

**IN THE DISTRICT COURT OF APPEAL
FOR THE FIFTH DISTRICT
STATE OF FLORIDA**

PATRICK JAMES CLARK,

CASE NO.: 5D14-320

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**On Appeal To The Fifth District Court Of Appeal
From The Circuit Court Of The Ninth Judicial Circuit
In And For Orange County**

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Appellant, PATRICK JAMES CLARK, by and through the undersigned counsel and pursuant to Rule 9.141(b)(3) of the Florida Rules of Appellate Procedure, hereby appeals the denial of his Amended Motion for Post-Conviction Relief. This Court has jurisdiction over the instant appeal pursuant to Rule 9.110(b) of the Florida Rules of Appellate Procedure.

In this brief, the Appellant, Patrick James Clark, will be referred to as “Mr. Clark”. The Appellee, the State of Florida, will be referred to as the “State.” The attorney who represented Mr. Clark during his trial will be referred to as “Trial Counsel.” The court that denied Defendant’s Amended Motion for Post-Conviction Relief, will be referred to as the “Trial Court.”

Citations to the record on appeal will be referred to by the letter “R”, followed by the appropriate page number.

Citations to the transcripts of the evidentiary hearing on Mr. Clark’s motion will be referred to by the letter “T”, followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

On August 31, 1995, the State of Florida, charged Mr. Clark with one count of Lewd and Lascivious Act, pursuant to Section 800.04(1), Florida Statutes. (R. at 7). On February 29, 1996, Mr. Clark entered a plea of *nolo contendere* to the

charged offense. (R. at 19). At the time of his plea, the trial court entered a withhold of adjudication, and sentenced Mr. Clark to two (2) years of administrative probation. (R. at 26).

On October 21, 2010, Mr. Clark filed his Verified Motion for Post-Conviction Relief, pursuant to Florida Rule of Criminal Procedure 3.850. (R. at 24). In his motion, Mr. Clark raises five arguments:

I. When the Defendant entered his plea to Section 800.04(1) Florida Statutes (1995), he was not required to register as a sex offender pursuant to Section 943.0435, Florida Statutes (1998), therefore his plea was not knowing or voluntary.

II. Application of Section 943.0435, Florida Statutes (1998) to the defendant violates the Ex Post Facto Clause, therefore his plea was not knowing or voluntary.

III. The Defendant's Due Process rights are violated because he is not required to register as a sex offender pursuant to Section 943.0435 (1998), therefore his plea was not knowing or voluntary.

IV. The FDLE should be enjoined from enforcing the sex offender registration requirements against the Defendant as such requirements are an improper retroactive sentence enhancement, therefore his plea was not knowing or voluntary.

V. Application of Section 943.0435, Florida Statutes (1998) to the Defendant violates the Eighth Amendment, therefore his plea was not knowing or voluntary.

On November 4, 2010, Mr. Clark filed his Amended Verified Motion for Post-Conviction Relief. (R. at 92). On December 6, 2011, the trial court directed the State to respond to Mr. Clark's Amended Verified Motion for Post-Conviction Relief, instructing the State to consider said motion pursuant to Florida Rule of Criminal Procedure 3.800, as well as Florida Rule of Criminal Procedure 3.850. (R. at 160). The State filed its response on January 31, 2012. (R. at 165-184.) On November 1, 2013, the Trial Court entered an order denying Claims II, III, IV, and V of Mr. Clark's amended motion, and granting an evidentiary hearing as to Claim I. (R. at 374).

On November 13, 2013, the Trial Court held an evidentiary hearing in order to address the merits of Claim I as set forth in Mr. Clark's Amended Verified Motion for Post-Conviction Relief. (R. at 374). On January 6, 2014, the Trial Court issued its written order denying Claim I of Mr. Clark's amended motion. (R. at 375). Mr. Clark now appeals that Order.

