PROVIDED TO TOMOKA CORRECTIONAL INSTITUTION ON 11-7-23 FOR MAILING BY ICD WG.

NO: 23-6254

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM GRAVES
PETITIONER

VS.

STATE OF FLORIDA
RESPONDENT

PETITION FOR WRIT OF CERTIORARI
FROM FLORIDA SUPREME COURT
DENYING PETITION FOR WRIT OF PROHIBITION

ORIGINAL

PETITIONER PRO SE
WILLIAM GRAVES, DC# 113141
TOMOKA CORRECTIONAL INSTITUTION
3950 TIGER BAY RD.
DAYTONA BEACH, FL. 32124.

FEDERAL QUESTION PRESENTED

WHETHER THE STATE OF FLORIDA HAS CREATED RULES OF CRIMINAL AND APPELLATE PROCEDURE THAT ARBITRARILY AND UNREASONABLY ENCROACHES UPON THE PERSONAL RIGHTS AND LIBERTIES OF PRO SE LITIGANTS AND RUNS AFOUL OF THE CONSTITUTIONAL GUARANTEE TO ACCESS TO THE COURTS; SUBSTANTIVE DUE PROCESS OF LAW; AND EQUAL PROTECTION AS SECURED BY THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

LIST OF PARTIES / CORPORATE DISCLOSURE STATEMENT

United States Court **Rule 29.6** requires Petitioner to file a corporate Disclosure Statement listing all interested parties to the proceeding that do not appear in the caption on the cover page of this petition, A list of all parties to the proceeding in the court whose judgment is the subject of this Petition is as follows:

1. Burger, Justice, Fifth District Court of Appeal.
2. Canady, Justice, Florida Supreme Court.
3. Cohen, Justice, Fifth District Court of Appeal.
4. Couriel, Justice, Florida Supreme Court.
5. Edwards, Justice, Fifth District Court of Appeal.
6. Evander, Justice, Fifth District Court of Appeal.
7. Feigenbaum, Bryan, State Attorney.
8. Francis, Justice, Florida Supreme Court.
9. Grosshans, Justice, Florida Supreme Court.
10. Hutcheson, Michael, R. Trial Court Judge.
11. Koller, Pamela, J. Attorney General.
12. Purdy, James, Public Defender.
13. Sasso, Justice, Florida Supreme Court.
14. Sawaya, Justice, Fifth District Court of Appeal.
15. Torpy, Justice, Fifth District Court of Appeal.
16. Wallis, Justice, Fifth District Court of Appeal.

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STATUTE AND RULES

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 **N/A** to the Petition and is:

[ ] reported at _____; 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[ ] is unpublished.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 **N/A** to the Petition and is:

[ ] reported at _____; 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 (A)** to the Petition and is:

[ ] reported at _____; or,

[X] has been designated for Publication but is not yet reported; or,

[ ] is unpublished.

The Opinion of the Lower Court appears at Appendix **N/A** to the Petition and is

[ ] reported at _____; or,

[ ] has been designated for publication but is not yet reported; or,

[ ] is unpublished.

JURISDICTION

[ ] For cases from **Federal Courts**: **N/A**

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 for 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 (date) on (date) in Application No. **N/A**.

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

[X] **For Cases From State Courts**:

The date on which the highest state court decided my case was **July 19th 2023**.

A Copy of that Decision appears at **Appendix (A)**.

[ ] A timely petition for rehearing was thereafter denied on the following date:

and a copy of the order denying rehearing appears at Appendix **N/A.**

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

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

ARTICLE I. UNITED STATES CONSTITUTION

CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEACH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

ARTICLE XIV. UNITED STATES CONSTITUTION

NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAW.

FLORIDA RULE CRIMINAL PROCEDURE 3.850 (n) SANCTIONS

No motion may be filed pursuant to this rule unless it is filed in good faith and with a reasonable belief that it is timely, has potential merit, and does not duplicate previous motions that have been disposed of by the court.

(1) By signing a motion pursuant to this rule, the defendant certifies that: the defendant has read the motion or that it has been read to the defendant and that the defendant understands its content; the motion is filed in good faith and with a reasonable belief that it is timely filed, has potential merit, and does not duplicate previous motions that have been disposed of by the court; and, the facts contained in the motion are true and correct.

(2) The defendant shall either certify that the defendant can understand English or, if the defendant cannot understand English, that the defendant has had the motion translated completely into a language that the defendant understands. The motion shall contain the name and address of the person who translated the motion and that person shall certify that he or she provided an accurate and complete translation to the defendant. Failure to include this information and certification in a motion shall be grounds for the entry of an order dismissing the motion pursuant to subdivision (f)(1), (f)(2), or (f)(3).

(3) Conduct prohibited under this rule includes, but is not limited to, the following: the filing of frivolous or malicious claims; the filing of any motion in bad faith or with reckless disregard for the truth; the filing of an application for habeas corpus subject to dismissal pursuant to subdivision (m); the willful violation of any provision of this rule; and the abuse of the legal process or procedures governed by this rule.

The court, upon its own motion or on the motion of a party, may determine whether a motion has been filed in violation of this rule.

The court shall issue an order setting forth the facts indicating that the defendant has or may have engaged in prohibited conduct.

The order shall direct the defendant to show cause, within a reasonable time limit set by the court, why the court should not find that the defendant has engaged in prohibited conduct under this rule and impose an appropriate sanction.

Following the issuance of the order to show cause and the filing of any response by the defendant, and after such further hearing as the court may deem appropriate, **the court shall make a final determination of whether the defendant engaged in prohibited conduct under this subdivision.**

(4) If the court finds by the greater weight of the evidence that the defendant has engaged in prohibited conduct under this rule, the court may impose one or more sanctions, including:

(A) contempt as otherwise provided by law;

(B) assessing the costs of the proceeding against the defendant;

(C) dismissal with prejudice of the defendant's motion;

(D) prohibiting the filing of further pro se motions under this rule and directing the clerk of court to summarily reject any further pro se motion under this rule;

(E) requiring that any further motions under this rule be signed by a member in good standing of The Florida Bar, who shall certify that there is a good faith basis for each claim asserted in the motion; and/or

(F) if the defendant is a prisoner, a certified copy of the order be forwarded to the appropriate institution or facility for consideration of disciplinary action against the defendant, including forfeiture of gain time pursuant to Chapter 944, Florida Statutes.

(5) If the court determines there is probable cause to believe that a sworn motion contains a false statement of fact constituting perjury, the court may refer the matter to the state attorney.

FLORIDA RULE APPELLATE PROCEDURE 9.410 SANCTIONS

(a) Courts Motion: After 10 days notice, on its own motion, the court may impose sanctions for any violation of these rules, or for the filings of any proceeding, motion, brief, or other document that is frivolous or in bad faith, —such sanctions may include reprimand, contempt, striking of briefs, or pleadings, dismissal of proceedings, cost, attorneys fee's.

PROCEDURAL HISTORY

1). This Writ of Certiorari is premised upon the denial of Petitioners Writ of Prohibition by the Florida Supreme Court, which Order was rendered on July 19th. 2023. **See Exhibit (A) of Appendix. (Order)**

2). Petitioners Writ of Prohibition sought relief from what is known as a **(Spencer Order)** in the State of Florida issued by the Fifth District Court of Appeal prohibiting Petitioner from filing any further pro se Petitions or Appeals in that Court. **See Exhibit (B) of Appendix. (Spencer Orders)**

3). The purpose of seeking relief from the ***(Spencer Order's)*** was founded upon the basis that: **(1).** The Fifth District Court of Appeal had recently receded from prior precedent in which it relied to deny Petitioners Post Conviction Claim on: and **(2).** Under the dictates of a ***(Spencer Order)*** the Clerk of Court is prohibited from accepting any further filings submitted by a pro se litigant.

