**CASE NUMBER 1D10-_____**

In The

# FIRST DISTRICT COURT OF APPEAL
# STATE OF FLORIDA

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**GARY MITCHELL,**

***Petitioner*,**

**v.**

**STATE OF FLORIDA,**

***Respondent*.**

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**On Petition for a Writ of Certiorari to the Circuit Court, Fourth Judicial Circuit of Florida**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

**WHETHER THE CIRCUIT COURT SITTING IN ITS CAPACITY AS A COURT OF APPEAL DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN REFUSING TO DECIDE WHETHER *ALABAMA v. SHELTON*, A UNITED STATES SUPREME COURT DECISION WHICH ANNOUNCED A NEW RULE OF CONSTITUTIONAL PROCEDURE RELATING TO THE RIGHT TO COUNSEL IN MISDEMEANOR CASES, WAS RETROACTIVE FOR PURPOSES OF RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE.**

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IN THE

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# STATE OF FLORIDA

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**GARY MITCHELL**,

*Petitioner*,

v.

**STATE OF FLORIDA**,

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**On Petition for Writ of Certiorari to the**
**Circuit Court, Fourth Judicial Circuit of Florida**

---

## PETITION FOR A WRIT OF CERTIORARI

The Petitioner, **GARY MITCHELL**, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Circuit Court, Fourth Judicial Circuit of Florida, entered in *Gary Mitchell v. State of Florida,* filed August 6, 2010. The decision of the Circuit Court is unreported, however, a a true and correct copy is included in Appendix A, *infra*.

## OPINION BELOW

The decision of the Circuit Court, Fourth Judicial Circuit of Florida in *Gary*

*Mitchell v. State of Florida* was filed August 6, 2010 and entered by the clerk on August 6, 2010, but unreported in the official reporter. The Circuit Court consisted of a single judge, who was sitting in his review capacity, deciding an appeal of a denial of a motion for post-conviction relief filed under Rule 3.850, Florida Rules of Criminal Procedure, based on a claim that Mitchell was entitled to the retroactive application of a newly issued decision of the United States Supreme Court, *Alabama v. Shelton*, 535 U.S. 654 (2002), which extended a right to court appointed counsel to cases such as Mitchell's. Mitchell had been convicted of DUI on the basis of an uncounseled guilty plea. At the time of the plea Mitchell did not have a right to court appointed counsel. Under *Shelton* he would have had the right to appointed counsel. Although neither the United States Supreme Court nor the Florida Supreme Court have decided whether *Shelton* is retroactive for purposes of post-conviction, habeas relief, virtually every reviewing court that has considered the question, under both state and federal retroactivity standards, has found *Shelton* to be retroactive. In particular, the Eleventh Circuit Court of Appeals in Atlanta, which has jurisdiction over Florida, has held *Shelton* to be retroactive for habeas purposes. The facts in Mitchell's case were undisputed. The trial court that ruled upon Mithcell's claim in the first instance did not dispute that under *Shelton* Mitchell would have been entitled to counsel and did not dispute that if *Shelton* were applied retroactively for 3.850

purposes, that Michell would be entitled to withdraw his plea to the DUI. The trial court denied relief solely on the ground that it found that *Shelton* was not retroactive.

Mitchell pursued a timely appeal of the county court's denial of his 3.850 motion. The only issue on appeal was whether *Shelton* was retroactive for purposes of a 3.850 post-conviction relief claim or not. Mitchell argued that it was retroactive, the State of Florida argued that it was not retroactive. After delaying the decision for three years, the Circuit Court, the Honorable Don H. Lester, issued its decision August 6, 2010, and affirmed the lower court but did so not because it found *Shelton* to not be retroactive, but instead *because it refused to decide whether Shelton was retroactive or not.* The Circuit Court decision stated:

> "The State counters that retroactivity can be decided only by the United States Supreme Court or by the Florida Supreme Court. . . . Neither the United States Supreme Court nor the Florida Supreme [*sic*] has, to date, made retroactive the right to counsel announced in *Shelton*. *It is not for this Court to speculate whether at some future date either of those courts will make Shelton retroactive*."

Slip opinion, pages 3-4 (emphasis supplied).

Mitchell is entitled to certiorari relief for two reasons: first, the Circuit Court departed from the essential requirement of law in refusing to fulfill its duty as an

appellate court and rule on the issue on appeal, that is, to decide whether *Shelton* is retroactive or not, and second, the Circuit Court departed from the essential requirements of law in not finding that *Shelton* is retroactive for purposes of a motion under Rule 3.850, Florida Rules of Criminal Procedure.

## JURISDICTION

This Petition seeks review of the judgment entered by the Circuit Court of the Fourth Judicial Circuit of Florida acting in its review capacity reviewing on appeal an order of the County Court denying Mitchell's Rule 3.850 motion. The jurisdiction of this Court to review the judgment is invoked under Article V, § 4(b)(3), of the Florida Constitution, and Rule 9.030(b)(2), Florida Rules of Appellate Procedure.

## STATEMENT OF FACTS MATERIAL TO THE QUESTION PRESENTED[1]

The following statement of facts is taken from Mitchell's sworn 3.850 motion [R1], the affidavit of his counsel [R21], and the hearing on the motion conducted on the motion November 30, 2006. [R44] There are no disputed facts presented by this appeal; the State conceded and stipulated to the facts presented by Mitchell and the lower Court accepted the State's concession and stipulation. [R49] The appeal turns solely on two questions of law. [R42-43]

Gary Mitchell ("Mitchell"), the appellant herein, was arrested on or about July 2, 1985 and charged with driving while intoxicated ("DUI") under Florida Statute § 316.193. This was his first DUI. He was brought before the Honorable Hugh Fletcher for first appearance within 24 hours of his arrest, while still in custody, and pled no contest at first appearance and adjudication of guilt was withheld and the court imposed the then minimum penalty for a first DUI, which was six months DUI probation and related costs and fine.

Mitchell pled no contest without the benefit of counsel.

The law in effect at that time did not require appointment of counsel for a first

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[1] The statement of facts is taken from Meehan's sworn 3.850 motion included in the attached Appendix. The lower court summarily denied the motion on timeliness grounds alone, so the motion's statement of facts are presumed true for purposes of appeal.

DUI if the court put on the record that the court was not going to impose a sentence of incarceration.

The Court below accepted that in such cases, it was Judge Fletcher's practice to inform persons charged with a first DUI that he was not going to impose a sentence of incarceration, therefore the person was not entitled to appointment of counsel. Judge Fletcher would inquire if the person desired to *retain* counsel, but if the person was financially unable to retain counsel, even if the person would otherwise qualify for appointment of counsel due to their financial circumstances, the law did not permit the appointment of counsel under these circumstances. *See Hlad v. State*, 565 So.2d 762 (Fla. 5th DCA 1990). The waiver of counsel that appears in the record of Judge Fletcher's first DUI cases, is only a waiver of the defendant's right to *retain* counsel, not the right to receive *appointed* counsel.