B. Claims Raised in the Motion

Mr. Clark sought to withdraw his plea and vacate his judgment and sentence because (1) he was never informed that he would have to register as a sex offender

as a consequence of the entry of his plea, and (2) because Trial Counsel induced him to enter a plea of *nolo contendere* by affirmatively misrepresenting his eligibility for expungement of his record. Prior to the entry of his plea, Trial Counsel informed Mr. Clark that he would later be able to have his record expunged, and that he would not be subject to any travel restrictions. (R. at 44).

Mr. Clark relied upon these representations by Trial Counsel in his decision to enter a plea and waive his constitutional right to trial by jury. (R. at 46). At the time of Mr. Clark's entry of plea, the State of Florida had no statutory provision for the registration of sexual offenders, as Section 943.0435, Florida Statutes, was not enacted until 1998. (R. at 27). Mr. Clark testified that if he had known at the time of his plea that he would have to register as a sexual offender, he would have proceeded to trial. (T. at 34, lines 16-19).

On February 29, 1998, exactly two years after the entry of Mr. Clark's plea, he finished his probation, having successfully completed all his probationary requirements. Prior to the termination of Mr. Clark's probation, the State of Florida had never contacted him regarding the necessity of registration with the Florida Department of Law Enforcement. (R. at 45).

The State of Florida never informed Mr. Clark that he would have to register as a sexual offender, until the Florida Department of Law Enforcement sent him a letter, dated July 10, 2000. (R. at 26). Upon receipt of this letter, Mr. Clark called

Trial Counsel in order to seek clarification with regard to Mr. Clark's responsibilities. (T. at 17, lines 21-23). Trial Counsel simply instructed Mr. Clark that the State of Florida had no jurisdiction over him, as Mr. Clark was then residing in Missouri. (T. at 18, lines 3-6). During the same conversation, Mr. Clark called upon Trial Counsel to fulfill his promise to expunge Mr. Clark's record. (T. at 19, lines 1-12). To date, Mr. Clark's record has been neither sealed nor expunged. (T. at 34, lines 7-11).

In 2004-2005, Mr. Clark hired Missouri attorney Scott Rosenblum to file a petition to remove Mr. Clark from the sex offender registry. (T. at 31, lines 6-12). Attorney Rosenblum took money from Mr. Clark, and took no further action. Attorney Rosenblum failed to contact any Florida attorney. Attorney Rosenblum failed to file a petition in either Missouri or Florida. (T. at 31, line 24 – 32, line 6). In 2009, Mr. Clark realized that attorney Rosenblum was not going to take any action to assist him to remove himself from Florida's sex offender registry. Mr. Clark then sought Florida counsel, ultimately hiring the Brownstone Law Firm, which promptly filed a motion for post-conviction relief on Mr. Clark's behalf. (T. at 32, line 21 – 33, line 8).

At the evidentiary hearing on Claim I of Mr. Clark's amended motion, Assistant State Attorney Janna Brennan conceded that the sex offense registry was not in existence at the time Mr. Clark entered his plea. (T. at 38, lines 2-5.)

During his testimony at the evidentiary hearing, Trial Counsel conceded that he did not recollect whether or not he had ever spoken to Mr. Clark regarding the possibility of expunging his record. (T. at 48, lines 10-13).

At the conclusion of testimony, Mr. Clark, through counsel, argued that his plea and sentence should be set aside as it was based upon the illusory promises of Trial Counsel, upon which he relied to his detriment. (T. at 58, lines 10-24). He points out that once he knew about the requirement that he register as a sex offender he took steps to attempt to rectify the situation, contacting Trial Counsel to seek assistance, and then hiring Missouri counsel. (T. at 63).

The State argued that Mr. Clark's motion should be denied as untimely, as it was filed outside of the two year statute of limitations set forth in Florida Rule of Criminal Procedure 3.850. (T. at 59). The State then argued that Trial Counsel should not be deemed ineffective for failing to inform Mr. Clark of an unforeseeable collateral consequence of his plea. (T. at 61-62).

On January 6, 2014, the Trial Court issued an Order Denying Claim One of Motion for Postconviction Relief, After Evidentiary Hearing. (R. at 374). In its decision, the Trial Court opined that it did not possess jurisdiction to grant Mr. Clark the relief sought, basing its belief upon the holding in *State v. Whitt*, 96 So.