4). Thus, while Petitioner would be entitled to have the prior Post Conviction Appeal **[Reconsidered]** under Florida law based on this fact, and relief granted in his case from a natural life sentence, because Florida's Rule's of Court do not contain any Procedural Safe-Guards to protect against the arbitrary deprivation of a pro se litigants Right to Access the Courts in these and other similar instance(s), Petitioner will subsequently die in prison under a Rule of law found to be in violation of the Federal Constitution and this Courts controlling precedent warranting Certiorari review in the instant case.

STATEMENT OF THE CASE

5). On March 8th 2001, Petitioner was arrested in Volusia County Florida and charged by Information with: [Ct. I. Armed Robbery] **See Exhibit (C) of Appendix. (Information)**

6). On June 14th 2002, Petitioner proceeded to trial and was found guilty as charged. **See Exhibit (D) of Appendix. (Verdict Form)**

7). On August 5th 2002, Petitioner was Sentenced as a Prison Releasee Reoffender (PRR) to Natural Life in Prison. **See Exhibit (E) of Appendix. (Judgment & Sentence)**

8). Petitioners Direct Appeal was Affirmed by the Fifth District Court of Appeal on July 29th 2003. **See Graves v. State 852 So. 2d 252 (Fla. 5th DCA 2003)**

9). Petitioner filed a timely **Rule 3.850** post conviction motion, to which was likewise denied and affirmed by the District Court of Appeal on May 17th 2005. **See Graves v. State 905 So. 2d 146 (Fla. 5th DCA 2005)**

10). On May 22nd 2006; May 24th 2006; and July 18th 2006: Petitioner submitted numerous Request to the State Attorneys Office; Public Defenders Office and the Clerk of Court as to whether there had been any Plea Offers made in his case prior to proceeding to trial. **See Exhibit (F) of Appendix. (Records Request)**

11). On July 25th 2006, the State Attorney provided Petitioner with a Response stating that a **[3—4 Year Plea Offer]** was made by their office prior to trial, and that Trial Counsel had confirmed such, stating that it had been put on the record and rejected. **See Exhibit (G) of Appendix. (States Response)**

12). On August 22nd 2006, Petitioner filed a **Second Rule 3.850 Motion** based on **Newly Discovered Evidence**, alleging his Trial Counsel was Ineffective for failing to convey the States Plea Offer to him and Attached a **Sworn Affidavit** thereto in support thereof. **See Exhibit (H) of Appendix. (Motion)&(Affidavit)**

13). On October 12th 2006, the Trial Court entered an order denying the motion based on the contention that Petitioner failed to demonstrate **due diligence**, in relation to this **Newly Discovered Evidence** claim. **See Exhibit (I) of Appendix (Court Order)**

14). Petitioner timely Appealed the Trial Courts denial of his **Newly Discovered Evidence Motion** to the Fifth DCA, resulting in **Case No: 5D06-3728**, to which Petitioner filed an **Initial Brief** in support thereof. **See Exhibit (J) of Appendix. (Brief)**

13). Consequently however, On December 26th 2006, The Fifth DCA Affirmed Petitioners post conviction Appeal. **See Graves v. State 945 So. 2d 522 (Fla. 5th DCA 2006)**

16). On January 12th 2007, Petitioner filed a **Third Rule 3.850 Motion** asserting the **[Same Claim of Newly Discovered Evidence]** based on Trial Counsels failure to convey the **[3—4 Year Plea Offer]** made by the State and asserted a specific factual basis explaining his reason for seeking Public Records, in relation to whether any plea offers were made in his case and the cause of the delay in doing so. **See Exhibit (K) of Appendix. (Motion) & (Affidavit)**

17). However, on February 16th 2007, The Trial Court again entered an Order denying Petitioners **Third 3.850 Motion** based on the fact that despite Petitioners attempt to explain his delay in seeking Public Records Request, **such explanation was inadequate in showing that he acted with due diligence in obtaining these Records. See Exhibit (L) of Appendix. (Order)**

18). Petitioner timely Appealed the Trial Courts Order to the Fifth DCA resulting in **Case No: 5D07-1224**, to which was likewise Affirmed on July 17th 2007. **See Graves v. State 959 So. 2d 1202 (Fla. 5th DCA 2007).**

19). Since the denial of his **Third 3.850** Post Conviction Motion on August 6th-2007, Petitioner has initiated **(Four-4)** separate post conviction proceedings in the Trial Court related to his criminal conviction on: **August 29th 2012; May 18th 2015; January 22nd 2018;** and **April 10th 2019**; **See Exhibit (M) of Appendix. (Docket)**

20). These separate collateral criminal proceedings were likewise Appealed to the Fifth DCA in **Case No's: 5D12-3706; 5D16-1406; 5D17-1960; 5D18-530;** and **5D19-1663; See Exhibit (M) of Appendix. (Docket)**

21). As a result of these separate post conviction proceeding(s), the Trial Court issued a **Spencer Order** on May 1st 2019, precluding Petitioner from filing any further pro se filings. **See Exhibit (M) of Appendix. (Docket)**

22). On February 26th 2018 and May 22nd 2018 respectively, the **Fifth DCA** likewise issued **Orders to Show Cause** as to why Petitioner should not be prohibited from filing any further pro se Appeals. **See Exhibit (N) of Appendix. (Orders)**

23). On February 7th 2018 and June 1st 2018 respectively, Petitioner filed **Response(s)** to the Courts Show Cause Order(s). **See Exhibit (O) of Appendix. (Responses)**

24). Consequently, On June 11th 2018 and November 15th 2019 respectively, The **Fifth DCA** entered Orders pursuant to **State v. Spencer 751 So.2d 47 (Fla. 1999)** prohibiting Petitioner from filing any further pro se Petitions or Appeals in that Court. **See Exhibit (B) of Appendix. (Orders)**

25). Conversely, Petitioner has recently learned that the Trial Courts denial, as well as the Appellate Courts Affirmance of his Newly Discovered Evidence Claim was based upon an erroneous interpretation of the law, to which the Fifth DCA has since recognized and rectified in subsequent case(s), and granted relief to other

similarly situated Criminal Defendant(s) on the **[Same Identical Claim]** in which Petitioners post conviction Appeals were Affirmed under. See ***Taylor v. State***, 279 So. 3d 1274 (Fla. 5th DCA 2019))

26). Pursuant to Florida Law, a Litigant may request the Appellate Court, under the principles of **Habeas Corpus,** to Reconsider a previous decisions, despite the law of the case, when it can be shown that the Court erred when affirming a prior Appeal and failure to Reconsider the prior decision will result in a Manifest Injustice. *See Baker v. State* 878 So.2d 1236 (Fla. 2004)

27). However, due to the Appellate Courts **Spencer Order**, the Clerk of the Fifth DCA will not accept any further pro se pleadings from Petitioner, which has operated to deprive him of his Constitutional Rights To Access To The Court and the ability to challenge the Appellate Courts previous denials of his post conviction Appeals through a valid **Petition for Habeas Corpus Relief**. **See Exhibit (P) of Appendix ("New Petition For Habeas Corpus Relief")**

28). On April 19th, 2023, Petitioner submitted a **Petition For Writ of Prohibition** to the Florida Supreme Court, requesting a Writ compelling the Fifth District Court of Appeal to show cause as to: **(1)**. Whether there exist a lawful basis to support its Order prohibiting Petitioner from filing any other pro se filings, and **(2)**. Whether such Order should not be Rescinded in light of the fact that the prior per curiam affirmance(s), in which the **Spencer Order** is premised, was directly based upon an Erroneous Interpretation of Law, to which the Fifth DCA has since recognized and implicitly receded therefrom in subsequent Appellate Case(s). **See Exhibit (Q) of Appendix (Petition For Writ of Prohibition)**

29). On July 19th 2023, the Florida Supreme Court denied Petitioners request for Prohibition Relief, thus, this Petition for Writ of Certiorari ensues upon the following facts, argument and citation of authorities. **See Exhibit (A) of Appendix. (Order)**

REASONS FOR GRANTING A WRIT OF CERTIORARI

The State Court of Florida has promulgated Rules of Criminal and Appellate Procedure that are found to be Repugnant to the Constitution, Treaties, or Laws of the United States, and has decided an Important Question of Federal Law in a way that conflicts with relevant decisions of this Court.

