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3D19-1088

IN THE

**SUPREME COURT OF THE UNITED STATES**

JOSEPH S. PAUL, - PETITIONER,

VS.

STATE OF FLORIDA, - RESPONDENT(S).

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE FLORIDA THIRD DISTRICT COURT OF APPEAL

**PETITION FOR WRIT OF CERTIORARI**

Joseph S. Paul  
Everglades Correctional Institution  
1599 SW 187th Avenue  
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305-228-2000

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SUPREME COURT, U.S.

**QUESTIONS ON PROCEDURAL ERRORS  
PRESENTED FOR REVIEW**

**QUESTION ONE**

**WHETHER THE ORDER ENTERED ON JULY 24, 2019, BY THE THREE JUDGE PANEL, PER CURIAL AFFIRMED THE TRIAL COURT'S ERRONEOUS RULING CREATED A CONFLICT WITH OTHER COURTS PERTAINING TO THE CLAIMS PRESENTED FOR REVIEW IN THE APPELLANT'S 3.850 MOTION?**

**QUESTION TWO**

**WHETHER THE TRIAL COURT COMMITTED PROCEDURAL ERRORS WHEN IT SUMMARILY DENIED A PROPERLY FILED AND SUFFICIENTLY PLED 3.850 MOTION FOR POST CONVICTION RELIEF FILED ON JULY 31, 1991 WITHOUT ATTACHMENT OF ANY PORTION OF THE RECORD THAT CONCLUSIVELY SHOWS THE MOVANT WAS ENTITLED TO NO RELIEF?**

**QUESTION THREE**

**WHETHER THE APPELLANT WAS PROCEDURALLY PREJUDICED WHEN THE TRIAL COURT FAILED TO ADDRESS THE MERITS OF THE CLAIMS RAISED IN HIS 3.850 MOTION FOR POST CONVICTION RELIEF FILED ON JANUARY 14, 2019, THUS DEPRIVED HIM OF CONSTITUTIONAL RIGHTS OF DUE PROCESS WITHOUT ATTACHMENT OF THE RECORD?**

**QUESTION FOUR**

**WHETHER THE APPELLANT WAS PROCEDURALLY PREJUDICED AND SUBSTANTIALLY, BECAUSE OF PROSECUTORIAL AND POLICE MISCONDUCT FOR WILLFULLY WITHHELD EXONERATORY EVIDENCE FAVORABLE TO THE DEFENSE AFTER IT WAS LEGALLY REQUESTED BY THE DEFENSE COUNSEL?**

**QUESTION FIVE**

**WHETHER THE APPELLANT WAS DEPRIVED DUE PROCESS AND A FAIR TRIAL WHERE THE PROSECUTOR FAILED TO PROVE THE ESSENTIAL ELEMENT PERTAINING TO THE DATES OF THE ALLEGATIONS BEYOND A REASONABLE DOUBT AS REQUIRED FOR CONVICTION?**

**LIST OF PARTIES**

All parties appear in this caption of the case on the cover page.

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IN THE  
SUPREME COURT OF THE UNITED STATES  
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

[ ] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix \_\_\_ to the petition and is

- [ ] reported at N/A; or,
- [ ] has been designated for publication but is not yet reported; or,
- [ ] is unpublished.

The opinion of the United States district court appears at Appendix \_\_\_ to the petition and is

- [ ] reported at N/A; or,
- [ ] has been designated for publication but is not yet reported; or,
- [ ] is unpublished.

[ X ] For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A1 / A2 to the petition and is

- [ ] reported at N/A; or,
- [ ] has been designated for publication but is not yet reported; or,
- [ ] is unpublished.

The opinion of the Trial Court in and for Miami-Dade appears at Appendix A3, B to the petition and is

- [ ] reported at N/A; or,
- [ ] has been designated for publication but is not yet reported; or,
- [X] is unpublished.

## JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was N/A.

No petition for rehearing was timely filed in my case.

A timely petition rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix \_\_\_\_.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on \_\_\_\_\_(date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

For cases from **state courts**:

The date on which the highest state court decided my case was July 24, 2019. A copy of that decision appears at Appendix A1.

A timely petition rehearing was thereafter denied on the following date: August 21, 2019, and a copy of the order denying rehearing appears at Appendix A2.