3d 1125 (Fla. 5th DCA 2012.)¹ (R. at 374). The Trial Court further stated that even if the court did have jurisdiction, Mr. Clark's motion would be untimely, as it was filed beyond the two-year statute of limitations enumerated in Florida Rule of Criminal Procedure 3.850. (R. at 375).

Mr. Clark timely filed his notice of appeal on January 29, 2014, and seeks appellate review of the Trial Court's January 6th, 2014 Order.

SUMMARY OF THE ARGUMENT

The Trial Court erred by denying Claim I of Mr. Clark's Amended Verified Motion for Post-Conviction Relief. Mr. Clark's initial Verified Motion for Post-Conviction Relief was filed on August 21, 2010. The Trial Court had jurisdiction to grant Mr. Clark the relief he sought. Mr. Clark sought specific relief in his motion: he asked for the Court to vacate his plea and sentence. While the Trial Court is correct that it did not have jurisdiction to order the Florida Department of Law Enforcement to remove Mr. Clark from its sex offender registry, it did possess jurisdiction to vacate an involuntarily entered plea. Mr. Clark entered his plea based upon the illusory promise of future expungement and anonymity. Therefore, his plea was neither knowing nor voluntary and should be set aside.

¹ In the *Whitt* decision, the Fifth District Court of Appeal overturned the trial court's order which directed the Defendant to the Florida Department of Law Enforcement to remove him from the sex offender registry. The appellate court held that as the sexual offender designation was not part of the plea or sentence, the trial court did not have postconviction jurisdiction to consider the matter.

Florida Rule of Criminal Procedure 3.850 governs the filing of post-conviction motions to vacate pleas. Under the version of Rule 3.850 in effect at the time of the filing of Mr. Clark's motion, there is an exception to the default two year statute of limitations for claims in which the predicate facts were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence. *See Fla. R. Cr. Pro. 3.850 (2010)*.

This exception clearly applies to Mr. Clark, as Florida's statutory sex offender registry did not exist or pertain to Mr. Clark until subsequent to the successful termination of Mr. Clark's probation. As Section 943.0435, Florida Statutes, did not exist at the time of Mr. Clark's plea and sentence, it could not have been ascertained through the exercise of due diligence.

Further, as Mr. Clark's claim is based upon a truly unknowing and involuntary plea, the facts of which could not have been discovered by him within two years of its finality, even exercising due diligence, barring his claim based upon a two-year procedural limitation would result in a manifest injustice. For this reason, even if this Court believes that Mr. Clark's motion was untimely filed, it should grant Mr. Clark the relief sought.

ARGUMENT

I. **THE TRIAL COURT ERRED IN HOLDING THAT IT DID NOT HAVE JURISDICTION TO GRANT DEFENDANT RELIEF**

A. **Standard of Review**

“The issue of jurisdiction is strictly a legal one, and thus the District Court of Appeal reviews the trial court’s jurisdiction de novo.” *Baldwin v. State*, 20 So. 3d 991, 992 (Fla. 1st DCA 2009).

B. **Argument on the Merits**

In his motion for post-conviction relief, Mr. Clark raised a facially sufficient claim that the entry of his plea was unknowing and involuntary. Mr. Clark provided un rebutted testimony that he entered his plea based upon affirmative misrepresentations by counsel, and an incomplete understanding of the long term consequences of his plea. “In criminal cases, the circuit court primarily has postconviction jurisdiction to review motions filed pursuant to Florida Rules of Criminal Procedure 3.800(a) and 3.850.” *State v. Whitt*, 96 So. 3d 1125 (Fla. 5th DCA 2012). “An involuntary plea is a recognized ground for post-conviction relief, but the defendant has the burden of showing that the plea was not voluntary or knowing.” *Young v. State*, 789 So. 2d 1160 (Fla. 5th DCA 2001.)