FACTS IN SUPPORT

In the case at bar, Petitioner is a pro se litigant, unskilled in the law and in the past **(22) years,** since his conviction in **2001**, he has filed **(7)** collateral criminal proceedings in the Trial Court, and a total of **(8)** proceedings in the Appellate Court. **See Exhibit (M) of Appendix. (Docket)**

Conversely, ***based on these facts***, the Trial Court and the Appellate Court found that Petitioners filings constituted an abuse of the Post Conviction and Appellate process, and subsequently entered Order(s) prohibiting Petitioner from filing any further pro se filings in his case. **See Exhibit(s) (M) & (B) of Appendix. (Docket) & (Orders)**

The Procedural Bar(s) in question are directly premised upon Florida Rules of Criminal and Appellate Procedure, **Rule(s) 3.850(n) and 9.410(a)** and the Florida Supreme Courts holding in ***State v. Spencer*** **751 So.2d 47 (Fla. 1999)** where the Court stated:

> We have recognized the importance of the constitutional guarantee of citizen access to the courts under Art. I. Sect. 21, Fla. Const., Thus, denying a pro se litigant the opportunity to file future petitions is a serious sanction, especially where the litigant is a criminal defendant who has been prevented from attacking his conviction, sentence, or conditions of confinement,..... However, any citizen, including a citizen attacking his or her conviction, abuses the right to pro se access *by filing repetitious and frivolous pleadings, thereby diminishing the ability of the courts to devote their finite resources to the consideration of legitimate claims.*

STANDARD OF REVIEW

Petitioners Constitutional Claim rest entirely on the Due Process Clause of the Fourteenth Amendment, the most familiar office of that Clause is to provide a guarantee of fair procedure in connection with any deprivation of life, liberty, or property by a State. ***i.e. (Procedural Due Process)***

Petitioners Claim also rest on the ***Substantive Component of the Clause*** that protects individuals liberty against *"Certain government actions regardless of the fairness of the procedures used to implement them."* ***i.e. (Substantive Due Process)*** See *Daniels v. Williams* 106 S. Ct 662 (1983)

The Due process Clause guarantees more than fair process, and the "Liberty" it protects includes more than the absence of physical restraint. *Collins v. Harker Heights* 112 S. Ct 1061 (1992)(quoting *Daniels v. Williams*, supra), The Clause provides ***heightened protection*** against government interference with certain fundamental rights and liberty interest. *Reno v. Flores* 113 S. Ct 1439 (1993).

This Courts established method of ***Substantive-Due Process Analysis*** has two primary features: **First**, this Court has regularly observed that the Due Process Clause specifically protects those fundamental rights and liberties which are, objectively, **"Deeply Rooted"** in this Nations History and Traditions. e.g. *Moore v. East Cleveland* 97 S. Ct 1932 (1977): *Snyder v. Massachusetts* 54 S. Ct 330 (1934)("So rooted in the traditions and conscience of our people as to be ranked as fundamental") and ***"implicit in the concept of ordered liberty." such that "neither liberty nor justice would exist if they were sacrificed."*** *Palko v. Connecticut* 58 S. Ct 149 (1937)

Second, this Court has required in ***Substantive Due Process Cases*** a ***"Careful Description"*** of the asserted fundamental liberty interest. *Flores supra. 113 S. Ct at 1447.*

This Nations History, legal traditions, and practices, thus, provide the crucial ***"guidepost for responsible decision making."*** *Collins, supra, 112 S. Ct at 1068,* that direct and restrain this Courts exposition of the ***Due Process Clause.***

There are two sources of the Right to Access the Courts, Florida's Constitution specifically guarantee's a Citizen's Access to Courts. **See Article I, Section 21 Fla. Const.** which provides;

> **THE COURTS SHALL BE OPEN TO EVERY PERSON FOR REDRESS OF ANY INJURY AND JUSTICE SHALL BE ADMINISTERED WITHOUT SALE, DENIAL OR DELAY.**

The Constitution of the United States does not, however, contain a specific Clause providing for this Right, this Court nevertheless has held that there is such a Right arising from several Constitutional Provisions, including the First Amendment, The Due Process Clause, and The Equal Protection Clause, and have upheld these universal tradition(s) and Right(s). *See Bounds v. Smith* 97 S. Ct 1491 (1977)(Prisoners have fundamental Constitutional Right to adequate, effective, and meaningful Access to Courts to challenge violation of constitutional rights): and *Johnson v. Avery* 89 S. Ct 747 (1969)(Prisoners Right of Access to Courts may not be denied or obstructed): *Wolff v. McDonnell* 94 S. Ct 2963 (1974) (Due Process Clause's prohibit government from infringing on prisoners liberty interest without due process of law): and *Dobbert v. Florida* 97 S. Ct 2290 (1977) (Equal Protection Clause prohibits government from treating similarly situated individuals differently from one another when there is no rational relation between the dissimilar treatment and any legitimate penological interest)

In the Substantive Due Process and Equal Protection Analysis, this Court utilizes the ***"Goal-Method Test"*** for cases in which a fundamental right is taken. See e.g. *Romer v. Evans* 116 S. Ct 1620 (1996)(***Equal Protection)***: and *Hodgson v. Minnesota* 110 S. Ct 2926 (1990)***(Substantive Due Process)***

In the ***Goal-Method Analysis***, if the interest which is being taken is a fundamental interest, then the means or method employed by the Court Rule or Statute to remedy the asserted problem must meet not only the ***Rational Basis Test***, but also the ***Strict Scrutiny Test.***

Under Substantive Due Process Goal-Method Analysis, if a State enacts Court Rules or Legislation that infringes fundamental rights, Courts will review the law under a ***Strict Scrutiny Test*** and uphold it only when it is "Narrowly Tailored to serve a compelling State interest." *Reno v. Flores* 113 S. Ct 1439 (1993), ***"Narrowly Tailored" means that "the method for remedying the asserted malady must be strictly tailored to remedy the problem in the most effective way [and] ... "must not restrict a persons rights more than absolutely necessary."*** *See also Washington v. Glucksberg* 117 S. Ct 2258 (1997)

ARGUMENT IN SUPPORT

POINT I.

WHETHER FLORIDA RULES OF CRIMINAL AND APPELLATE PROCEDURE ARE NARROWLY TAILORED TO SERVE A COMPELLING STATE INTEREST

Petitioner does not dispute the fact that **Florida Rule(s) of Criminal and Appellate Procedure 3.850(n) and 9.410(a)** meet the ***Rational Basis Test*** under this Courts precedent. *See In Re McDonald* 109 S. Ct 993 (1989)(Pro Se Litigant barred from further filings without payment of docket fee based upon **73** separate frivolous filings); *In Re Sindram* 111 S. Ct 546 (1991)(**Same**—Based upon **43** separate frivolous filings); *Zatko v. California* 112 S. Ct 355 (1991)(**Same**—Based upon **73** separate frivolous filings); and *Martin v. District of Columbia Court of Appeals* 113 S. Ct 397 (1992)(**Same**—Based upon **45** separate frivolous filings)

POINT II.