An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on \_\_\_\_\_(date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

U.S. Constitution Amend. XIV; Sec. 1...nor shall any State deprive any person of life, liberty, or property without due process of law; or deny to any person within its jurisdiction the equal protection of the law...;5<sup>th</sup> Amend.

U.S. Constitution Amend. Six guarantees to an accused effective assistance of counsel before and during trial.

Fla. Constitution Art. 1, Sec. 9:...no person shall be deprived of life, liberty, or property without due process of law, or be twice put in jeopardy for the same offense.

JUDICIAL NOTICE AND ADOPTION

The Appellant respectfully moves this Honorable U.S. Supreme Court to take judicial notice pursuant to Fla. Stat. Chapter 90.202(5)(b)(7)(11)(12), 190.203; Fla. R. App. P. 9.140(h)(i), that he is adopting his 3.850 Motion for Post Conviction Relief filed in the trial Court, reviewed by the lower tribunal and all its claims on January 14, 2019, for review on this Petition for Certiorari.

He believes that this petition is being filed in good faith and that this Honorable U.S. Supreme Court will reasonably find reversible errors in the lower Court's ruling with the specific legal and factual grounds presented thereto for that opinion.

## STATEMENT OF THE CASE

In this Petition for Certiorari, the Petitioner will be referred to as Appellant.  
The State of Florida as Respondent.

This Petition for Review on Certiorari is being filed in good faith in accordance with the U.S. Supreme Court's Rules 10-14, because of an existence of conflicts created by the lower Court with other Appellate Courts when it per curiam affirmed the trial Court's silent ruling. That, ruling by the three Judge panel not only created a conflict with other Courts but as well as with its own prior rulings, which gave rise to this Petitioner for Review on Certiorari being filed.

Where the petitioner establishes that such conflict does exist by the lower Court's per curiam affirmed and by virtue of this Honorable Court, It does not require anything less, but to resolve such conflicts as they existed in this case in order to promote confidence and public trust in the judicial system. It would constitute a mockery of justice should the Court ignore such gross miscarriage of justice perpetuated against the Appellant.

Any failure in resolving such conflicts would eviscerate the only force of this Honorable Court with the capability and the duty to address this issue as it has occurred in this case.

## SUMMARY OF THE ARGUMENT

After the Appellant filed his notice of appeal, he never received any notice from the lower Court. Instead on July 29, 2019 he received the Order per curiam affirm. (See attached Exhibit A1). In rendering this order, the panel may have overlooked the law of the case doctrine that holds a decision rendered in a former appeal of a case is binding in a later appeal as it applies in this case. The Appellant subsequently filed for an En Banc Rehearing on August 5, 2019, to no avail. (See attached Exhibit A2)

This Motion for Certiorari has ensued as a result of the panel's per curiam affirm the trial Court's procedural errors in summarily denying the Appellant's 3.850 Motion for Post Conviction Relief, without attachment of any portion of the record that conclusively refute the claims raised, failed to address the merits, nor elaborate on its rationale for the denial, expressly and directly conflicts with the opinion of the Court in *Smith v. State*, 719 So. 2d 1017 (Fla. 4<sup>th</sup> DCA 1998); Fla. R. Crim. P. 3.850(d).

Consequently, the claims remains unrefuted and should be accepted as truth by this Honorable Court and take the appropriate action in favor of the Appellant by reversing and remanding to the trial Court for evidentiary hearing or attachment of portions of the record showing that Appellant was not entitled to relief for ineffective assistance of counsel as required by due process.

On July 29, 1991, the Appellant timely and properly filed his 3.850 Motion for Post Conviction Relief pursuant to Fla. R. Crim. P. 3.850, claiming ineffective assistance of trial counsel and prosecutorial misconduct, clearly demonstrated prima facie ground for relief. On July 31, 1991, the Clerk of the Court received the petition and it was summarily denied on the exact same day without attachment of any portion of the record to conclusively shows that the petition was entitled to no relief. (See attached Exhibit A3).

The denial was in violation of the Appellant's Procedural Rights to Due Process in light of the adoption of Fla. R. Crim. P. 3.850(d),(f)(2); Fla. R. App. P. 9.141(2)(d). The Legislature had promulgated the above procedural laws that prescribed the steps for having a right of duty judicially enforced. Furthermore, the trial Court was obligated to follow the above established rules and principles for the protection and enforcement of the Appellant's rights to a fair hearing. Such power is vested upon the trial Court, but failed to comply with the due process standards of fairness and justice when it summarily denied the Appellant's 3.850 Motion for Post Conviction Relief.