The Trial Court clearly had jurisdiction to award Mr. Clark the relief sought in his motion. As stated above, Mr. Clark’s motion asked the Trial Court to vacate his judgment and sentence, pursuant to Florida Rule of Criminal procedure 3.850,

based upon the involuntariness of his plea. The Trial Court cited to *State v. Whitt*, 96 So.3d 1125 (Fla. 5th DCA 2012) in support of its conclusion that it did not possess jurisdiction to grant the relief sought.

The *Whitt* decision stands for the proposition that the trial court does not have the jurisdiction to address a motion to remove a defendant's name from the FDLE sex offender registry. *State v. Whitt*, 96 So. 3d 1125 (Fla. 5th DCA 2012). To the extent that Mr. Clark's motion requested such relief, he concedes that the trial court is constrained by the *Whitt* decision. However, Mr. Clark's case is procedurally distinguishable from the *Whitt* case in that Mr. Clark sought relief via Florida Rule of Criminal Procedure 3.850. This Court has repeatedly held that a trial court has jurisdiction to consider motions to withdraw pleas filed pursuant to Florida Rule of Criminal Procedure 3.850. *See, e.g. State v. Whitt*, 96 So.3d 1125, 1126 (Fla. 5th DCA 2012). As Mr. Clark has filed a facially sufficient motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, requesting the trial court to withdraw his plea and vacate his sentence, the Trial Court had jurisdiction to award the relief sought in an exercise of its discretion. Therefore, Mr. Clark asks this Court to remand this matter to the Trial Court with instructions to rule upon the merits of his motion.

II. THE TRIAL COURT ERRED IN HOLDING THAT THE DEFENDANT’S MOTION WAS UNTIMELY

A. Standard of Review

“A legal issue surrounding a statute of limitations question is an issue of law subject to de novo review.” *Hamilton v. Tanner*, 962 So .2d 997, 1000 (Fla. 2d DCA 2007).

B. Argument on the Merits

The trial court is not precluded from consideration of Mr. Clark’s motion by operation of the two year statute of limitations set forth in Florida Rule of Criminal Procedure 3.850. Pursuant to the version of Florida Rule of Criminal Procedure 3.850 in effect on October 21, 2010, (the date Mr. Clark filed his motion for post-conviction relief), a motion filed pursuant to Rule 3.850 of Florida Rules of Criminal Procedure must have normally be filed within two (2) years of the judgment and sentence becoming final. The Rule allows the following enumerated exceptions to the two year limitation where:

- (1) the facts on which the claim is predicated were unknown to the movant or the movant’s attorney and could not have been ascertained by the exercise of due diligence, or

(2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Fla. R. Cr. Pr. 3.850 (2010).

It was not until October 12, 2011 that the Florida Supreme Court amended the text of Florida Rule of Criminal Procedure 3.850(b)(1), as follows:

(b) Time Limitations. A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final unless it alleges that

(1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, *and the claim is made within two years of the time the new facts were or could have been discovered with the exercise of due diligence.* (Emphasis added).

Fla. R. Cr. Pr. 3.850 (2014).

Mr. Clark entered his plea on February 29, 1996. He was released from his probation on February 29, 1998. Section 943.0435 of the Florida Statutes did not take effect until July 1, 1998. Mr. Clark filed his motion for post-conviction relief on October 21, 2010.

There can be no debate that the facts upon which Mr. Clark's claims are predicated were unknown to him at the time he entered his plea. In addition, Mr. Clark could not have ascertained these facts by the exercise of due diligence.

Mr. Clark promptly and successfully completed his probation. Once finished his probation he was justified in his belief that his involvement with the criminal justice system had ended. He was under no responsibility to research pending civil legislation. Under the plain language of Florida Rule of Criminal Procedure 3.850 at the time Mr. Clark filed his motion, he is exempted from any two-year statute of limitations. As his motion was not time barred, the trial court had jurisdiction to consider the merits of Mr. Clark's claim, the trial court's order should be quashed, and Mr. Clark's case remanded.

III. THE MOTION IS TIMELY UNDER THE MANIFEST INJUSTICE EXCEPTION

A. Standard of Review

"A legal issue surrounding a statute of limitations question is an issue of law subject to de novo review." *Hamilton v. Tanner*, 962 So. 2d 997, 1000 (Fla. 2d DCA 2007).

