IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT IN AND FOR POLK COUNTY, FLORIDA

ANTHONY W. BROOM,
Defendant,

vs. TRIAL CASE NO.: **CF81-1860A1-XX**

STATE OF FLORIDA,
Plaintiff.
_____/

MOTION FOR EXTENSION TO FILE BELATED AND SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF

COMES NOW, Defendant, *pro se*, and respectfully moves this Honorable Court, pursuant to Rule 3.050(2), Florida Rules of Criminal Procedure, for an extension to file a motion for post-conviction relief and shows as follows.

A motion for extension may be filed even after the two-year time limit under Rule 3.050(2), Florida Rule of Criminal Procedure. The Defendant must show both "good cause" and that the failure to act was the result of "excusable neglect." Both novelty and futility warrant waiver of any procedural default in this case under these circumstances. See *e.g.*, Witt v. State, 465 So.2d 510, 512 (Fla. 1985)(explaining the abuse of the writ doctrine and the two exceptions – new case law and new facts – implemented under Rule 3.850 and adding the caveat "[t]hese two examples are not intended to set forth the exclusive means to justify a second petition.").

In Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983)(*en banc*), the court expressly noted the conflict between the table – or "schedule" – and Fla.R.Crim.P. 3.490:

> The subject of lesser included offenses under first degree (felony) murder is a difficult one with inherent latent complexities far more extensive than the aspects which we have referred to above. We believe this is a case of first impression concerning the relationship between the foregoing portion of the table and rule 3.490.

Id. at 256. Moreover, Justice Grimes wrote a concurring opinion:

> As a member of the Supreme Court committee which recommended the 1981 revision of the Florida Standard Jury Instructions in Criminal Cases and chairman of the subcommittee which prepared the schedule of lesser included offenses, I concede that the schedule is inconsistent with Florida Rule of Criminal Procedure 3.490 as it relates to the lesser included offenses of first degree (felony) murder. This occurred because the schedule was originally adopted on the premise that degrees of an offense would be treated in the same manner as lesser included offenses. Thus, our committee contemplated that Florida Rule of Criminal Procedure 3.490 would be amended to provide that if the indictment or information charges an offense divided into degrees, the jury could find the defendant guilty of any lesser degree of the offense which as a matter of law is a necessarily included offense or any lesser degree of the offense charged in the indictment or information and supported by the evidence. This is reflected in the Comment on Schedule of Lesser Included Offenses (page 257) and in the Order and Opinion of Supreme Court of Florida Adopting Florida Standard Jury Instructions in Criminal Cases, Nos. 57,734 and 58,799 (April 16, 1981) (page viii), both of which are reprinted in Florida Standard Jury Instructions in Criminal Cases. However,

> the new rule did not go as far as the committee originally intended. The amended Florida Rule of Criminal Procedure 3.490 as ultimately recommended and approved by the supreme court in 1981 only required that the lesser degree of offense be supported by the evidence and omitted any reference to it either being necessarily included or being charged in the indictment or information. Unfortunately, the table was not changed to coincide with the rule as adopted. Hence, this particular aspect of the schedule is inconsistent with the rule, and one or the other should be changed. (Original emphasis).

Id. at 256-57 (Grimes, J., concurring).

Notwithstanding Justice Grimes' concurring opinion, the error was not corrected and Linehan was approved in Linehan v. State, 476 So.2d 1262 (Fla. 1985), even though Justice Shaw dissented, expressing his belief that the majority of the Court had departed from Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), codified in §775.021(4), Fla. Stat. (1983). *Id.* at 1266 (Shaw, J., dissenting).

Clearly, any attempt to challenge the instant conviction and sentence on this issue would have been futile as it would have been foreclosed by Linehan as the settled law of this state. When Linehan was receded from in Coicou v. State, 39 So.3d 237 (Fla. 2010), it was as a result of a novel question of great public importance, not a certified conflict among the District Courts of Appeal. In other words, the issue was not "perculating" in the courts. Howard v. United States, 374 F.3d 1068 (11th Cir. 2004). Accordingly, futility and novelty justify an extension.