This is what happened in Mitchell's case. The Court below accepted that Mitchell qualified for appointment of counsel at the time of this offense based on his then financial condition, but he did not qualify for appointment of counsel under then established law, because it was his first DUI, and Judge Fletcher put on the record that he would not impose a sentence of incarceration. The Court below accepted that Mitchell was told by Judge Fletcher that he was not entitled to appointment of counsel. The Court below accepted that the waiver of counsel that appears in this

record reflects only that Mitchell was unable to afford to retain counsel and for that reason he informed the court that he waived his right to *retain* counsel.

Therefore, Mitchell pled no contest without the benefit of counsel and without a knowing and intelligent waiver of counsel.

Mitchell alleged and it was accepted below that he was not correctly advised of his right to appointment of counsel as required by *Alabama v. Shelton*, 535 U.S. 654 (2002),[2] and did not knowingly and intelligently waive his right to counsel.

The Court's advice to Mitchell that he was not entitled to appointment of counsel because the Court was not going to impose a sentence of incarceration, although correct under the law in effect at that time, is no longer a correct statement of the law, based on *Alabama v. Shelton.*

> The Supreme Court held in *Shelton* that "a suspended sentence that may ''end up in the actual deprivation of a person's liberty'' may not be imposed unless the defendant was accorded ''the guiding hand of counsel'' in the prosecution for the crime charged." *Shelton,* 535 U.S. at 658, 122 S.Ct. at 1767 (quoting *Argersinger v. Hamlin,* 407 U.S. 25, 40, 92 S.Ct. 2006, 2014, 32 L.Ed.2d 530 (1972)). It said that two prior decisions "controlled" its judgment in the *Shelton* case: *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), and *Scott v. Illinois,* 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). *Shelton,* 535 U.S. at 657, 122 S.Ct. at 1767. In *Argersinger,* the Supreme Court

[2] In *Shelton*, the Supreme Court held that if a person is placed on probation and could be subject to imprisonment for violation of probation, that initial proceeding in which probation is imposed triggers a right to appointment of counsel, not just when the probation is violated and the person is facing incarceration.

> held that defense counsel must be appointed in any criminal prosecution "that actually leads to imprisonment even for a brief period." *Argersinger,* 407 U.S. at 33, 37, 92 S.Ct. at 2006, 2012. In *Scott,* the Supreme Court "drew the line at ''actual imprisonment,'' holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment." *Shelton,* 535 U.S. at 657, 122 S.Ct. at 1767 (quoting *Scott,* 440 U.S. at 373-74, 99 S.Ct. at 1162).

*Howard v. United States,* 374 F.3d 1068, 1074 (11th Cir. 2004).

The new rule of constitutional procedure in *Shelton*, requiring appointment of counsel even when the court announces that no sentence of incarceration will be imposed, if a defendant is sentenced to probation, has been held to be retroactive for habeas relief purposes. *Howard v. United States*, 374 F.3d 1068 (11th Cir. June 25, 2004) ("In our judgment, the new rule of the *Shelton* decision does apply retroactively to cases on collateral review.").

The Court below accepted that the original trial judge did not engage in what is now understood to be the proper colloquy to establish a knowing waiver of his right to appointed counsel. The lower Court accepted that Mitchell did not understand that he qualified for the appointment of counsel because the Court told him that he did not qualify for appointment of counsel.

The lower Court accepted that Mitchell was at the time in question indigent as that term is used in Florida Rule of Criminal Procedure 3.111(b)(4) and thus entitled

to court appointed counsel under *Alabama v. Shelton* and *Howard v. United States*. The lower Court accepted that the original trial court did not appoint counsel nor was Mitchell otherwise represented by counsel and that Mitchell did not knowingly and intelligently waive his right to appointment of counsel.

Mitchell filed a motion under Rule 3.850(b)(2), Florida Rules of Criminal Procedure, within two years of the decision in *Howard* seeking to vacate his plea and conviction.

At the November 30, 2006 hearing on the motion the issues were narrowed to whether *Shelton* was retroactive for 3.850 purposes, and if so, whether Mitchell had filed his motion in a timely manner under *Shelton*. [R62-63] The lower court denied relief finding that *Shelton* was not retroactive, in reliance upon a prior Duval County Circuit Court appellate decision, *Florida v. Quigley*. Alternatively the lower court ruled that even were *Shelton* retroactive, that Mitchell did not file his 3.850 motion in a timely manner because he did not file it within two years of the *Shelton* decision itself, disagreeing with Mitchell's argument that the two year window would not start until *Howard* found *Shelton* to be retroactive.

Mitchell filed a timely notice of appeal December 29, 2006 and again on September 5, 2007 after the trial court entered its written order. The Circuit Court issued its decision *three years later*, on August 6, 2010, in which it affirmed the

lower court adopted the argument of the State below that only the United States Supreme Court or Florida Supreme Court could determine the retroactivity of *Shelton*, and upon that basis expressly declined to rule on the single issue on appeal, whether *Shelton* is retroactive or not.

> "The State counters that retroactivity can be decided only by the United States Supreme Court or by the Florida Supreme Court. . . . Neither the United States Supreme Court nor the Florida Supreme [*sic*] has, to date, made retroactive the right to counsel announced in *Shelton*. *It is not for this Court to speculate whether at some future date either of those courts will make Shelton retroactive*."

Slip opinion, pages 3-4 (emphasis supplied).

Mitchell then timely proceeded with this petition for certiorari.

## ARGUMENTS IN SUPPORT OF GRANTING THE WRIT

**WHETHER THE CIRCUIT COURT SITTING IN ITS CAPACITY AS A COURT OF APPEAL DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF LAW IN REFUSING TO DECIDE WHETHER *ALABAMA v. SHELTON,* A UNITED STATES SUPREME COURT DECISION WHICH ANNOUNCED A NEW RULE OF CONSTITUTIONAL PROCEDURE RELATING TO THE RIGHT TO COUNSEL IN MISDEMEANOR CASES, WAS RETROACTIVE FOR PURPOSES OF RULE 3.850, FLORIDA RULES OF CRIMINAL PROCEDURE.**

## MERITS ARGUMENT

### SUMMARY OF ARGUMENT

**I. MITCHELL'S PLEA AND CONVICTION ARE INVALID BECAUSE THEY WERE OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL ESTABLISHED BY *ALABAMA v. SHELTON* MADE RETROACTIVE FOR HABEAS PURPOSES BY *HOWARD v. UNITED STATES*, AND MITCHELL'S MOTION TO VACATE HIS PLEA AND CONVICTION WAS TIMELY FILED UNDER RULE 3.850(b)(2), BECAUSE MITCHELL FILED IT WITHIN TWO YEARS OF THE *HOWARD* RETROACTIVITY DECISION.**

Mitchell's plea and conviction are invalid because they were obtained in violation of his right to counsel as established by *Alabama v. Shelton,* made retroactive for habeas purposes by *Howard v. United States*, and Mitchell's motion to vacate his plea and conviction was timely filed under Rule 3.850(b)(2), because Mitchell filed it within two years of the *Howard* retroactivity decision.