WHETHER FLORIDA RULE(S) OF CRIMINAL AND APPELLATE PROCEDURE ARE NARROWLY TAILORED IN A MANNER THAT DOES NOT RESTRICT A PERSONS RIGHTS MORE THAN ABSOLUTELY NECESSARY

Petitioner would aver however, that **Florida Rule(s) of Criminal and Appellate Procedure 3.850(n) and 9.410(a)** fail to meet the ***Strict Scrutiny Test*** under this Courts precedent, where the Rule(s) do not contain any Procedural Safe-Guards to ensure that the Right of Access to the Courts is not abrogated unreasonably or imposed in a discriminatory fashion in violation of the Equal Protection and Due Process Clause of the U.S. Constitution.

In support of this factual proposition, Petitioner would show that the compelling State interest behind Florida Rules of Criminal and Appellate procedure, **Rule(s) 3.850(n) and 9.410(a),** was to prevent Vexatious litigation from interfering with the business of the Court System, focusing on meritless litigation, the Florida Supreme Court adopted Recommendations made by the (Steering Committee) on Post Conviction Relief to include Sanctions against pro se litigants prohibiting the Clerk of Court from accepting further pro se filings unless such filings are signed by an Attorney in good standing with the Florida Bar. See *In Re: Amendments To The Florida Rules of Criminal and Appellate Procedure* 132 So. 3d 734 (Fla. 2013)*(Effective July 1st 2013)* which provide's:

> **(3) Conduct prohibited under this rule includes, but is not limited to, the following: the filing of frivolous or malicious claims; the filing of any motion in bad faith or with reckless disregard for the truth; the filing of an application for habeas corpus subject to dismissal pursuant to subdivision (m); the willful violation of any provision of this rule; and the abuse of the legal process or procedures governed by this rule.**

The court, upon its own motion or on the motion of a party, may determine whether a motion has been filed in violation of this rule.

The court shall issue an order setting forth the facts indicating that the defendant has or may have engaged in prohibited conduct.

The order shall direct the defendant to show cause, within a reasonable time limit set by the court, why the court should not find that the defendant has engaged in prohibited conduct under this rule and impose an appropriate sanction.

Following the issuance of the order to show cause and the filing of any response by the defendant, and after such further hearing as the court may deem appropriate, **the court shall make a final determination of whether the defendant engaged in prohibited conduct under this subdivision.**

(4) If the court finds by the greater weight of the evidence that the defendant has engaged in prohibited conduct under this rule, the court may impose one or more sanctions, including:

(A) contempt as otherwise provided by law;

(B) assessing the costs of the proceeding against the defendant;

(C) dismissal with prejudice of the defendant's motion;

(D) prohibiting the filing of further pro se motions under this rule and directing the clerk of court to summarily reject any further pro se motion under this rule;

(E) requiring that any further motions under this rule be signed by a member in good standing of The Florida Bar, who shall certify that there is a good faith basis for each claim asserted in the motion; and / or

(F) if the defendant is a prisoner, a certified copy of the order be forwarded to the appropriate institution or facility for consideration of disciplinary action against the defendant, including forfeiture of gain time pursuant to Chapter 944, Florida Statutes.

FLORIDA RULE APPELLATE PROCEDURE 9.410 SANCTIONS

(a) Courts Motion: After 10 days notice, on its own motion, the court may impose sanctions for any violation of these rules, or for the filings of any proceeding, motion, brief, or other document that is frivolous or in bad faith, —such sanctions may include reprimand, contempt, striking of briefs, or pleadings, dismissal of proceedings, cost, attorneys fee's.

Consequently however, these Rule(s) are Unreasonably Broad, where they fail to contain Procedural Safe Guards to prevent the State Courts from abusing their power and employing the Rule(s) as an instrument of oppression, specifically in light of the fact that these Rule(s) fail to include:

(a). Any specific amount of pro se pleadings that can be filed in an individual case prior to sanctions being imposed.

(b). The right to appeal from a sanction order.

(c). Any exception to the Rule that would allow further review should the law change or new evidence be discovered.

(d). Any other means to obtain relief when justice so requires.

Petitioner would demonstrate the short coming(s) of these Rule(s) by comparison with Florida law itself, where the Legislature, when promulgating the **Florida Vexatious Litigant Law under Fla. Stat. §68.093** included several procedural safe guards to ensure that the Right to Access the Court for a pro se litigant is not restricted more than absolutely necessary, where the Statute provides in relevant part:

> **(1) This section may be cited as the Florida Vexatious Litigant Law.**
>
> **(2)** As used in section, the term:
>
> **(a)** Action means a civil action governed by the Florida Rules of Civil Procedure and proceedings governed by the Florida Probate Rules, but does not include actions concerning family law matters governed by the Florida Family Law Rules of Procedure or any action in which the Florida Small Claims Rules apply.
>
> **(b)** Defendant means any person or entity, including a corporation, association, partnership, firm, or governmental entity, against whom an action is or was commenced or is sought to be commenced.
>
> **(c)** Security means an undertaking by a vexatious litigant to ensure payment to a defendant in an amount reasonably sufficient to cover the defendants anticipated, reasonable expenses of litigation, including attorney's fees and taxable costs.

(d) Vexatious litigant means:

1. A person as defined in s. 1.01(3) who, in the immediately preceding **5-year period, has commenced, prosecuted, or maintained, pro se, five or more civil actions in any court in this state**, except an action governed by the Florida Small Claims Rules, which actions have been finally and adversely determined against such person or entity; or

2. Any person or entity previously found to be a vexatious litigant pursuant to this section.

An action is not deemed to be finally and adversely determined if an appeal in that action is pending. If an action has been commenced on behalf of a party by an attorney licensed to practice law in this state, that action is not deemed to be pro se even if the attorney later withdraws from the representation and the party does not retain new counsel.

(3)(a) In any action pending in any court of this state, including actions governed by the Florida Small Claims Rules, any defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion shall be based on the grounds, and supported by a showing, that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against the moving defendant.

(b) At the hearing upon any defendants motion for **an order to post security**, the court shall consider any evidence, written or oral, by witness or affidavit, which may be relevant to the consideration of the motion. No determination made by the court in such a hearing shall be admissible on the merits of the action or deemed to be a determination of any issue in the action. If, after hearing the evidence, the court determines that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against the moving defendant, the court shall order the plaintiff to furnish security to the moving defendant in an amount and within such time as the court deems appropriate.

(c) If the plaintiff fails to post security required by an order of the court under this section, the court shall immediately issue an order dismissing the action with prejudice as to the defendant for whose benefit the security was ordered.

(d) If a motion for an order to post security is filed prior to the trial in an action, the action shall be automatically stayed and the moving defendant need not plead or otherwise respond to the complaint until 10 days after the motion is denied. If the motion is granted, the moving defendant shall respond or plead no later than 10 days after the required security has been furnished.

(4) In addition to any other relief provided in this section, the court in any judicial circuit may, on its own motion or on the motion of any party, **enter a prefiling order prohibiting a vexatious litigant from commencing, pro se, any new action in the courts of that circuit without first obtaining leave of the Administrative Judge of that Circuit**. Disobedience of such an order may be punished as contempt of court by the Administrative Judge of that Circuit. **Leave of Court shall be granted by the Administrative Judge only upon a showing that the proposed action is Meritorious** and is not being filed for the purpose of delay or harassment. The Administrative Judge may condition the filing of the proposed action upon the furnishing of security as provided in this section.

(5) The Clerk of the Court shall not file any new action by a vexatious litigant pro se unless the vexatious litigant has obtained an order from the Administrative Judge permitting such filing. If the Clerk of the Court mistakenly permits a vexatious litigant to file an action pro se in contravention of a prefiling order, any party to that action may file with the clerk and serve on the plaintiff and all other defendants a notice stating that the plaintiff is a pro se vexatious litigant subject to a prefiling order. The filing of such a notice shall automatically stay the litigation against all defendants to the action. The **Administrative Judge** shall automatically dismiss the action with prejudice within 10 days after the filing of such notice unless the plaintiff files a **Motion for Leave** to file the action. If the Administrative Judge issues an order permitting the action to be filed, the defendants need not plead or otherwise respond to the complaint until 10 days after the date of service by the plaintiff, by United States mail, of a copy of the order granting leave to file the action.