Ever since, the Appellant, throughout the years has repeatedly informed the lower Court of the procedural errors committed by the trial Court when the original 3.850 Motion was filed. Instead of addressing the merits, each time the Appellant filed a Petition, the trial Court always denied the petition as being successive or

procedural barred or insufficient to avoid addressing the merits. (See attached Exhibits 1, 2, 3, 4, 5, 6, 7, 8).

Because the 3.850 Motion was timely filed and the merits of the issues were not properly addressed neither resolved by the Court, thus under the doctrine of equitable tolling, the Appellant was entitled to refile his 3.850 Motion until the issues are resolved on the merits. Consequently, on January 14, 2019, he filed the present 3.850 Motion currently on appeal, because the trial Court has also committed procedural errors when it summarily denied the Motion without addressing the merits nor any attachment of the record nor its rational for the denial. (See attached Exhibit B).

However, on a Motion for Rehearing filed on February 27, 2019, after receiving the denial order on February 19, 2019, in which Appellant requested that should the Court find no merits, the law requires that the record that refutes all the claims should be attached with the Court's ruling or should it find that the Motion is successive, the record shall also be attached showing the successiveness with the previous ruling on the merits including the Court's reason or rationale.

It was therefore unconscionable, an affront to the sense of justice for the trial Court to have neglected to do the above when it rendered the final order denying the Appellant's 3.850 Motion for Post Conviction Relief on April 29, 2019, as being insufficient, given the Appellant 30 days to appeal, a clear procedural error. (See attached Exhibit #8).

Therefore, the panel's per curiam ruling was contrary to "Stare Decisi Doctrine," under which a Court must follow earlier judicial decisions when the same point arise again in litigation. Thus in this case, it creates a conflict with the opinion of other Courts on this issue.

Consequently, a Review on Certiorari has became imperative in order to resolve such conflict with other sister Courts, created by the panel when it per curiam affirmed the lower tribunal's silent ruling. (See *Wilson v. Sellers*, U.S. Case No. 16-6855, April 17, 2018.

## **APPELLANT'S ARGUMENTS ON CONFLICT**

### **QUESTION ONE**

#### **WHETHER THE ORDER ENTERED ON JULY 24, 2019, BY THE THREE JUDGE PANEL, PER CURIAM AFFIRMED THE TRIAL COURT'S ERRONEOUS RULING CREATED A CONFLICT WITH OTHER COURTS PERTAINING TO THE CLAIMS PRESENTED FOR REVIEW IN THE APPELLANT'S 3.850 MOTION?**

The Due Process Clause of the 5<sup>th</sup> and 14<sup>th</sup> Amendments of the U.S. Constitution prohibit the government from unfairly or arbitrarily depriving a person of liberty...Such rights are so fundamentally important as to require compliance with due process standards of fairness and justice.

The Appellant was deprived of such rights when the panel may have misapprehended the law as it should have been applied in this case when it per curiam affirmed the trial Court's erroneous ruling.

As a matter of fact, the Appellant clearly elaborated in his Motion for Post Conviction Relief how he was a victim of a fundamental miscarriage of justice where the trial Court ignored the law that should have been applied. The Appellant also pointed out all the facts and laws that the panel has misapprehended in its review of the lower Court's ruling when it per curiam affirming the trial Court's silent ruling.

The panel has also overlooked the fact that the Appellant's claims were never addressed by the trial Court on its merits, therefore remain unresolved. A conflict is

therefore created where the panel ignored the “Stare Decisis Doctrine” for failure to follow prior precedent from earlier judicial decision on the same point as it applies in this case.

Wherefore, for the general welfare of the public or great public interest, a Review on Certiorari has become necessary in order to correct such gross miscarriage of justice as it occurred in this case. Because, it is a procedural error for the trial Court not to attached portion of the record when it summarily denied the Appellant’s 3.850 Motion.