B. Argument on the Merits

The United States Supreme Court has repeatedly recognized that a manifest injustice claim overcomes procedural defaults if applying the defaults to bar relief will result in a miscarriage of justice. *See Murray v. Carrier*, 477 U.S. 478, 496 (1986) (a court may grant relief even in the absence of a showing of cause for procedural default where a constitutional violation has probably resulted in conviction of someone who is actually innocent); *Singleton v. Wulff*, 428 U.S. 106,

121 (1976) (arguments raised for the first time on appeal may be entertained if their consideration would prevent manifest injustice); and *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (the “law of the case” doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice).

This exception to procedural limitations has also widely been accepted by Florida courts in numerous contexts. Significantly, the manifest injustice exception to procedural defaults has been applied to the two-year time limit imposed by Florida Rule of Criminal Procedure 3.850. *See Deras v. State*, 54 So.3d 1023 (Fla. 3d DCA 2011). In *Deras*, the charges arose from two car accidents. *Id.* The second accident, which involved a death, occurred five minutes after Deras had fled from the first accident and required that Deras be airlifted to a hospital. *Id.*

Deras filed a post-conviction motion alleging that insufficient evidence existed to support the crimes to which he had pled. *Id.* Following three additional motions for post-conviction relief, the trial court summarily dismissed Deras’ subsequent post-conviction motion as untimely. *Id.* While the Third District Court of Appeal acknowledged that Deras had raised his innocence arguments in prior motions, it held that if Deras’ claim of innocence were true, it should be revisited under the manifest injustice exception regardless of the timeliness of the motion. *Id.*

Mr. Clark's motion raised a claim of manifest injustice, and as such should not be subject to Florida Rule of Criminal Procedure 3.850's default two year procedural bar. There is no question that Mr. Clark's motion was filed more than two years after his judgment and sentence became final. Rather than make a determination as to whether Mr. Clark's claim amounted to a manifest injustice as *Deras*, the Trial Court denied his motion on the basis of Florida Rule of Criminal Procedure 3.850's two year time limit. Since it is well established that procedural limitations cannot be applied to prevent an injustice from being cured, the trial court erred in denying Mr. Clark's claim as procedurally barred.

In Mr. Clark's motion, he discusses the case of *State v. Wiita*, 744 So.2d 1232 (Fla. 4th DCA 2000). That case dealt with a defendant who had entered a plea in 1991 to one count of lewd assault and one count of sexual activity with a child pursuant to a negotiated plea agreement. *Id.* The terms of the plea agreement included that the defendant's adjudication would be withheld, and that he would serve ten years of probation, during which he would complete various requirements including counselling and payment of restitution. *Id.* On October 1, 1997, Section 943.0435, Florida Statutes, was enacted. *Id.* Section 943.0435, which is retrospective in nature, requires persons convicted of sexual offenses to report to the Florida Department of Law Enforcement and register as a sexual offender. *Id.* The defendant complied with all requirements under 943.0435, and then, on June 4,

1998, he filed a motion to vacate his plea and/or preclude his compliance with the requirements of sex offender registration. *Id.* In his motion, the defendant stated that since Section 943.0435 was not in existence at the time he entered his plea agreement its reporting and publication requirements were not part of his plea agreement. He concluded that this unknown subsequent registration requirement rendered his plea involuntary. *Id.*

At the hearing on his motion, the defendant testified that he had bargained for anonymity in exchange for his guilty plea, that he had been promised a withhold of adjudication, and the subsequent ability to seal his file. *Id.* The trial court granted the defendant's motion to vacate his plea. *Id.* The State then appealed the trial court's decision, arguing that the defendant's challenge to his guilty plea was ineffective because he failed to show that a manifest injustice occurred. *Id.*