The State and lower court below accepted all of Mitchell's factual assertions

as true. The State's sole objections were (1) that *Shelton* was not retroactive, relying for that proposition on *Florida v. Quigley*, an earlier, unpublished decision of a Circuit Court three judge panel acting in their appellate capacity, Judges L. Haldane Taylor, E. McRae Mathis, and David C. Wiggins, Judge Wiggins writing for the court, in a case that did not discuss or purport to apply *Howard*, and (2) that the motion was untimely. The lower Court, Judge Tyrie W. Boyer, accepted the State's arguments and denied relief solely on the basis of his finding as a matter of law that he was bound by the *Quigley* decision that *Shelton* was not retroactive, and alternatively, that were *Shelton* retroactive, Mitchell's motion was untimely because it was not filed within two years of *Shelton*. Judge Boyer rejected Mitchell's argument that the two year window opened under Rule 3.850(b)(2) for a new Constitutional decision opened on the date of the *Howard* decision which first held it to be retroactive, not on the date of the underlying *Shelton* decision itself, which did not address retroactivity. The State and lower Court both accepted that were the Court in error on these two questions of law, that Mitchell would otherwise be entitled to relief.

Because this appeal presents two pure questions of law, the lower court's determination of the legal questions comes to this Court with no presumption of correctness, instead, Mitchell is entitled to *de novo* review.

Mitchell's argument is made in five points:

**A. *Quigley* Is Not Binding on this Court Because Circuit Court Appellate Decisions Are Binding Only on Lower Courts, That Is, on the County Court, and Have No Binding Precedential Effect Otherwise.**

Putting aside the issue of the controlling authority of the federal court retroactivity decision, *Howard v. United States*, which we will discuss below, the starting point for the analysis of the lower Court's decision is the *Quigley* decision. In considering *Quigley* this Court must understand that *Quigley* is *not binding precedent* for this Court. The law in Florida is well settled that Circuit Court appellate decisions are binding authority only in the lower county courts of their own circuit and not otherwise. No jurisprudential or Constitutional principle requires this Court to afford any deference to an appellate decision of another Circuit Court, even in our own Circuit. *Quigley* may, but need not, even be considered. Whether considered or not, this Court is not permitted to treat *Quigley* as binding precedent, rather the duty of this Court is to make an independent appellate decision on the facts and law of this case.

**B. the Question of Retroactivity of a Federal Constitutional Decision Is a Question of Federal Law and a State Court Is Bound by a Governing Federal Decision.**

Readily distinguishing Mitchell's case from *Quigley* is that *Quigley* failed to

address the above issue, that is, if there is a binding *federal* decision determining that a new rule of *federal* Constitutional procedure announced by the United States Supreme Court is retroactive for habeas purposes, is this Court bound by the federal retroactivity decision? The simple answer is yes. The nature of the federal system in the United States dictates this result, which has been implied if not directly held in numerous federal and state habeas decisions. State courts are permitted to apply their own retroactivity analysis as to State constitutional and statutory rulings which may be more or less restrictive than the federal rule in *Teague v. Lane*, and may expand and broaden the retroactive application of even federal decisions by applying a less restrictive model of retroactivity analysis than *Teague*, as Florida does with *Witt*, but no state is permitted to disregard federal decisions that mandate retroactive application of federal Constitutional rulings under *Teague*.[3]

At issue in Mitchell's case is the holding in *Alabama v. Shelton*, which is a question of federal Constitutional law. The United States Court of Appeals for this jurisdiction, the Eleventh Circuit Court of Appeals, in *Howard v. United States*, applying the *Teague* analysis, which is *more restrictive than Florida's Witt analysis*,

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[3] *Talley* is particularly instructive because it expressly holds that as a state court applying federal constitutional principles, it is bound by the United States Supreme Court's *Teague* analysis and is not permitted to apply its own state specific retroactivity model.

held *Shelton* to be retroactive for habeas purposes. This Court is bound by that decision.

**C. Both Federal and State Courts Hold That *Shelton* Is Retroactive.**

The question of *Shelton's* retroactivity has only been considered by two reported decisions, *Howard v. United States* from the Eleventh Circuit, and *Talley v. State*, by the South Carolina Supreme Court. Both cases reached the same conclusion, that *Shelton* is retroactive for habeas purposes. There is no binding Florida precedent holding to the contrary. Indeed, in the last half century, no reported Florida decision has ever declined to retroactively apply any right to counsel case from *Gideon* forward. *Quigley* is an outlier.

**D. *Quigley* Was Wrongly Decided and in Any Event Need Not Be Followed.**

This brief quotes at length from *Howard* and less so from *Talley* for their arguments on retroactivity. Both reach the same conclusion, *Howard* after an exhaustive survey of the controlling Supreme Court precedents, that *Shelton* is a new rule which requires retroactive application because it is a watershed rule of criminal procedure because of its importance in determining the accuracy of the adjudicative process. *Quigley* on the other hand concluded without analysis or explanation that *Shelton* is not a new rule for retroactivity purposes. After studying *Howard* and

*Talley*, the decision is clear that *Quigley* was wrongly decided.

In defense of *Quigley* and clearly distinguishing it from Mitchell's case, is that the parties apparently did not bring *Howard* to the attention of the *Quigley* panel. *Howard* is not cited in the *Quigley* opinion, nor does the *Quigley* opinion reach the issue presented by this case, whether this Court is bound by controlling federal precedent on the question of *Shelton* retroactivity.

Because *Quigley* (1) was wrongly decided, (2) is not binding precedent for this Court under Florida's system of appellate jurisprudence, which requires independent appellate decisions at the Circuit Court level, and (3) does not control this case because it does not address the federal supremacy issue presented by this case, this Court should not and must not follow *Quigley*.