**APPELLANT'S ARGUMENTS  
ON PROCEDURAL ERRORS**

**QUESTION TWO**

**WHETHER THE TRIAL COURT COMMITTED  
PROCEDURAL ERRORS WHEN IT SUMMARILY  
DENIED A PROPERLY FILED AND SUFFICIENTLY  
PLED 3.850 MOTION FOR POST CONVICTION  
RELIEF FILED ON JULY 31, 1991 WITHOUT  
ATTACHMENT OF ANY PORTION OF THE  
RECORD THAT CONCLUSIVELY SHOWS THE  
MOVANT WAS ENTITLED TO NO RELIEF?**

**PROCEDURAL ERROR  
ARGUMENT**

The Appellant on July 29, 1991, timely and properly filed his 3.850 Motion for Post Conviction Relief, clearly demonstrated *prima facie* grounds for relief. The trial court procedurally unconscionably with extreme unfairness summarily denied the Motion the same day it was received by the Clerk of Court on July 31, 1991, without attachment of any portion of the record to show that the Appellant was entitled to no relief. (See attached Exhibit A3)

The substantive unconscionability of the Court's unfairness is that, in spite of the undisputed facts that actually existed and presented in support of the Appellant's claims, the Court disregarded the following legislative facts that explain the rationality of the law to be applied that is essential to the issues at hand:

- 1. The Court failed to render a non final order allowing the Petitioner at least one opportunity of (60) days to amend the petition to correct any deficiency in violation of Fla. R. Crim. P. 3.850(f)(2); U.S. C. Amend. 6.**
- 2. The Court did not attach any portion of the record, showing that the Petitioner is entitled to no relief.**

- 3. The Court never ordered a show cause to the Respondent.**
- 4. The Court never ordered an evidentiary hearing in violation of Fla. Crim. P. 3.850(d), Fla. R. App. P. 9.141(2)(d).**
- 5. The Court never notified the Petitioner that he has 30 days to appeal that unjust ruling.**
- 6. The Court never stated or elaborated on the reason or its rationale in its order. (See attached Exhibit A3)**

Therefore, his 3.850 Motion was never properly pled nor disposed on the merits as required by the above enacted laws. The Court's procedural errors in denying the Motion, expressly and directly conflicted with prior opinion of the lower court, the 3<sup>rd</sup> District Court of Appeal in:

*Perez v. State, 746 So. 2d 521 (Fla. 3<sup>rd</sup> DCA 1999)*  
*Roth v. State, 479 So. 2d 848 (Fla. 3<sup>rd</sup> DCA 1985)*  
*Cueto v. State, 88 So. 3d 1064; 37 Fla. L. Weekly (Fla. App. 3<sup>rd</sup> DCA 2012)*

In *Foster v. State*, 993 So. 2d 97 (Fla. 1<sup>st</sup> DCA 2005) the Court held:

**“...It is reversible error for trial Judge to neglect to attach the relevant files to the order denying the Motion, as required by the rule.”**

Also in conflict with the following Courts:

*Spera v. State, 971 So. 2d 754 (Fla. 2007);*  
*Gallo v. State, No. 4 D14-3424, May 13, 2015;*  
*Nelson v. State, 875 So. 2d at 583 (Fla. 2004);*  
*Dries v. State, 899 So. 2d 489 (Fla. 2d DCA 2005);*  
*Lewis v. State, 51 So. 3d 618 (Fla. 1<sup>st</sup> DCA 2011);*  
*Pierre v. State, 973 So. 2d 647 (Fla. 5<sup>th</sup> DCA 2005).*

Since the alleged procedural errors appear on the face of the record, this U.S. Supreme Court is entitled to review the merits of the claims and the previous order of summary denial, because it conflicted the following:

***Hutchins v. State, 750 So. 2d 119 (Fla. 2<sup>nd</sup> DCA 1999);***  
***Williams v. State, 358 So. 2d 1165 (1978);***  
***Jacobs v. State, 880 So. 2d 548 (2004), No. SC02-107;***  
***Scott v. State, 658 So. 2d 558 (Fla. 1<sup>st</sup> DCA 1995);***  
***Ames v. State, 518 So. 2d 465 (Fla. 1<sup>st</sup> DCA 1988).***

Furthermore, when the trial court entered its order on July 31, 1991, it was improperly done in violation of the procedural rules of law, thus tolled the time, because the claims were not conclusively refuted by the record, were not properly addressed, nor disposed on the merits.