(6) The Clerk of a Court shall provide copies of all prefiling orders to the Clerk of the Florida Supreme Court, who "shall maintain a registry" of all vexatious litigants.

(7) The relief provided under this section shall be cumulative to any other relief or remedy available to a defendant under the laws of this state and the Florida Rules of Civil Procedure, including, but not limited to, the relief provided under s. 57.105.

Based upon the provisions of Florida's Vexatious Law, the Legislature itself included:

(a). A specific amount of pleadings that can be filed, in a specified time period.

(b). A means to still obtain review by posting security if an opposing party so moves the court for an order.

(c). Allowing a pro se litigant to seek leave from an (Administrative Judge) of the Circuit to file additional pleadings, and;

(d). Upon a showing that the pleading has merit, to allow such pleading to be filed with the Court for review.

Notwithstanding, and unlike **Rule(s) 3.850(n) and 9.410(a); Fla. Stat. §68.093** specifically directs the Clerk of Court to forward a pro se pleading to an ***(Administrative Judge)*** for review on the merits, rather than refusing to file it altogether and sending it directly back to a pro se litigant without any action taken on it at all, in other words, **Fla. Stat §68.093** contains procedural safe guards to ensure the Right of Access to the Courts is not abrogated entirely, but only to the extent necessary to protect the interest it was created to protect.

Conversely, the same cannot be said for the State Courts promulgation of **Rule(s) 3.850(n) and 9.410(a),** where these Rule(s) not only interfer with a pro se litigants protected liberty interest, *i.e. (Access to the Courts)*, but because these Rule(s) lack Procedural Safe Guards to protect against unjustified deprivations, it cannot be said that these Rule(s) do not violate Substantive Due Process of Law. *See Sandin v. Conner* 115 S. Ct 2293 (1995)("Protected liberty interest can be created by State law, Statute or Regulation," "A Violation of Procedural and Substantive Due Process requires **(1)** that the State has interfered with the inmates protected liberty or property interest and **(2)** that procedural safe guards were constitutionally insufficient to protect against unjustified deprivations). *I.d. at 2300-2301.*

As this Court stated in Flores *supra*, the Fourteenth Amendment ***"forbids the government to infringe....'fundamental' liberty interest at all,*** no matter what process is provided, ***unless the infringement is narrowly tailored to serve a compelling state interest,"*** and ***"must not restrict a persons right any more than absolutely necessary."*** See Washington v. Glucksberg 117 S. Ct 2258 (1997)

The text and history of the Due Process Clause supports Petitioners Claim that the State of Florida's duty to provide Access to the Courts is a Substantive Component of the Due Process Clause." *See* Collins v. City of Harker Heights, Tex. 112 S. Ct 1061 (1992) citing DeShaney v. Winnebago County Dep't of Social Services 109 S. Ct 998 (1989)("The Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of Oppression'").

Petitioner would contend that the Due Process Clause of its own force requires that Rules of Court satisfy certain minimal standards for Convicted Felons challenging their conviction and sentences, The ***"Process"*** that the Constitution guarantees in connection with any deprivation of liberty, thus includes a continuing obligation to satisfy certain minimal standards to ensure that the Right to Access to the Court for a pro se litigant is not entirely abrogated. Collins *I.d. at 112 S. Ct 1061.*

Furthermore, by requiring the government to follow appropriate procedures when its agents decide to "deprive any person of life, liberty, or property," the Due Process Clause promotes fairness in such decisions, and by baring certain government actions regardless of the fairness of the procedures used to implement them, it serves to prevent government power from being ***"Used for Purposes of Oppression."*** *See* Daniels v. Williams 106 S. Ct 662 (1986) citing DeShaney *supra 109 S. Ct at 998.*

In addition to the violation of Due Process, Petitioner would further show that **Rule(s) 3.850(n) and 9.410(a)** contrive the ***Equal Protection Clause*** of the Fourteenth Amendment as well, where, while the **Fifth DCA** premised its Order prohibiting any other pro se filings in Petitioners case, based upon the aforementioned ***Rule of law,*** there is no **Bright Line Rule** expressly stated in the **Rule(s) provisions** as to the **maximum number of filings** a pro se litigant can make before he should be barred in the Courts, and as a result thereof, not only are similarly situated individuals treated differently from one another, but there is no rational relationship between the dissimilar treatment and the interest the Rule(s) were promulgated to protect, in that the Rule(s) are applied at will by the Courts of Florida in an Uneven and Discriminatory fashion to Florida pro se litigants. *See Gaston v. State* 141 So.2d 627 (Fla. 4th DCA 2014) where the Court there held:

> We find that the trial court ***abused its discretion*** in barring defendant from further pro se filings after his **Third** post conviction motion,..... Florida Courts have long recognized the need for judicial economy and importance of curtailing the egregious abuse of the judicial process. See e.g. Bivins v. State 35 So.3d 67 (Fla. 1st DCA 2010),..... Nevertheless, barring a criminal pro se litigant from filing future petitions has been described as an **["Extreme Remedy"]** which should be reserved for those who have repeatedly filed successive, frivolous and meritless claims ***which were not advanced in good faith***. Therefore, We reverse the trial courts order prohibiting defendant from filing any future pro se pleadings.

See also Garcia v. State 212 So.3d 479 (Fla. 3rd DCA 2017) where the Court there followed the holding in ***Gaston supra***, and specifically stated:

> **While there is no bright line rule on the maximum number of filings a pro se litigant can make before he is barred,**.....[W]e do not think the **Three (3)** filings in this case justify such a serious sanction,..... The filing of **Three (3)** post conviction motions in a **Sixteen year period** does not rise to the level of being an ***egregious abuse of the judicial process which would warrant such an order***, thus, [W]e reverse the order prohibiting ***Garcia*** from filing future pro se filings.

Petitioner would aver that because he only filed a total of **(8)** Appellate proceeding in his case in the past **(22) Years,** the facts clearly failed to prove an ***egregious abuse of the judicial process that warranted an order prohibiting him from filing any other pro se filings,*** specifically where there was no showing: ***"that his Previous Appellate Proceedings were not advanced in Good Faith."***

Compare *Sapp v. State* 238 So.3d 875 (Fla. 5th DCA 2018)(**Thirty Six (36)** pro se filings prior to ***Spencer Order*** being issued): *Myles v. Crews* 116 So.3d 1256 (Fla. 2013)(**Twenty Three (23)** pro se filings prior to ***Spencer Order*** being issued): *Carter v. State* 173 So.3d 1052 (Fla. 3rd DCA 2015)(**Seventeen (17)** pro se filings prior to ***Spencer Order*** being entered): and *Espinosa v. State* 262 So.3d 114 (Fla. 3rd DCA 2018)(**Twenty One (21)** pro se filings prior to ***Spencer Order*** being entered).

Petitioner would contend that a good example of the way these Rule(s) are applied in an Uneven and Discriminatory manner to similarly situated pro se litigants in the State of Florida occurred in the case of **Brown v. State, 4D22-2172 (Fla. 4th DCA 12/27/22)**

In **2010, Christopher Brown** had been convicted in Indian River County of Attempted Transfer of Cocaine within 1,000 feet of a church, **and sentenced to Life imprisonment.**

Subsequently thereafter, **Christopher Brown filed [Two-2]** 3.850 post conviction relief motion(s), however, upon the filing of the **Second Motion,** the Trial Court issued a ***(Spencer Order)*** under **Rule 3.850(n)** barring ***Brown*** from filing any further pro se filings.