**E. Florida's Two Year Window of Retroactivity for Purposes of Rule 3.850(b)(2) Opens on the Date of the Decision Making the New Rule Retroactive, Not on the Date of the Decision of the Underlying New Constitutional Rule.**

Judge Boyer's alternative holding that Mitchell's motion is not timely under Rule 3.850(b)(2), because although filed within two years of *Howard's* decision that *Shelton* was retroactive, it was not filed within two years of the *Shelton* decision itself, is wrong. This is not the rule in Florida. Instead, the Florida Supreme Court has expressly held that the two year window for filing new claims under Rule

3.850(b)(2) based on newly retroactive Supreme Court constitutional question decisions opens on the date of the decision holding the new rule retroactive, not from the date of the underlying new rule decision itself. *Dixon v. State*, 730 So.2d 265, 268-269 (Fla. 1999).

**Conclusion.**

Based on the foregoing argument and authorities this Court should vacate the plea, judgment and sentence in Mitchell's case.

## ARGUMENT

### I. MITCHELL'S PLEA AND CONVICTION ARE INVALID BECAUSE THEY WERE OBTAINED IN VIOLATION OF HIS RIGHT TO COUNSEL ESTABLISHED BY *ALABAMA v. SHELTON,* MADE RETROACTIVE FOR HABEAS PURPOSES BY *HOWARD v. UNITED STATES*, AND MITCHELL'S MOTION TO VACATE HIS PLEA AND CONVICTION WAS TIMELY FILED UNDER RULE 3.850(b)(2), BECAUSE MITCHELL FILED IT WITHIN TWO YEARS OF THE *HOWARD* RETROACTIVITY DECISION.

Mitchell sought to vacate his 1985 uncounseled plea and conviction for driving under the influence in violation of Florida Statutes, § 316.193 (1985) based on *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002), which extended the right to counsel to probationary offenses as to which no sentence of incarceration is imposed, if the person could subsequently be incarcerated for violation of probation. At the time of his underlying plea to the DUI, Mitchell had been advised by the trial court that he had no right to appointed counsel, because the court did not intend to sentence Mitchell to any time in jail for the offense but only place Mitchell on probation.[4]

Mitchell relied upon the decision of the United States Court of Appeals for the

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[4] The waiver of counsel reflected in the docket of Mitchell's case was only a waiver of his right to *retain* counsel. Mitchell was indigent at the time of the offense and unable to attain counsel. Mitchell would only been able to have counsel if the court had appointed him counsel. The State and lower court accepted that this was so for purposes of the 3.850 proceeding.

Eleventh Circuit, the federal court of appeals which has jurisdiction over Florida, Georgia and Alabama, in *Howard v. United States*, 374 F.3d 1068 (11th Cir. 2004), which had held *Shelton* retroactive under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060 (1989). Mitchell argued that his motion was timely because it came within two years of the *Howard* decision, thus within the exception provided in Rule 3.850(b)(2), which provides:

> (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 in a noncapital case or more than 1 year after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that . . .
>
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively . . .

Once *Shelton* was determined to be retroactive, Mitchell argued that he had two years from that determination to seek relief under Rule 3.850. *Howard* was decided June 25, 2004. The mandate did not issue on *Howard* until August 18, 2004. Mitchell filed his 3.850 motion on June 26, 2006. June 25, 2006 was a Sunday. Therefore Mitchell's motion was filed within two years of both the mandate and the decision date of *Howard*.[5]

[5] Neither the State nor lower court disputed this point.

The lower court denied relief on two grounds, first, that based on the unpublished decision in *Florida v. Quigley*, Appeal No. 2004-AP-61 (Fla. 4th Judicial Circuit, Duval County)(Wiggins, J., August 1, 2005), *Shelton* had been determined to not apply retroactively for purposes of post conviction relief under Rule 3.850, and alternatively, that even were *Shelton* determined to be retroactive, that Mitchell's motion was untimely, because it should have been filed within two years of the *Shelton* decision itself.[6]

## A. *QUIGLEY* IS NOT BINDING ON THIS COURT BECAUSE CIRCUIT COURT APPELLATE DECISIONS ARE BINDING ONLY ON LOWER COURTS, THAT IS, ON THE COUNTY COURT, AND HAVE NO BINDING PRECEDENTIAL EFFECT OTHERWISE.

Putting aside the question of the controlling effect of *Howard* which we will address below, the lower court was bound by *Quigley* because the decision of a circuit court acting in its appellate capacity is binding upon all county courts within that circuit. *Fieselman v. State*, 566 So.2d 768 (Fla.1990). The same is not true as to this Court, however. This Court is in no way bound by *Quigley*, because one Circuit Court appellate decision does not bind another Circuit Court Judge, even within the same Circuit:

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[6] *Shelton* was decided May 20, 2002. If the two year window commenced on the date *Shelton* was decided then Mitchell would have had until May 20, 2004 to file his 3.850 motion.

> We hold that the circuit court sitting in its appellate capacity was required to consider all decisions of the circuit court in the Ninth Circuit when searching for precedents upon which to base its decision, and, in the absence of a rule of procedure to resolve conflicts among the decisions, to make its independent decision.

*State v. Lopez*, 633 So.2d 1150, 1151 (Fla. 5th DCA 1994).

> Moreover, there is no official reporter for circuit court appellate opinions. Although the supreme court has stated that these circuit court opinions are binding on all *county courts* within the circuit, *Fieselman v. State*, 566 So.2d 768 (Fla.1990), it has also recognized that circuit court appellate opinions are "not widely reported and used as precedent." *Heggs*, 658 So.2d at 526 n. 4. *This system permits or even encourages multiple conflicting circuit court appellate opinions* that are difficult to locate and whose conflicts are hard to resolve in the district courts.

*State v. Wilson,* 690 So.2d 1361, 1365 (Fla. 2nd DCA 1997) (emphasis supplied).[7]

That is not to say that this Court should not *consider Quigley*, but for the

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[7] Indeed, as a technical matter, even at the district court of appeal, one three judge panel constitutionally can override the decision of a prior panel, simply because it disagrees:

> Although we agree that, to carry out the purpose behind our new appellate structure, a three-judge panel of a district court should not overrule or recede from a prior panel's ruling on an identical point of the law, we cannot accept the chief judges' suggestion that we should prohibit that action by court rule. Without addressing possible constitutional problems, we find that a strict rule of procedure would be unworkable and inappropriate

*In re Rule 9.331, Determination of Causes by a District Court of Appeal En Banc, Florida Rules of Appellate Procedure*, 416 So.2d 1127, 1128 (Fla. 1982).

reasons set forth in some detail below, the Court will see that it should not and indeed may not follow *Quigley*.

This Court should not follow *Quigley,* because it was wrongly decided and apparently decided without the benefit of the *Howard* decision. *Quigley* does not cite *Howard* and apparently *Howard* was not brought to the attention of the *Quigley* court. *Quigley* was decided before the mandate issued in *Howard*. *Quigley* did not consider whether it would have been bound by federal precedent had it known federal precedent existed on the question of *Shelton* retroactivity.