Thus, pursuant to the doctrine of equitable tolling, the Motion was timely filed and improperly denied, there remains, therefore, a gap for the Defendant to refile with a timely Post Conviction Motion. However, the trial court never provided the Appellant with an opportunity to fill that gap with a properly refilled Motion for Post Conviction Relief, before the deadline expired. Therefore, it would be grossly unfair and unjust to penalize the Appellant for the Court's procedural errors.

The Appellant, therefore had the right under Fla. R. Crim. P. 3.850(f) to file a successive 3.850 Motion for Post Conviction Relief, raising the same claim, to fill the gap after the deadline pursuant to the doctrine of equitable tolling.

Furthermore, the restriction against successive Motion on the same grounds is applied only when the grounds raised were previously adjudicated on their merits and not where the previous Motion was summarily denied. In this case,

Appellant's case was never adjudicated on the merits. (See attached Exhibit A3)(see *Ames v. State*, *supra*).

Consequently, on January 14, 2019, the Appellant filed the present extraordinary pleading currently on appeal, titled "Second or Successive 3.850 Motion for Post Conviction Relief, pursuant to Fla. R. Crim. P. 3.850(h)(2).

Upon receipt of the Motion a show cause was ordered, but the Respondent failed to address the merits of the claims, instead requested that the Appellant be sanctioned. (See attached Exhibit C).

The trial Court should have considered the merits of the claims raised in the Motion. In spite of the preponderance of clear and convincing evidence presented in the Motion that a manifest injustice has indeed occurred in this case, still the trial Court refused to address the merits of the claims. Thus, committed procedural errors when it summarily denied the Motion without attachments of that portion of the file and record necessary to accompany the order denying the Motion, in violation of Fla. R. Crim. P. 3.850(d); (f)(2), (h)(2). (See attached Exhibit B).

Such grossly unfair ruling expressly and directly conflicts with the opinion of the Court in *Ames v. State*, *supra*. (See attached Exhibit D).

Neither the trial Court ever attached evidence showing the successiveness with the previous ruling on the merits, nor any evidence that conclusively refute the claims on the merits, nor the Court's reasons or rationale.

Such grossly unfair ruling violated the Appellant's procedural due process rights, because the exact basis of the order denying the Motion was not clear nor ever stated, the case should be remanded to the trial Court for attachments, or for further proceedings on the merits, consistent with the applicable law.

After consideration of the unique procedural history of this case, this Honorable U.S. Supreme Court should conclude that good cause existed to allow the successive filing pursuant to Fla. R. Crim. P. 3.850(h)(2), and reverse the lower court's ruling.

In *Coleman v. State*, 128 So. 3d 193, 194 (Fla. 5<sup>th</sup> DCA 2013) the Court held:

**“...To prevent a manifest injustice and a denial of due process, post conviction relief may be afforded when a litigant raising a successive claim.” U.S.C. Amend. 14; *Thornton v. State*, 963 So. 2d 8004 (Fla. 3<sup>rd</sup> DA 2007).**

## **APPELLANT'S ARGUMENTS ON PROCEDURAL ERRORS**

### **QUESTION THREE**

**WHETHER THE APPELLANT WAS PROCEDURALLY PREJUDICED WHEN THE TRIAL COURT FAILED TO ADDRESS THE MERITS OF THE CLAIMS RAISED IN HIS 3.850 MOTION FOR POST CONVICTION RELIEF FILED ON JANUARY 14, 2019 THUS DEPRIVED HIM OF HIS CONSTITUTIONAL PROCEDURAL RIGHTS TO DUE PROCESS WITHOUT ATTACHMENT OF THE RECORD?**

### **PROCEDURAL ERROR ARGUMENT**

When the Appellant filed his second or successive 3.850 Motion for Post Conviction Relief in the trial court, it was because the original 3.850 when it was timely filed was never disposed of on the merits as required by procedural due process. Until this day, the issues remain unresolved nor refuted by the record.

The law makes it absolutely clear that:

**“A successive Motion raising the same grounds for relief can only be denied as an abuse of process if the prior determination was on the merits.” (See attached Exhibit D)**

The law further states:

**Fla. R. Crim. P. 3.850(f): In order to uphold a denial of a postconviction relief on that basis (successive motion), excerpts from the record demonstrating the successiveness of the motion must be attached to the order of denial.” (See *Smith v. State*, (supra)).**

When the trial Court erroneously denied the Appellant's 3.850 Motion, it failed to follow the above required procedures, thus making its ruling illegal, unconstitutional and should be voided.

