on its merits.[5] This alone establishes the inherent fallacy of the State's position as to the instant habeas petition.[6] If the

---

[5]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.

[6]Mr. Breedlove was not alone in filing a successive habeas petition in light of *Ring*, and was not alone in receiving a merits ruling. *See, e.g. 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). Curiously, in some of these cases, the Court did order a response from the State. For example, in *Diaz* and *Valle*, a response was ordered and the State raised an argument that those petitions were barred pursuant to Rule 3.851 (d)(3) and *Mann v. Moore*. *See Diaz v. Crosby*, No. SC 03-234; *Valle v. Crosby*, No. SC03-298. This Court rejected the State's arguments and reached the merits of the claims in its decision denying relief to Mr. Diaz and Mr. Valle. In *Chandler*, the State was ordered to file a response but did *not* assert any procedural bar under Rule 3.850 (d)(3) or *Mann v. Moore*. *See Chandler v. Moore*, No. SC02-1901. In *Haliburton*, the State was ordered to file a response in which it asserted a procedural bar not in light of Rule 3.850 (d)(3) or *Mann v. Moore*, but because the Sixth Amendment issue had allegedly not been raised on direct appeal. *See Haliburton v. Crosby*, No. SC03-1108. These inconsistent assertions of

State's position is to be accepted, then this Court was without jurisdiction to entertain all of the *Ring* state habeas petitions it has addressed on the merits since 2002.

The State glosses over this Court's longstanding history of sanctioning habeas corpus as a vehicle to challenge prior decisions of this Court, noting, as did Mr. Breedlove, that on occasion this Court has acknowledged "practical difficulties" with this approach (Answer Brief at 17). Those situations, however, involved the emergence of new case law which required courts to engage in a factual assessment; thus, the Court *prospectively* ruled that such cases should be brought 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).[7] While the State argues that this historical practice has been altered by the "new approach"

---

procedural bar highlight the arbitrary nature of procedural bars and establish that such a bar in the instant case would be whimsical. There is no difference between the authority of this Court to address the merits of the above-listed *Ring* habeas petitions–including Mr. Breedlove's prior *Ring* habeas–and the authority of this Court to address Mr. Breedlove's *Crawford* habeas.

[7]Here, the State does not even allow that Mr. Breedlove should have filed a Rule 3.851 motion in order to raise his *Crawford* claims. Rather, in the State's view, Mr. Breedlove would only be able to raise the issue if and when some court were to determine that *Crawford* is retroactive. In fact, Mr. Breedlove would not, in the State's view, be able to even litigate the issue of *Crawford*'s retroactivity in his case (Answer Brief at 18 n.4).

embodied in Rule 3.851 (d)(3) and *Mann v. Moore* (Answer Brief at 17), this Court's long line of cases in which it accepted jurisdiction over successive habeas petitions in light of *Ring* (all of which were post-new Rule 3.851 (d)(3) and *Mann v. Moore*), *see supra* n.6, establishes otherwise.

Other than simply stating that habeas corpus relief is subject to "reasonable limitations" (Answer Brief at 15), Respondent does not address at all Mr. Breedlove's contentions that the view espoused by the State would result in a total absence of a forum in which to raise his claims. The State also does not address the unquestionable Equal Protection problems associated with its view of Rule 3.851 (d)(3), namely, that non-capital defendants are not subject to a comparable restriction in Rule 3.850 whereas capital defendants like Mr. Breedlove are. This is the epitome of an equal protection violation.

## 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 29th day of June, 2004.

TODD G. SCHER
Florida Bar No. 0899641
Special Assistant CCRC
Law Office of Todd G. Scher, P.L.
5600 Collins Avenue, #15-B
Miami Beach, FL 33140
Tel: 305-861-9252
Fax: 305-861-9253

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL-
SOUTH
101 NE 3rd Ave., Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Attorney for Mr. Breedlove

## CERTIFICATE OF COMPLIANCE

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

TODD G. SCHER
Attorney for Mr. Breedlove