So *Quigley* fails to address what in fact is the controlling question in this appeal, whether federal precedent holding *Shelton* retroactive under *Teague* is binding on this Court. As will be explained below, it is. A decision of a federal court that a rule of federal Constitutional law is retroactive for habeas purposes is binding on a state court in deciding the same question, and because the governing federal court has held *Shelton* retroactive, this Court is bound by that decision.

## B. THE QUESTION OF RETROACTIVITY OF A FEDERAL CONSTITUTIONAL DECISION IS A QUESTION OF FEDERAL LAW AND A STATE COURT IS BOUND BY A GOVERNING FEDERAL DECISION.

It appears to be well established that the decision of a federal court determining that a federal constitutional rule *is retroactive* for purposes of *Teague v. Lane* is binding on state courts.[8] Although Florida can and does have its own independent retroactivity model based on *Witt v. State*, 387 So.2d 922 (Fla. 1980), which is the governing model in determining independent state law retroactivity questions, that model is only applicable to expand or *broaden* retroactivity for *federal* constitutional questions.[9] For example, in deciding whether *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428 (2002), would be applied retroactively in Florida death penalty proceedings, the Florida Supreme Court stated:

> Applying the test for retroactivity under *Teague*, the United States Supreme Court recently held in *Schriro v. Summerlin*, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004), that Ring does not apply retroactively for purposes of federal law. But *Summerlin* does not control our decision. As courts in other states have noted, state courts

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[8] The reverse of this proposition is not so: a federal decision declining to apply a new rule of constitutional law retroactively is *not* binding on state courts, which may, if they choose, elect to apply the new rule more broadly for state post-conviction relief purposes. *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008).

[9] *Witt* preceded *Teague v. Lane* and was itself based on the then current federal model of retroactivity analysis, *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731 (1965).

> are not bound by *Teague* in determining the retroactivity of decisions. See *California v. Ramos*, 463 U.S. 992, 1014, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) (acknowledging that "[s]tates are free to provide *greater protections* in their criminal justice system than the Federal Constitution requires"); *Colwell v. State*, 118 Nev. 807, 59 P.3d 463, 470 (2002) (noting that "[*w*]*e may choose to provide broader retroactive application of new constitutional rules of criminal procedure than Teague and its progeny require*"); *Cowell v. Leapley*, 458 N.W.2d 514, 517 (S.D.1990) (noting that states may decide how to provide access to state postconviction relief). *We continue to apply our longstanding Witt analysis, which provides more expansive retroactivity standards than those adopted in Teague*. We nevertheless conclude that, even under *Witt, Ring* does not apply retroactively.

*Johnson v. State*, 904 So.2d 400, 408-409 (Fla. 2005).

The Florida Supreme Court's view that Florida may provide *broader* and *more expansive* retroactivity than the federal courts provide under *Teague* was recently ratified in *Danforth v. Minnesota*, 128 S.Ct. 1029 (2008).[10] Although the holding in *Danforth* is limited to the question whether state courts may extend *broader* retroactivity than federal courts, *dicta* throughout *Danforth* supports the obvious conclusion that the reverse is not true, that is, that state courts may not restrict retroactivity of federal constitutional decisions to less than that required under

[10] Because the United States Supreme Court has never held any new rule of Constitutional procedure retroactive *other than rules relating to right to counsel*, as a practical matter all Florida retroactivity analysis is *Witt* driven and by definition purporting to apply a *broader* retroactivity principle than required by the federal rules. *Quigley* is the *only Florida decision to ever refuse to apply* a new Supreme Court decision on right to counsel retroactively.

*Teague*:

> For example, the Court stated:
>
> > Our recent decision in *Whorton v. Bockting*, 549 U.S. ----, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007), makes clear that the Minnesota court correctly concluded that *federal law does not require state courts to apply the holding in Crawford to cases that were final when that case was decided*. Nevertheless, we granted certiorari, 550 U.S. ----, 127 S.Ct. 2427, 167 L.Ed.2d 1129 (2007), to consider whether *Teague* or any other federal rule of law prohibits them from doing so.

*Danforth v. Minnesota*, 128 S.Ct. 1029, 1034 (2008) (emphasis supplied).

At issue in *Danforth* was the decision of the Minnesota Supreme Court to apply the holding of *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354 (2004),[11] retroactively for purposes of Minnesota state post conviction relief procedures. In *Bockting* the United States Supreme Court had held that under *Teague* analysis, *Crawford* was not retroactive. The significance of the emphasized language above is the necessary implication that had *Bockting* been decided the other way, had it held *Crawford* to be retroactive, then that decision would have *required* state courts to follow it.

*Danforth* later concluded:

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[11] *Crawford* held that out-of-court statements by witnesses that are testimonial are barred, under the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by court, abrogating *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980).

> In sum, the *Teague* decision limits the kinds of constitutional violations that will *entitle* an individual to relief on federal habeas, but does not in any way limit the authority of a state court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed "nonretroactive" under *Teague*.

*Danforth v. Minnesota*, 128 S.Ct. 1029, 1042 (2008) (emphasis supplied).

The only reported decision to consider the retroactivity of the *Shelton* decision other than *Howard* has been that of the South Carolina Supreme Court in *Talley v. State,* 371 S.C. 535, 541-544, 640 S.E.2d 878, 880-882 (2007). The State argued in *Talley* for application of South Carolina's own retroactivity model found in *State v. Jones*, 312 S.C. 100, 439 S.E.2d 282 (1994), but the South Carolina Supreme Court disagreed, and held that it was *required* to follow *Teague*:

> The State urges us to apply both *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and *State v. Jones,* 312 S.C. 100, 439 S.E.2d 282 (1994), to determine whether *Shelton* should be applied retroactively on collateral review. We disagree. *In determining whether Respondent was deprived of his federal constitutional right to counsel, we are required to follow the United States Supreme Court's decisions on retroactivity. Am. Trucking Ass'ns, Inc. v. Smith,* 496 U.S. 167, 178, 110 S.Ct. 2323, 2330, 110 L.Ed.2d 148, 159 (1990) ("*In order to ensure the uniform application of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decisions*.")

*Talley v. State,* 371 S.C. 535, 541, 640 S.E.2d 878, 880 (2007) (emphasis supplied).

The rule could not be otherwise under our federal system of government. Were

this Court or any state court to disagree and refuse to apply a federal court retroactivity decision - - that is, a federal decision holding a federal constitutional right to be retroactive - - and deny relief, the petitioner then would resort to federal court under 28 U.S.C. § 2254, and then be entitled to application of the federal retroactivity decision, and the federal court would be required to reverse the state court decision. Florida's courts are required to follow binding federal Eleventh Circuit precedent in any case in which the federal court has held a newly announced federal Constitutional rule to be retroactive under *Teague*. The Eleventh Circuit has held *Shelton* to be retroactive for habeas purposes in *Howard*, therefore Mitchell is entitled to the retroactive application of *Shelton* to his case.