Throughout the years the Appellant has repeatedly informed the Circuit Court and the lower Court of the fact that the Appellant's claims were never adjudicated on the merits, instead, the trial court denied relief, citing insufficient and the lower Court affirmed these erroneous rulings in per curiam decision without an opinion. (See attached Exhibit 1 through 8).

The Appellant now is respectfully requesting to this Honorable U.S. Supreme Court to direct the lower court to instruct the trial court to address the merits or attach portion of the record as required by procedural due process.

A review of the Appellant's second and successive 3.850 Motion will clearly demonstrate that he has been a victim of a fundamental miscarriage of justice. And, where there is such a "manifest injustice," it is the responsibility of the Court to correct such injustice as states in State v. McBride, 848 So.2d 287, 291-92 (Fla. 2003); Ranes v. State, 913 So.2d 742, 743 (Fla. 4<sup>th</sup> DCA 2005).

As demonstrated through the claims raised in his petition, the Appellant has been wrongly convicted or imprisoned in violation of his constitutional rights to due process.

When the trial court summarily denied the Petition without attachments of the record, neither stated its rationale, it violated the fundamental idea of justice

and fairness, the basic principle that underlies the judicial system of this country.

Thus, committed procedural errors that requires reversal and remand to the trial court for attachments of the record or conduct an evidentiary hearing.

## **APPELLANT'S ARGUMENTS ON PROCEDURAL ERRORS**

### **QUESTION FOUR**

**WHETHER THE APPELLANT WAS PROCEDURALLY PREJUDICED AND SUBSTANTIALLY, BECAUSE OF PROSECUTORIAL AND POLICE MISCONDUCT FOR WILLFULLY WITHHELD EXONERATORY EVIDENCE FAVORABLE TO THE DEFENSE AFTER IT WAS LEGALLY REQUESTED BY THE DEFENSE COUNSEL?**

### **PROCEDURAL ERROR ARGUMENT**

The appellant in his 3.850 Motion for Post Conviction Relief, issued 10, currently on appeal clearly elaborated how he was procedurally prejudiced in the context of discovery violations when the police and the prosecutor willfully withheld the taped recording evidence from defense lawyer.

The evidence has become material when the accusers contradicted the content of the police report. Therefore, Defendant's preparation or strategy would have been materially different had the violation not occurred. The Appellant has fully explained in his 3.850 Motion issue 10, how this violation affects defense trial preparedness.

Consequently, the error substantially prejudiced his case to a point whereas it affected the jury's verdict, because the jury would have had the opportunity to hear the real truth about the accusation.

The Appellant is now praising this Honorable U.S. Supreme Court to take judicial notice of the following laws that the police and the prosecutor have violated pertaining to this issue:

**Fla. R. Crim. P. 3.220(b)(1)(B) discovery obligation and 3.220(j) continuing duty to disclose. Fla. Rule of Court 4-3.8(c) "... The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence known to the prosecutor..." Fed. R. Crim. P. 12(b)(3).**

**In *Stipp v. State*, 371 So. 2d 712 (Fla. 4<sup>th</sup> DCA 1979), the Court was concerned with the breaches of Rule 3.220(a)(1)(vi) and basic fairness.**

In *Farrell v. State*, 317 So. 2d 142 (1975) the Court held:

**“...Suppression by the prosecutor of evidence favorable to an accused upon request violated due process, irrespective of the good or bad faith of the prosecution...acts forbidden by Fed. and State Constitutions.”**

These violations were substantial and undeniably presented in the Motion, where they had a negative effect on defense counsel's ability to properly prepare for trial. *Scipio v. State*, 867 So. 2d 427 (Fla. 5<sup>th</sup> DCA 2004); *State v. Evans*, 770 So. 2d 1174, 1182 (Fla. 2000). (See attached Exhibit E)

It is, therefore procedurally unconscionably, despite of the above dispositive fact that is so decisively indicative of the discovery violation in this case and for the Court to ignore these judicial facts, is **“beyond the pale.”**

The trial Court should have ordered an evidentiary hearing in order to determine to what extent these laws have been violated in this case. Instead, the Court committed procedural errors when it summarily denied the Appellant's

second or successive 3.850 Motion without stating its rationale for the denial, nor attached any portion of the record that conclusively refute the claims.