In **2022**, **Christopher Brown** discovered that the Crime of ***Attempted Transfer of Cocaine*** is a **Non-Existent Crime** in the State of Florida, however, because of the Trial Courts ***(Spencer Order)***, ***Brown*** was precluded from filing any other pleading in the Trial Court to obtain relief from an otherwise illegal conviction and Life sentence.

Brown, having no other procedural remedy at hand, filed a Petition for Writ of Mandamus in the Fourth District Court of Appeal seeking an Order from the Appellate Court quashing the Trial Courts ***(Spencer Order)*** and allowing him to proceed with a new 3.850 motion. **See Exhibit (R) of Appendix. (Christopher Brown Mandamus)**

Consequently however, despite the fact that the Appellate Court found merit with the argument presented, it denied relief with directions for ***Brown*** to seek collateral relief in the Trial Court **by retaining an Attorney**. **See Exhibit (S) of Appendix. (Christopher Brown 12/27/22 Court Order)**

However, because **Christopher Brown** has no family or funds to hire an Attorney, and due to the fact that **Rule 3.850(n)** contains no **"Exceptions"** to the Sanction Rule, he will be left to die in prison for a crime that does not even exist in the State of Florida.

Notwithstanding, and contrary to the Fourth District Court of Appeals decision in **Christopher Browns** case, the Florida Second District Court of Appeal, faced with an identical situation involving a ***(Spencer Order)*** in *Huffman v. State* 192 So. 3d 687 (Fla. 2nd DCA 2016), Reversed and Remanded for the Trial Court to Appoint ***Huffman*** an Attorney to represent him in a post conviction motion due to the Trial Courts entree of a **Spencer Order**, to which is authorized by Florida Statute and Court Rule.

Based upon this analogy of law, when Petitioner submitted his ***Petition For Writ of Prohibition*** to the Florida Supreme Court seeking relief from the Appellate Courts **Spencer Order**, he also submitted a Motion for the **Appointment of Counsel** on his quest for ***(Reconsideration)*** of the prior Appellate proceeding. **See Exhibit (T) of Appendix. (Motion For Appointment of Counsel)**

Consequently however, because ***"No Rights Exist under Appellate Rule or the Florida Constitution to seek review of a Spencer Order in the Florida Supreme Court*** prohibiting a pro se litigant from filing any other pro se filings, the Court had no Jurisdiction to entertain the merits of Petitioners Petition, and dismissed it on procedural grounds.

Thus, it cannot be said that these particular **Rule(s)** do not infringe upon Rights secured by the Florida and U.S. Constitution. *See Thomas v. State* 1 So.3d 194 (Fla. 4th DCA 2005) where the Court there held in its reversal:

> Because a ***Spencer Order*** affects a pro se litigants access to the court, the litigant has the right to challenge whether the ***Order was warranted and whether the proper procedure was followed***. See e.g. Rogers v. State 916 So.2d 899 (Fla. 4th DCA 2005),.....
> Moreover, as this Court has recognized an ***(Order)*** restricting further pro se filings **"cannot restrict or frustrate in any way an Appeal taken from that Order."**

Therefore, utilizing the analysis traditionally used in **Strict Scrutiny Review,** this Court should conclude that the **Sanction Clause of Rule 3.850(n) and 9.410(a)** restricts and impedes the filing of many more types of Inmate Petitions which were identified by the Court to be the malady being targeted, in other words, even assuming the Court Rules satisfy the ***"compelling interest" prong***, the Court Rules are not ***Strictly Tailored***. ***i.e., (their overbroad),*** Therefore, it does not meet the ***Strict Scrutiny Test*** set forth in *Washington v. Glucksberg* 117 S. Ct 2258 (1997)

Furthermore, in order to find that a Right has been violated it is not necessary for the Rule to produce a procedural hurdle which is absolutely impossible to surmount,... only one which is significantly difficult.

Since the procedural hurdles caused by these Court Rules can and in some cases do rise to the level of a denial of Access to the Courts, this Court should come to the conclusion they are Unconstitutionally Broad under the Due Process and Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Based upon the foregoing, Petitioner would aver that he has clearly demonstrated that these particular Rule(s) also violate the Equal Protection Clause of the Fourteenth Amendment warranting Certiorari Review in the case at bar. ***See Dobbert supra*** (Equal Protection claim stated when Party demonstrated (1) that similarly situated individuals intentionally have been treated differently from one another by the government, and (2) that there is no rational relation between the dissimilar treatment and any legitimate penological interest)

ERROR NOT HARMLESS

In the case at bar, Petitioner made the argument to the Florida Supreme Court that the Fifth DCA Erred when it denied his post conviction Appeals based upon an erroneous interpretation of law, and that such Order prohibiting further pro se filings should not be allowed to stand.

Petitioner supported his argument with the fact that the ***Doctrine of Manifest Injustice contains an ["Exception"] to the Rule*** that allows for such an Order to be Rescinded, when failure to Reconsider a prior decision will result in a Manifest Injustice. See *Muehleman v. State* 3 So. 3d 1149 (Fla. 2009)

For this reason, a claim asserted by a litigant that an Appellate Court erred in a prior Appellate decision, may challenge that decision, ***v.i.a. Writ of Habeas Corpus,*** and have the Appellate Court reconsider it, despite ***The Law of The Case***. *See Baker v. State* 878 So.2d 1236 (Fla. 2004)

As such, it was Petitioner's argument, that, not only did he have standing to bring a ***Habeas Corpus Petition*** requesting the Fifth District Court of Appeals to ***Reconsider*** it's prior decisions denying his post conviction claim based on Counsels failure to convey a favorable plea offer, but should Petitioner be allowed to file a Habeas Corpus Petition with the Fifth DCA, there was a reasonable probability that Relief would be granted, resulting in Petitioners Life Sentence being reduced to **[3-4 Years],** and his immediate release from prison.

Petitioner based his argument on the fact that the cause of the Appellate Courts misapplication of the law to Petitioners case, directly stemmed from case precedent emanating from the Florida Supreme Court, to which, not only caused confusion on the issue, but rendered the law governing such claim vague and ambiguous.

More specifically, Petitioner asserted that at the time his Appellate proceedings were pending in the **Fifth DCA in [2006-2007],** the law in Florida governing this particular Post Conviction Claim, consisted of **Two competing theories**, that was further comprised of ***Two Different Standards of Review governing Each***, to which, as a result thereof, rendered these Standards ***Mutually Exclusive***, and thus, caused valid claims, ***(such as Petitioners)*** to be summarily denied without cause.

In Support of this Factual Proposition Petitioner Proffered the following:

FIRST: In **Jones v. State** 591 So.2d 911 (Fla. 1991) The Florida Supreme Court developed the Standard governing **Newly Discovered Evidence Claims,** that was comprised of **Two specific prongs** which consisted of:

[1]. The asserted facts "must have been **unknown** by the trial court, by the party, **[or] by counsel** at the time of trial, and it must appear that defendant **[or] his counsel** could not have known of them by the use of diligence.

[2]. The Newly Discovered Evidence must be of such nature that it would probably produce an acquittal.

SECOND: In **Cottle v. State** 733 So.2d 963 (Fla. 1999) The Florida Supreme Court developed the Standard governing Claims for Ineffective Assistance of Counsel when Counsel fails to Convey a Plea Offer made to a Defendant by the State, that was further comprised of the following **Three prongs:**

[1]. Counsel failed to relay a plea offer;

[2]. Defendant would have accepted it; and

[3]. The plea would have resulted in a lesser sentence.

Consequently, when the Court developed the ***Cottle Standard***, it did so under the guise of *Strickland v. Washington* 104 S. Ct 2052 (1984) governing claims of **Ineffective Assistance of Counsel**, with the thought in mind of **[such claim]** being raised in a **["Timely Rule 3.850 Motion"].**

However, at the time these decisions were rendered, there was no common ground established by the Court, as to how to apply the ***Cottle Standard,*** to a ***Claim of Newly Discovered Evidence*** under the ***Jones test***, to which, as a result thereof, caused valid claims, ***(such as Petitioners)*** to be summarily denied without cause.