## C. BOTH FEDERAL AND STATE COURTS HOLD THAT *SHELTON* IS RETROACTIVE.

Mitchell rested his retroactivity argument below on the decision of the Eleventh Circuit Court of Appeals in *Howard*. Writing for a three judge panel, Judge Ed Carnes held:[12]

Under *Teague,* new rules of constitutional law are not to be applied

[12] Counsel does not routinely replicate at such length cited decisions, but in this case, the issue has been so carefully and thoroughly analyzed by the Eleventh Circuit that the reasoning and argumentation of that Court's decision cannot be improved upon. It would be fraudulent pretense to imagine that counsel for Mitchell could express the argument better than Judge Carnes has already done. Mitchell rests on Judge Carnes's arguments.

retroactively to cases on collateral review unless they fall into one of two exceptions. *Teague,* 489 U.S. at 311-13, 109 S.Ct. at 1075-76;*see also Saffle,* 494 U.S. at 494-95, 110 S.Ct. at 1263-64 (same); *Garcia v. United States,* 278 F.3d 1210, 1214 (11th Cir.2002) (same). Only the second exception is in play here. Under it, a new rule should be applied retroactively if it "requires the observance of those procedures that ... are implicit in the concept of ordered liberty *Teague,* 489 U.S. at 311, 109 S.Ct. at 1076 (internal quotation marks and citations omitted). This exception is "reserved for watershed rules of criminal procedure ... [that] properly alter our understanding of the *bedrock procedural elements.*" *Id.* We have stated that " '[t]o fall within the [second] exception, the new rule must satisfy a two-pronged test: (1) it must relate to the accuracy of the conviction; and (2) it must alter our understanding of the bedrock procedural elements essential to the [fundamental] fairness of a proceeding.' " *Garcia,* 278 F.3d at 1215 (quoting *Nutter v. White,* 39 F.3d 1154, 1157 (11th Cir.1994)).

Overshadowing our consideration of whether *Shelton* 's extension of the right to counsel should be made retroactively applicable is one momentous fact: Every extension of the right to counsel from *Gideon* [*Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792 (1963)] through *Argersinger* has been applied retroactively to collateral proceedings by the Supreme Court. The holding of *Gideon* itself, which established the right to counsel in all felony convictions, 372 U.S. at 344-45, 83 S.Ct. at 796-97, was judged to be retroactively applicable in *Kitchens v. Smith,* 401 U.S. 847, 847, 91 S.Ct. 1089, 1090, 28 L.Ed.2d 519 (1971). The right to counsel at plea hearings, recognized in *White v. Maryland,* 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), was held to be retroactively applicable in *Arsenault v. Massachusetts,* 393 U.S. 5, 6, 89 S.Ct. 35, 36, 21 L.Ed.2d 5 (1968). The right to counsel at probation revocation hearings, announced in *Mempa v. Rhay,* 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967), was held to be retroactively applicable in *McConnell v. Rhay,* 393 U.S. 2, 3-4, 89 S.Ct. 32, 33-34, 21 L.Ed.2d 2 (1968). The right to counsel on appeal, recognized in *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), has also been retroactively applied. *See McConnell,* 393 U.S. at 3, 89 S.Ct. at 33. Finally, *Argersinger* 's extension of the right to counsel to any

prosecution leading to actual imprisonment was deemed retroactively applicable in *Berry v. City of Cincinnati,* 414 U.S. 29, 29-30, 94 S.Ct. 193, 194, 38 L.Ed.2d 187 (1973). A score that is perfect packs punch in any analysis.

The implication of all those retroactivity decisions dealing with *Gideon*-related rights is arguably lessened because they were made in the pre-*Teague* era. The Supreme Court has not decided the retroactivity of any rule expanding *Gideon* since the *Teague* regime began in 1989-there have been no expansions of *Gideon* since then except for *Shelton*. Before *Teague* retroactivity issues in criminal cases were governed by the guidelines set out in *Linkletter v. Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965). Under the *Linkletter* guidelines the Court considered the purposes of the new rule, any reliance on the old rule, and the effect retroactive application of the new rule would have on the administration of justice. *Id.* at 636, 85 S.Ct. at 1741; *Johnson v. State of New Jersey,* 384 U.S. 719, 727, 86 S.Ct. 1772, 1777, 16 L.Ed.2d 882 (1966). Because of the substantial difference in analysis, the pre-*Teague* decisions applying *Gideon*-related rights retroactively do not control whether a post-*Teague* decision announcing a new one is retroactively applicable. But those pre-*Teague* decisions are hard to ignore. There are statements in them, and in later decisions characterizing them, that stress the importance of the right to counsel in the retroactivity context.

Examples of various paeans to the right to counsel abound. "The Supreme Court typically offers the right to counsel ... as the paradigm of a 'bedrock procedural element' falling within the second exception." *Nutter v. White,* 39 F.3d 1154, 1157-58 (11th Cir.1994) (quoting *Mackey v. United States,* 401 U.S. 667, 693-94, 91 S.Ct. 1160, 1180-81, 28 L.Ed.2d 404 (1971) (Harlan, J., concurring)). "The right to counsel at the trial ... on appeal, and at the other 'critical' stages of the criminal proceedings have all been made retroactive, since the 'denial of the right must almost invariably deny a fair trial.' " *Arsenault,* 393 U.S. at 6, 89 S.Ct. at 36 (citations omitted) [*Arsenault v. Com. of Mass.*, 393 U.S. 5, 89 S.Ct. 35 (1968)]. The right to counsel relates to "the very integrity of the fact-finding process." *McConnell,* 393 U.S. at 3, 89 S.Ct. at 33. The

Supreme Court has "underscored the narrowness of [*Teague* 's] second exception by using as a prototype the rule of *Gideon*." *Spaziano,* 36 F.3d at 1043 [*Spaziano v. Singletary,* 36 F.3d 1028 (11th Cir. 1994)] (citing *Teague,* 489 U.S. at 313, 109 S.Ct. at 1077);*see Beard v. Banks,* 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494, 2004 WL 1402567, No. 02-1603, at 11 (June 24, 2004) ("In providing guidance as to what might fall within this [second *Teague* ] exception, we have repeatedly referred to the rule of *Gideon v. Wainwright*... and only to this rule."); *Saffle,* 494 U.S. at 495, 110 S.Ct. at 1264 ("Although the precise contours of this [second *Teague* ] exception may be difficult to discern, we have usually cited *Gideon*... to illustrate the type of rule coming within the exception.").