Without the Court's rationale for the denial, there is no way the lower Appellate Court could determine the true intent of the trial Judge. Therefore, the claims were not formally disposed of on the merits, thus remain unrefuted by the record. This Honorable U.S. Supreme Court should reverse the lower Court's rulings with the instruction to remand to the trial Court for attachments of the record or for an evidentiary hearing on the merits of the claims in the interest of equal justice.

## **APPELLANT'S ARGUMENTS ON PROCEDURAL ERRORS**

### **QUESTION FIVE**

**WHETHER THE APPELLANT WAS DENIED DUE  
PROCESS AND A FAIR TRIAL WHERE THE  
PROSECUTOR FAILED TO PROVE THE  
ESSENTIAL ELEMENT PERTAINING TO THE  
DATES OF THE ALLEGATION BEYOND A  
REASONABLE DOUBT AS REQUIRED FOR  
CONVICTION?**

### **ARGUMENT ON PROCEDURAL ERROR**

In the instant case, the Appellant was denied Due Process and a fair trial, because the prosecution did not prove the essential element of the charges pertaining to the date of the allegations beyond a reasonable doubt. The evidence presented through the testimony of the State's witnesses was insufficient to establish the dates of the allegation as required for conviction.

The jury charging document stated as follows:

**“...Before you can find the Defendant guilty, the State must prove that the crime alleged in Counts II and VI were committed between December 1, 1985 and July 11, 1986...”**

**“...The State must prove that the crimes alleged in Counts I, IV, V, VII were committed between March 1<sup>st</sup>, 1986 and July 11, 1986.” (Trial T. Pg. 602)**

On direct examination, the following occurred: Date concerning R.L. (Counts II and VI)

**Q. ...From Christmas last year until July of 86, did you come to visit during that time?**

**A: No**

**Q: I want you to tell these people what happened with Sergo, Okay?**

**A: I don't remember the date.**

**Q: It was a long time ago wasn't it?**

**A: Yes (Trial T. Pg. 302)**

These answers did not prove between December 1985 and July 11, 1986.

On direct examination concerning the offense date on R.P. (Counts IV, V, VII):

By the prosecutor:

**"...Over a year ago, lets go back to 1986.**

**Q: Can you tell these people exactly when it happened?**

**A: I don't remember. (Trial T. Pg. 194-198)**

This answer did not prove between March 1<sup>st</sup>, 1986 and July 11, 1986.

Date concerning S.L. by Ms. Rifkin (Count I):

**Q: How long after it happened did you tell?**

**A: I don't remember.**

**Q: How old were you when all this happened?**

**A: I don't know, I guess about nine or ten. (Trial T. Pg. 264, 265).**

To be noted S.L. was born on October 1<sup>st</sup> 1975, therefore her testimony placed the date outside the bill of particular and did not prove between March 1<sup>st</sup>, 1986 and July 11, 1986. And, the State doctor stated that she could not tell when these things occurred. (Trial T. Pg. 415).

Furthermore, no adult parents were ever testified concerning when these things occurred. Therefore, no rational trier of facts viewing the above answers in

light most favorable to the prosecution would have found the essential element of the alleged crime pertaining to any of the above dates were ever proven beyond a reasonable doubt.

As it can be seen in light of the holdings in *Gisi v. State*, and *K.E.A. v. State*, the Appellant should have been exonerated of all the charges. The holdings in *Gisi v. State*, 909 So. 2d 531 (Fla. 2d DCA 2005) states:

**“The State has specifically alleged certain dates in a statement of particulars, and Defendant was entitled to an acquittal when the evidence failed to establish that the offense occurred on the date specified.”**

The lower Court own holdings in *K.E.A. v. State*, 802 So. 2d 410, 412 (Fla. 3<sup>rd</sup> DCA 2001) states the following:

**“...Because the police admitted that he did not remember. Judgment was reversed.”**

Also in conflict with the following Courts:

*Fiore v. White*, 531 U.S. 225, 228-29 (2001)  
*U.S. v. Caruci*, 364 F. 3d 339, 343 (1<sup>st</sup> Cir. 2004)  
*Clay v. State*, 595 So. 2d 1052, 1053 (Fla. 4<sup>th</sup> DCA 1992)  
U.S.C. Amend VI, XIV Fla. Const.  
Art. 1, See 9, 16 (1968); Fed. R. Crim. P. 12.1; Fla. R. Crim. P. 3.6(1)  
*Miller v. State*, 764 So. 2d 640 (Fla. 1<sup>st</sup> DCA 2000)

The above indicates that the Appellant was denied his procedural right to due process and a fair trial when trial Judge adjudicated him guilty in the absence of the sufficiency of the evidence.