More specifically, the Rule authorizing claims of ***Newly Discovered Evidence*** as an exception to the two-year procedural bar is written in the ***disjunctive***, using the word **["or"],....** "The use of this particular ***disjunctive word*** in the Rule indicates that an alternative is intended." Sparkman v. McClure, 498 So. 2d 892, (Fla. 1986) see also Kirksey v. State, 433 So. 2d 1236, n.2 (Fla. 1st DCA 1983)("[W]e note the general rule that 'the use of a ***disjunctive*** in a statute indicates alternatives and requires that those alternatives be treated separately.'" (quoting Quindlen v. Prudential Ins. Co. of Am., 482 F.2d 876 (5th Cir. 1973)).

Therefore, in order to meet the exception to the two-year procedural bar, the evidence could not have been known to the defendant ***or, alternatively, to Counsel;*** that is, if either the defendant ***or Counsel knew of the evidence, it is not newly discovered.***

Abundant case law also set forth this ***disjunctive standard***. *See, e.g.,* Jones v. State, 709 So. 2d 512 (Fla. 1998)("First, in order to be considered newly discovered, the evidence 'must have been unknown by the trial court, by the party, ***[or] by Counsel*** at the time of trial, and it must appear that defendant ***[or] his Counsel*** could not have known [of it] by the use of diligence."

This reading and application of the ***disjunctive*** is consistent with numerous cases emanating from the Florida Supreme Court, where the Court had clearly stated that ***evidence known to trial counsel is not newly discovered such that the procedural bar of post conviction motions is lifted***. *See* Atkins v. State, 663 So. 2d 624 (Fla. 1995)("Moreover, the photographs clearly are not newly discovered evidence, which could lift the procedural bar, ***since their existence was known to trial counsel***."); see also Miller v. State, 926 So. 2d 1243 (Fla. 2006) ***("Because Miller's trial counsel was aware of the Evidence at the time of trial" Miller "failed to demonstrate the [First prong] of the Jones test for newly discovered evidence)*** *See also* McDonald v. State, 117 So. 3d 412 (Fla.

2013)(affirming summary denial of post conviction motion where "[a]ll the evidence upon which McDonald relies ***was known to him or his counsel,*** or was discoverable by due diligence, in 2002 or earlier").

Accordingly, not only have the Courts of Florida determined that the pleading requirement for ineffective assistance of counsel claims for failure to convey a plea offer, are mutually exclusive from those asserting newly discovered evidence, but because Counsels knowledge of a proposed plea deal would be directly imputed to the defendant for purposes of such claim, under the competing standards of review, such claim would automatically fail as a matter of law, in that where the allegation is that Counsel knew of the Offer and failed to convey it, ***the first prong of Jones cannot be met.***

Petitioner would aver, that the only Appellate Court in Florida to actually entertain this particular claim and reach a proper determination on the law in regards to both Standards of Review, was ***Gallant v. State*** 898 So.2d 1156 (Fla. 2nd DCA 2005) where the Court there reversed the denial of a post conviction claim based on trial counsel's failure to convey a plea offer holding:

> A trial counsel's failure to convey a plea offer can constitute ineffective assistance of counsel. *Whitten v. State*, 841 So. 2d 578 (Fla. 2d DCA 2003) **(citing *Cottle v. State*, 733 So. 2d 963 (Fla. 1999))**.
>
> In order to state a prima facie case of ineffective assistance of counsel based on failing to convey a plea offer, the defendant must allege **(1)** that counsel failed to communicate a plea offer; **(2)** that the defendant would have accepted the plea offer but for the inadequate communication; and **(3)** that acceptance of the plea offer would have resulted in a lesser sentence. *Whitten, 841 So. 2d at 579.*
>
> If the claim is sufficiently alleged, the court should order an evidentiary hearing. ***Cottle, 733 So. 2d at 969 n.6.,.... "An inherent prejudice results from a defendant's inability, due to counsel's neglect, to make an informed decision whether to plea bargain, which exists independently of the objective viability of the actual offer." Id.***

Accepting, as we must, the truth of ***Gallant's*** allegations, ***a prima facie case of ineffective assistance of counsel by failing to convey a plea offer is demonstrated, and he is entitled to an evidentiary hearing.***

There is no conclusive proof in the record that he knew or should have known that the State had made a ***four-year offer*** when he filed his original **Rule 3.850 motion.** Thus, ***Gallant's*** claim is, therefore, founded upon ***Newly Discovered Evidence*** and shall not be barred. Accordingly, We reverse the order of the circuit court and remand for an evidentiary hearing.

However, despite the **(2005)** decision rendered in ***Gallant supra,*** it wasn't until most recently, that the Appellate Courts of Florida actually aligned themselves with the ***Gallant decision,*** and started providing relief to criminal defendants, to which they had been entitled to all along. See ***Tribbitt v. State*** 339 So. 3d 1029 (Fla. 2nd DCA 2022) where the Court there best explained the evolvement of this issue:

Marcus Tribbitt appeals the summary denial of his Florida Rule of Criminal Procedure **3.850 motion,** which asserted one claim of ineffective assistance of counsel based on **newly discovered evidence**.

Mr. Tribbitt argued that his circumstances were ***"virtually identical"*** to those in ***Petit-Homme v. State,*** 205 So. 3d 848 (Fla. 4th DCA 2016), where the defendant claimed his half-brother told him about a previously unconveyed plea offer ***Seventeen years after his conviction.*** and the Fourth District held that those allegations were facially sufficient to support an ineffective assistance of counsel claim based on **newly discovered evidence**. *Id. at 849.*

The post conviction court summarily denied ***Mr. Tribbitt's*** motion, concluding that **(1)** it was time-barred "in that **[Mr. Tribbitt]** could have discovered this claim during his **2010** post conviction practice" and **(2)** ***Mr. Tribbitt's*** mother's affidavit did "not show that probation was not a part of the offer" because "[c]ounsel informed the mother that she needed to check her notes" and "[n]o follow up with counsel was conducted."

Under ***Petit-Homme*** and other district court precedent that bound the post conviction court, ***Mr. Tribbitt's*** claim was facially sufficient and was not procedurally-or time-barred.

A defendant can file a **Rule 3.850 Motion** after the two-year time limit if his claim is predicated on **"newly discovered facts." See Fla. R. Crim. P. 3.850(b)(1);** *Blake v. State*, 152 So. 3d 66 (Fla. 2d DCA 2014) (discussing the "newly discovered facts" exception).

A motion based on **newly discovered facts** must be filed "within [two] years of the time the **new facts** were or could have been discovered with the exercise of due diligence." **Fla. R. Crim. P. 3.850(b)(1).**

In two decisions featuring **facts** quite similar to those at hand, the Fourth District held that the defendants alleged facially sufficient claims outside the two-year time limit by asserting they first learned of a previously unconveyed plea offer through a third party and then promptly filed **Rule 3.850** motions. ***See Clark v. State*, 236 So. 3d 481 (Fla. 4th DCA 2018); *Petit-Homme*, 205 So. 3d at 849.**

As did the post conviction court here, the post conviction courts in ***Petit-Homme*** and ***Clark*** concluded that the defendants could have discovered these plea offers sooner with due diligence.