Significantly, the Supreme Court has never distinguished between different contexts in judging whether an extension of the right to counsel should be made retroactive. It appears that, for these purposes at least, one right to counsel case is indistinguishable from another. *See Arsenault,* 393 U.S. at 6, 89 S.Ct. at 36. The Supreme Court has instructed us that the right to representation by counsel is inevitably tied to the accuracy of a conviction. *McConnell,* 393 U.S. at 3-4, 89 S.Ct. at 33-34. We have said outright that the right to counsel is a bedrock procedural element for *Teague* purposes. *See Nutter,* 39 F.3d at 1157.

The government does not dispute much, if any, of this, but instead pegs its position to the proposition that *Shelton* did not really alter our understanding of the right to counsel. Having already held in this opinion that *Shelton* 's application of the right to counsel in a new context constitutes a "newly recognized" right, it would be odd to hold now that our understanding was not altered by the *Shelton* decision. Before *Shelton* this circuit had no rule on whether it violated the Sixth Amendment right to counsel to use an uncounseled conviction that had not resulted in jail time to enhance the sentence imposed for a counseled conviction. Other courts had answered that question in different ways. Now, the split of authority has been healed. Along with every other court in the country, we must follow the *Shelton* rule. Our own understanding has been altered because it went from a blank slate to one on which is written the *Shelton* rule.

Another consideration in deciding this retroactivity issue is the realization that *Teague* is a remarkably restrictive doctrine, and its second exception exceedingly narrow. As we have explained:

> This exception is a narrow one, and its narrowness is consistent with the recognition underlying *Teague* that retroactivity "seriously undermines the principle of finality which is essential to the operation of our criminal justice system." *Teague,* 489 U.S. at 309, 109 S.Ct. at 1074. To fit within the second exception, it is not enough that the rule "preserve the accuracy and fairness of capital sentencing judgments," *Sawyer,* 497 U.S. at 242, 110 S.Ct. at 2831 [*Sawyer v. Smith*, 497 U.S. 227, 110 S.Ct. 2822 (1990)], or that it "is aimed at improving the accuracy of trial." *Id.* The new rule also must be so fundamentally important that its announcement is a "groundbreaking occurrence." *Caspari,* 510 U.S. at 396, 114 S.Ct. at 956 [*Caspari v. Bohlen*, 510 U.S. 383, 114 S.Ct. 948 (1994)] . It must be a "watershed rule" that "alter[s] our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Sawyer,* 497 U.S. at 241, 110 S.Ct. at 2831 (internal quotation marks omitted). Thus, there is a requirement of "the primacy and centrality of the rule,"*Saffle,* 494 U.S. at 495, 110 S.Ct. at 1264.

*Spaziano,* 36 F.3d at 1042-43.

The Supreme Court has often examined, announced, or proposed new rules of law to see if they fit within the strictures of *Teague*'s second exception, but it has never found one that does. *Beard,* No. 02-1603, at 10, 124 S.Ct. at 2513;*see id.* at 13-14, 124 S.Ct. at 2515 (holding that the new rule announced in *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), does not fit within the second *Teague* exception); *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 2526, 159 L.Ed.2d 442, No. 03-526, 2004 WL 1402732, (June 24, 2004) (same holding regarding the new rule announced in

*Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)); *O'Dell v. Netherland,* 521 U.S. 151, 167, 117 S.Ct. 1969, 1978, 138 L.Ed.2d 351 (1997) (same holding regarding the rule of *Simmons v. South Carolina,* 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994)); *Gray v. Netherland,* 518 U.S. 152, 170, 116 S.Ct. 2074, 2085, 135 L.Ed.2d 457 (1996) (same holding regarding a proposed new rule concerning notice to a defendant of evidence to be used against him in a capital sentencing proceeding); *Goeke v. Branch,* 514 U.S. 115, 120, 115 S.Ct. 1275, 1278, 131 L.Ed.2d 152 (1995) (per curiam) (same holding regarding a proposed new rule relating to the fugitive disentitlement doctrine); *Caspari v. Bohlen,* 510 U.S. 383, 396, 114 S.Ct. 948, 956, 127 L.Ed.2d 236 (1994) (same holding regarding a proposed new rule that Double Jeopardy Clause applies to noncapital sentencing proceedings); *Gilmore v. Taylor,* 508 U.S. 333, 345, 113 S.Ct. 2112, 2119, 124 L.Ed.2d 306 (1993) (same holding regarding a new rule about jury instructions on mitigating mental state in a murder case); *Graham v. Collins,* 506 U.S. 461, 478, 113 S.Ct. 892, 903, 122 L.Ed.2d 260 (1993) (same holding regarding a proposed new rule concerning jury questions in Texas' capital sentencing scheme); *Sawyer,* 497 U.S. at 244, 110 S.Ct. at 2832 (same holding regarding the new rule of *Caldwell v. Mississippi,* 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)); *Saffle,* 494 U.S. at 495, 110 S.Ct. at 1264 (same holding regarding a proposed new rule regarding jury consideration of sympathy in a capital sentencing proceeding); *Butler v. McKellar,* 494 U.S. 407, 416, 110 S.Ct. 1212, 1218, 108 L.Ed.2d 347 (1990) (same holding regarding the new rule of *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988)).

We have been slightly more liberal in our application of *Teague* 's second exception and have on two occasions found a rule to fit within it, but in one of those the Supreme Court later disagreed. In *Nutter,* 39 F.3d at 1157-58, we held that the new rule of *Cage v. Louisiana,* 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), which prohibited certain jury instruction language that undermined the beyond a reasonable doubt standard, did fall into the second *Teague* exception because the rule is central to an accurate determination of innocence or guilt, and, like *Gideon,* implicated a fundamental guarantee of a fair

trial. In *Clark v. Dugger,* 901 F.2d 908, 912-13 (11th Cir.1990), we held that the rule announced by the Supreme Court in its *Caldwell* decision fit within the second *Teague* exception, but the Supreme Court itself later disagreed. *See Sawyer,* 497 U.S. at 244, 110 S.Ct. at 2832.

More often we, like the Supreme Court, have found that new rules cannot squeeze within the narrow confines of the second *Teague* exception. *See Turner v. Crosby,* 339 F.3d 1247, 1285 (11th Cir.2003) (holding that the new rule of *Ring v. Arizona* does not fall into the second *Teague* exception); *Housel v. Head,* 238 F.3d 1289, 1298 (11th Cir.2001) (same holding regarding proposed new rule that Eighth Amendment forbids jury from weighing unadjudicated crimes in capital sentencing proceeding); *Glock,* 65 F.3d at 890 (same holding regarding the new rule of *Espinosa v. Florida,* 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992)); *Spaziano,* 36 F.3d at 1043 (same holding regarding proposed new rule to bar or curtail the use of a witness' hypnotically refreshed testimony against a defendant); *Collins v. Zant,* 892 F.2d 1502, 1512 (11th Cir.1990) (per curiam) (same holding regarding the new rule of *Michigan v. Jackson,* 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986)).