This fundamental error was further amplified when the trial Court declined to review this issue when summarily denied the Appellant’s 3.850 Motion currently

on appeal. The procedural error needs to be corrected by this Honorable U.S. Supreme Court, because the trial Court failed to attach portions of the record, nor state its rationale for the denial.

Such erroneous ruling conflicted with the lower Court own prior holding in *K.E.A. v. State*, supra and should be reversed and remanded for attachments or conduct an evidentiary hearing as required by the Fla. R. Crim. P. 3.850(d).

#### **REASONS FOR GRANTING THE PETITION**

Because the Appellant has been a victim of a fundamental miscarriage of justice that is apparent on the face of the record.

Most importantly, the lower Courts have overlooked prior precedent from its own Court rulings that should have been applied in this case conflicted with its own prior decision as well as other Court's. The lower Court have also misinterpreted in their reasoning the evidence, law and the facts presented to deny relief, rather applying the correct laws and statutes in this case as required by the Constitution.

Furthermore, such per curiam affirmed without an opinion provides no basis for the U.S. Supreme Court to determine the lower Court's rationale when it affirmed the trial Court's summarily denial without any attachments of the record, a silent ruling.

Therefore, the lower Court's per curiam affirmed is virtually meaningless and does not offer any real solution to the conflict created by the trial Court,

instead it created additional conflict with its own prior decisions. Affirming a silent ruling is equivalent to affirming nothing from the trial Court. What a paradox!

## **CONCLUSION**

As it can be seen through the above supporting facts and authorities, the Appellant was indeed a victim of a fundamental miscarriage of justice. He was procedurally prejudiced when the trial Judge summarily denied on July 31, 1991, the Appellant's original 3.850 timely filed Motion.

The Court then departed from the essential requirement of the law when it failed to render a non final order to provide a time frame within which to refile the Motion with any type of insufficiency remedied. The Court also failed to attach portions of the record showing that the Appellant was entitled to no relief. The Court failed to state its rationale for the denial. The Court failed to notify the Appellant that he has 30 days to appeal the adverse ruling.

Thus, the claims were never formally nor legally disposed of on the merits. Consequently, the two (2) years filing period provided by the Fla. R. Crim. P. 3.850 (b) had been tolled, making the Appellant entitled to equitable tolling.

In *Brigham v. State*, 950 So. 2d 1274 (Fla. 2d DCA 2007) the Court held:

**“Insufficient motions should be denied without prejudiced to refile a sufficient amended motion within an appropriate time period set forth in the order before summary denial can be entertained.”**

The trial Court therefore committed procedural error when it summarily denied the appellant second or successive 3.850 Motion on April 29, 2019, in a silent ruling. It is therefore unclear of the Court's true intention.

The trial Court also committed procedural error when it failed to attach portion of the record, also failed to state its rationale for the denial. This Honorable Court should therefore reverse the lower Court's erroneous ruling and remand for attachment of the record or conduct an evidentiary hearing or any other relief that this Honorable Court deemed just and proper be granted.

Done this 2nd day of October, 2019.

Respectfully submitted,

Joseph S. Paul  
Joseph Paul #406786

**PROOF OF SERVICE**

I, Joseph S. Paul, pro se, do swear or declare that on this 2nd day of October, 2019, as required by Supreme Court Rule 29, I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, THE ATTACHED APPENDICES, AND THE PETITION FOR WRIT OF CERTIORARI to the Office of the Attorney General at Sun Trust International Center, 1 S.E. 3<sup>rd</sup> Avenue, Suite 900, Miami, Florida 33131 by depositing an envelope containing the above documents properly addressed in the hands of prison officials for delivery within 3 calendar days by the United States Postal Service.