The Fourth District disagreed, reasoning in ***Petit-Homme*** that a third party's knowledge of a plea offer should not be imputed to the defendant for purposes of the two-year deadline prescribed in **Rule 3.850(b)**. ***See Petit-Homme**, 205 So. 3d at 849.*

Two years later, the Fourth District specifically stated that ***"trial counsel's knowledge of the plea offer is not imputed to [the defendant]*** for purposes of the newly discovered fact exception of **Rule 3.850(b)."** ***Clark**, 236 So. 3d at 482.* ***See also Taylor v. State,*** 248 So. 3d 280 (Fla. 5th DCA 2018)(reversing summary denial of **Rule 3.850(b)(1) motion** where defendant alleged that he learned of unconveyed plea offer ***Eleven years after his conviction***)

Accordingly, ***Mr. Tribbitt's*** motion was facially sufficient, and "[n]o procedural hurdles prevented the post conviction court from considering the merits of ***[Mr. Tribbitt's]*** newly discovered evidence claim." ***See Forbes v. State,*** 269 So. 3d 677 (Fla. 2d DCA 2019).

Though we agree with the post conviction court that the ***mother's affidavit*** does not conclusively "show" that the State offered ***Mr. Tribbitt*** a twenty-year plea offer without probation, ***Mr. Tribbitt*** was not required to make such a showing ***at this stage of the proceeding.***

Instead, ***Mr. Tribbitt*** would be required to ***prove at an evidentiary hearing*** that the twenty-year plea offer existed. ***See Forbes, 269 So. 3d at 680*** (holding that to succeed on an ineffective assistance of counsel claim based on an uncommunicated plea offer, **the defendant must prove the existence of the offer at an evidentiary hearing**); see generally ***Freeman v. State***, 761 So. 2d 1055, 1061 (Fla. 2000) (explaining that the defendant only "bears the burden of establishing a prima facie case based upon a legally valid claim" before an evidentiary hearing); ***Green v. State***, 857 So. 2d 304, 305 (Fla. 2d DCA 2003) (holding that the defendant "ha[s] the burden of proving his claim of ineffective assistance of counsel" at "an evidentiary hearing" on the Rule 3.850 motion),

Because no record evidence conclusively refutes ***Mr. Tribbitt's*** allegation that this plea offer existed, [W]e too are bound to accept ***Mr. Tribbitt's*** allegations as true.

Mr. Tribbitt sufficiently alleged ***due diligence*** by claiming that he first learned of the plea offer from a third party three months before he filed his motion. ***See Petit-Homme, 205 So. 3d at 849; Clark, 236 So. 3d at 482; accord Forbes, 209 So. 3d at 679.***

Mr. Tribbitt also "demonstrated" the ***operative due diligence facts*** by attaching his ***mother's affidavit*** in which she confirmed ***Mr. Tribbitt's allegations and time-line to his motion.***

While it can be argued that ***Mr. Tribbitt's*** allegations and his mother's affidavit are conclusory ***because they don't explain why he couldn't have discovered this plea offer sooner,*** nothing in this record conclusively refutes ***Mr. Tribbitt's*** allegation to the contrary. ***See Clark, 236 So. 3d at 483*** (stating that reversal of summary denial of **Rule 3.850 motion** was required where record did not conclusively refute defendant's allegation that he could not have learned of the plea offer with due diligence during the two-year time limit).

As was the case in ***Clark***, [W]e "express no opinion on the merits of **[Mr. Tribbitt's]** allegations or whether he could have learned of the offer with due diligence." ***See Clark, 236 So. 3d at 482,*** and as was the case in ***Clark***, this "record simply fails to conclusively refute the claim, so reversal is required."

We reverse and remand for the post conviction court to either hold an evidentiary hearing or attach to its order portions of the record that refute ***Mr. Tribbitt's*** claim.

Petitioner would aver, that the Court(s) decisions in ***Tribbitt; Petit-Homme; Clark; Forbes; and Taylor supra,*** not only recognized the error between these ***Two Competing Standards of Review***, but expanded post conviction litigation beyond the limits of what had previously been established by the Courts when Petitioners Appellate proceedings were pending in **[2006-2007],** to which, should entitle Petitioner to ***Reconsideration*** of his prior Appellate proceeding(s), where it is abundantly clear that his post conviction Appeals were Affirmed under an erroneous interpretation of the law.

In support of the ***Right to Reconsideration***, Petitioner would show that when the Fourth District issued ***Petit-Homme*** in **2016**, like ***Gallant***, the Court focused on the ***ineffective assistance of counsel case law*** rather than on the ***operative language of Rule 3.850(b)(1)*** to reverse the summary denial of a ***newly discovered evidence claim alleging counsel's failure to convey a plea offer.*** However, ***Petit-Homme*** does not discuss how counsel's knowledge of the plea offer satisfies the newly discovered evidence requirements. ***Rather, it states only that "[k]nowledge of the plea offer by [defendant's] half-brother is not imputed to [defendant] "for purposes of timeliness***. *205 So. 3d at 849.*

Furthermore, two years later, in ***Clark***, the Fourth District relied on ***Petit-Homme*** to reverse the summary denial of a **Rule 3.850(b)(1) motion** alleging newly discovered evidence in the form of counsel's failure to convey a plea offer. *236 So. 3d at 482.*

The Court in ***Clark*** expressly disagreed with the post conviction court's determination that ***"the plea offer was not newly discovered evidence because Clark's counsel was aware of the offer,"*** instead concluding that "[i]n these circumstances, ***trial counsel's knowledge of the plea offer is not imputed to [defendant]*** for purposes of the **newly discovered fact** exception to **Rule 3.850 (b)(1)**." Id.

In ***Howarth,*** an earlier decision addressing the summary denial of a petition for writ of error coram nobis, the Court held: that "[a] prima facie case for relief is not made by couching other claims in terms of ***newly discovered evidence*** or by characterizing previously known information as newly discovered." ***moreover, "[c]laims of ineffective assistance of counsel are not errors of fact that are cognizable in a traditional Petition for writ of error coram nobis.)***

Thus, based upon the fact that the **Fifth DCA** has implicitly receded from ***Lamb***, and ***Howarth,*** when it issued its subsequent decision in ***Taylor supra,*** it cannot be said that Petitioner is not entitled to have the prior Appellate decisions denying his post conviction Appeals reconsidered, where, not only was the Courts decisions announced in ***Lamb***, and ***Howarth*** found to be based upon an erroneous interpretation of the law, to which Petitioners post conviction Appeals were directly denied under, but because the **Fifth DCA** has subsequently rectified such error in ***Taylor supra,*** it cannot be said that ***Reconsideration*** is not warranted, specifically where, failure to do so will certainly result in a manifest injustice being committed in Petitioners case.

Thus, based on the aforementioned principles of law, it cannot be said that Petitioner did not have standing to have the **Fifth District Court of Appeal *(Reconsider)*** its prior Appellate Decision(s) in **Case No'(s): 5D06-3728: and 5D07-1224:** under the principles of ***Habeas Corpus*** to Correct the Manifest Injustice committed in Petitioners case.

REQUEST FOR CERTIFICATION OF QUESTION

FLORIDA APPELLATE RULE 9.150(a) — DISCRETIONARY PROCEEDINGS TO REVIEW CERTIFIED QUESTIONS FROM FEDERAL COURTS

Pursuant to **Florida Appellate Procedure, Rule 9.150(a) —Applicability.**, The Florida Supreme Court is obligated to entertain Certified Questions from the United States Supreme Court when no controlling precedent exist to resolve the issue at bar, this Rule provides:

> On either its own motion or that of a party, the Supreme Court of the United States or a United States Court of Appeals may Certify One-1 or more questions of law to the Supreme Court of Florida if the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida.

CONCLUSION

Wherefore, based upon the foregoing facts, argument, and citation of authorities, Petitioner respectfully moves this Honorable Court to grant review under its Certiorari Jurisdiction and Reverse and Remand to the Florida Supreme Court a Certified Question as to whether its Rule(s) of Criminal and Appellate Procedure are Unreasonably Over-Broad and Violative of the Substantive Due Process Clause of the Fourteenth Amendment that operate to arbitrary deprive Florida Prisoners of their Rights to Access to the Courts.

Respectfully Submitted

/S/ _____

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