NEW CASE LAW AND RETROACTIVITY ANALYSIS

Defendant alternatively relies on Coicou v. State, 39 So.3d 237 (Fla. 2010), decided on June 28, 2010, as a new decision from the Supreme Court of Florida that should be applied retroactively to Defendant's case because it meets the three prong test announced in Witt v. State, 387 So.2d 922 (Fla. 1980). First, the decision does emanate from the Supreme Court of Florida. Second, the decision is constitutional in nature because it involves an interpretation of the due process and double jeopardy clauses of Amends. 5 and 14 U.S. Const. by the United States Supreme Court in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), codified in §775.021(4), Fla. Stat. (1983). In effect, the decision in Coicou created a substantial right in the State of Florida by recognizing that its prior decision in Linehan v. State, 476 So.2d 1262 (Fla. 1985), had erroneously abrogated those substantive rights announced in Blockburger. Moreover, the Court recognized that Fla.R.Crim.P. 3.490 usurped the authority of the Legislature by superceding §775.021(4), Fla. Stat. (1983), on a substantive right such that the rule incorrectly interpreted the statute allowing courts to enter convictions without statutory authority. Third, the decision is of fundamental significance, as it constitutes a jurisprudential upheaval, *e.g.*, Rule 3.490 placed beyond the authority of the State the power to regulate certain conduct and to impose certain penalties. Witt, 387 So.2d at 929. That is, without Rule 3.490, a trial court could not enter a

conviction for an offense lesser in degree than the offense charged unless all of the elements of the lesser offense were charged, nor could any sentence be imposed on any such lesser offense.

DUE PROCESS OVERLAY

In State v. Barnum, 921 So.2d 513 (Fla. 2005), the Court opined that "retroactivity will be adjudged solely through operation of the Witt standard with an overlay of the Fiore due process considerations." *Id.* at 528-29, citing Fiore v. White, 531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). As stressed in Bunkley v. Florida, 538 U.S. 835, 840, 123 S.Ct. 2020, 155 L.Ed.2d 1046 (2003), "'[t]he proper question under Fiore is not whether the law has changed,' but rather what the state of the law was at the time of the defendant's conviction." Barnum, 921 So.2d at 521.

By receding from Linehan in Coicou, the Court made it clear that, at the time Defendant's conviction became final, the controlling law was Blockburger, as codified in §775.021(4), Fla. Stat. (1983), pursuant to which Defendant could not have been convicted and sentenced as he was in this case. Accordingly, the Fiore due process overlay requires a retroactive application of Coicou to Defendant's case.

RELIEF SOUGHT

WHEREFORE, premises considered, this Court should grant an extension to file a Belated and Successive Motion for Post-Conviction Relief.

Anthony W. Broom

Anthony W. Broom, *pro se*

UNNOTARIZED OATH/VERIFICATION

PURSUANT TO §92.525, FLORIDA STATUTES

UNDER PENALTIES OF PERJURY, I declare that I have read the foregoing document and that the facts stated herein are true and correct.

Anthony W. Broom

Anthony W. Broom, *pro se*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing document was placed in the hands of Mayo Correctional Institution officials to forward by U.S. Mail to: Office of the State Attorney, Jerry Hill, 255 N. Broadway Avenue, P.O.

Box 9000-Drawer AS, Bartow, FL 33831 on this 21 day of February, 2012.

Anthony W. Broom

Anthony W. Broom, *pro se*
DC# 081443
Mayo Correctional Institution Annex
8784 W. U.S. 27
Mayo, FL 32066

cc: Richard Weiss, Clerk of the Court, 255 N. Broadway Avenue, P.O. Box 9000, Bartow, FL 32831-9000