The Fourth District Court of Appeal upheld the decision of the trial court, agreeing that a manifest injustice had occurred, and that the defendant should be allowed to withdraw his plea. *Id.* In reaching its decision, the Fourth District found that where the defendant had entered a plea in order to avoid publicity, and then subsequently found publicity thrust upon him by virtue of the enactment of Section 943.0435, Florida Statutes, justice and fairness supported the withdrawal of the defendant's plea. *Id.* The Honorable J. Stevenson authored a special concurrence to the District Court's decision, stating:

(However) as the majority opinion points out, the record that was before the trial judge established that Wiita was assured that he would be able to have the file “sealed” and that his record would be “wiped clean.” These additional assurances, in combination with the publication provisions of 943.0435, wholly frustrated Wiita’s expectations of complete anonymity based on his understanding of what would occur as a result of his guilty plea. *Id.*

The facts in Mr. Clark’s case are extremely similar to those in the *Wiita* case.

Like Wiita, Mr. Clark entered a plea to a sex offense prior to the promulgation of Section 943.0435, Florida Statutes. Like Wiita, Mr. Clark accepted a negotiated resolution conditioned upon future anonymity. During the hearing on Mr. Clark’s motion, he made it explicitly clear that he entered his plea only because of this promised anonymity:

Mr. Clark: No. The way it was described to me is, expungement meant that it would – it would – the records would be sealed. They would be as if it would – it never happened.

Mr. Tiffany: And did Mr. Schaeffer promise at the time you entered the plea, that your record, assuming you made it through probation, would be sealed or expunged?

Mr. Clark: Yes.

Mr. Tiffany: Has your record subsequently been sealed or expunged?

Mr. Clark: No, it has not.

Mr. Tiffany: Judge, I don’t have any further questions.

The Court: Okay.

Mr. Megaro: Very brief. Would you have entered the plea in 1996 if you had known that you'd someday be subject to sexual offender registration?

Mr. Clark: Absolutely not.

(T. at 33, line 25 – 34, line 19.)

The only distinguishing fact between the *Witta* case and Mr. Clark's is that Mr. Witta filed his motion within two years of the enactment of Section 943.0435, Florida Statutes. That factual distinction is meaningless, however. In the *Witta* case the Fourth District Court of Appeal found that a manifest injustice had occurred where a plea was predicated upon exactly the same illusory promises as those Mr. Clark suffered. As a finding of manifest injustice renders Florida Rule of Criminal Procedure 3.850's default two year time bar moot, this Court should adopt the reasoning of the Fourth District Court of Appeal in its *Witta* decision, find that Mr. Clark has suffered a manifest injustice, reverse the Trial Court's order, and remand the case for reconsideration on the merits.

Ultimately, the purpose of the doctrine of manifest injustice is to ensure that justice is not lost based upon a mere technicality. At the time that Mr. Clark entered his plea, he was assured of future anonymity by virtue of a promised expungment subsequent to the successful completion of his probation. At the time of his plea, Mr. Clark was not concerned about the requirements of sex offender registration, as such did not exist in the State of Florida.

Mr. Clark expeditiously completed his probation, and then assumed that his promised anonymity had been given him, until he was notified of his sex offender status in 2000. At that time, he reached out to his trial counsel to seek relief, then hired Missouri counsel when his trial counsel refused to help him. Neither of these attorneys took any steps to assist Mr. Clark. Like Wiita, Mr. Clark entered a plea based upon explicit promises of future anonymity, which were frustrated by the promulgation of Section 943.0435, Florida Statutes. Mr. Clark could not have foreseen this coming change in the law at the time he entered his plea. Mr. Clark should not be precluded from rectifying a manifest injustice because of the two year statute of limitations set forth in Florida Rule of Criminal procedure 3.850. In order to avoid a manifest injustice, Mr. Clark's judgment and sentence must be vacated and set aside.

CONCLUSION

Based on the foregoing arguments and legal authority, the Appellant, Patrick Clark, respectfully requests this Court reverse the denial of his motion for post-conviction relief below. Mr. Clark also requests this Court vacate his judgment and sentence, permit him to withdraw his plea, and grant any other relief this Court deems just and proper.

DATED this 15 day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this 15th day of May, 2014 to:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Gary J. Schwartz, Esquire
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