The lesson of all these decisions, we believe, is that the second *Teague* exception is so tight that very few new rules will ever squeeze through it. The exception that proves the exception, however, is a new *Gideon*-related rule. Over and over again, the Supreme Court and this Court have held up *Gideon* as the paradigm case for the second *Teague* exception. *See, e.g., Saffle,* 494 U.S. at 495, 110 S.Ct. at 1264 ("[W]e have usually cited *Gideon*... to illustrate the type of rule coming within the exception."); *Nutter,* 39 F.3d at 1157-58 ("The Supreme Court typically offers the right to counsel ... as the paradigm of a 'bedrock procedural element' falling within the second exception [of the *Teague* rule]"). The pre-*Teague* retroactivity decisions dealing with right to counsel indicate that each extension of that groundbreaking decision has itself been treated with the worshipful respect accorded *Gideon* itself. The inference we draw is that it is the sheer importance of the right to counsel that is primary in the analysis, not the incremental extension of that right in the case at hand. At the risk of oversimplification, for

> purposes of the second *Teague* exception there are new rules, and then there are new *Gideon*-extension rules. The *Shelton* decision fits within the second category.

*Howard v. United States*, 374 F.3d 1068, 1078-1081 (11th Cir. 2004).

*Howard* does not stand alone. After testing the rule in *Shelton* under *Teague*, the South Carolina Supreme Court reached the same conclusion, and held that *Shelton* was retroactive for purposes of South Carolina post-conviction relief:[13]

> Precedent prior to *Shelton* established that a defendant was entitled to the constitutional right to counsel when the defendant received a sentence "that end[s] up in the actual deprivation of a person's liberty." *Argersinger*, 407 U.S. at 40, 92 S.Ct. at 2014, 32 L.Ed.2d at 540. However, the *Shelton* decision required counsel to be appointed when an indigent defendant received a sentence that "may end up in the actual deprivation of a person's liberty." *Shelton*, 535 U.S. at 658, 122 S.Ct. at 1767, 152 L.Ed.2d at 895 (internal quotation omitted) (emphasis added). *Shelton*'s extension of the right to counsel was a new rule under *Teague* because it was not dictated by precedent existing at the time of Respondent's convictions. See also *Howard v. United States*, 374 F.3d 1068, 1074-77 (11th Cir.2004) (finding *Shelton* announced a new rule under *Teague*).

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[13] *Talley* cited as persuasive but was not bound by *Howard*. That is because the binding effect of federal appellate decisions does not run outside of the states of the particular circuit that issued the appellate decision. "Were it otherwise, it would cast doubt on the federal court practice of limiting the binding effect of appellate decisions to the courts of a particular circuit. Circuit boundaries - and the very system of circuit courts-are a matter of judicial administration, not constitutional law." *Hart v. Massanari*, 266 F.3d 1155, 1175-1176 (9th Cir. 2001). *Howard* was a decision of the Eleventh Circuit Court of Appeals and hence binds only the courts of Florida, Georgia and Alabama.

> Generally, new procedural rules should be not applied retroactively to cases on collateral review, unless the new rule falls within one of two exceptions to the general rule. *Teague*, 489 U.S. at 305, 310, 109 S.Ct. at 1072, 103 L.Ed.2d at 352, 356. The first exception is when the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Id. at 311, 109 S.Ct. at 1075, 103 L.Ed.2d at 356 (internal quotation omitted). The second exception is when the rule "requires the observance of those procedures that ... are implicit in the concept of ordered liberty." Id. at 311, 109 S.Ct. at 1076, 103 L.Ed.2d at 356 (internal quotations omitted). The second exception is "reserved for watershed rules of criminal procedure" which implicate the fundamental fairness and accuracy of the proceeding. Id.
>
> The first exception is not applicable to the present situation. The Supreme Court has repeatedly cited *Gideon* as illustrative of the type of new rule which falls within the second exception in *Teague*. See, e.g., *Beard v. Banks*, 542 U.S. 406, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (recognizing the right to counsel announced in *Gideon* as an example of the second *Teague* exception); *Saffle v. Parks*, 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (same); *Teague*, 489 U.S. at 311-312, 109 S.Ct. at 1075-76, 103 L.Ed.2d at 357 (same). The Supreme Court also has applied each extension of the constitutional right to counsel retroactively to collateral proceedings. We conclude the new rule announced by *Shelton* is a watershed rule of criminal proceeding because the right to counsel undeniably implicates the fundamental fairness and accuracy of the proceeding. See *Howard*, 374 F.3d at 1077-80 (collecting authority which supports retroactive application of every extension of right to counsel on collateral review but noting these decisions were decided prior to *Teague* and concluding *Shelton* fell within the second *Teague* exception because of "the sheer importance of the right to counsel").

*Talley v. State,* 371 S.C. 535, 543-544, 640 S.E.2d 878, 881-882 (2007).

## D. *QUIGLEY* WAS WRONGLY DECIDED AND IN ANY EVENT NEED NOT BE FOLLOWED.

We do not fault the panel for the decision in *Quigley*. Busy Circuit Court judges must take time that they does not have away from their calendars of trial cases to decide appeals. Appellate decision-making under such circumstances can be no better than the quality of the briefing presented. Given that *Howard* was not cited to the *Quigley* panel - - an assumption we make from the failure of the opinion to cite to *Howard* - - it would not be reasonable to expect the Court on its own to have discovered *Howard*.[14] In addition, the parties and the Court may simply have missed *Howard* because it was decided less than a week before the decision in *Quigley* was filed and *Quigley* was filed before the mandate issued in *Howard*. As a practical matter *Quigley* was written before the Court or parties could have known about *Howard* even if the parties were attempting to update their research.

Therefore, although *Howard* may not technically qualify as supervening authority, in effect it is. On that basis alone *Quigley* merits revisiting. The concept of supervening superior authority is well established in appellate jurisprudence:

> Of course, prior panel decisions can be overruled by intervening Supreme Court decisions, as well as by the en banc court, and where there is a conflict between the holding of an earlier panel decision and

[14] Alternatively we ask this Court to take judicial notice of the record in *Quigley,* including the briefs.

> that of a later Supreme Court decision, subsequent panels must follow the Supreme Court decision. See *In re Provenzano*, 215 F.3d 1233, 1235 (11th Cir.2000), cert. denied, 530 U.S. 1256, 120 S.Ct. 2710, 147 L.Ed.2d 979 (2000) ("We would, of course, not only be authorized but also required to depart from [the prior decision] if an intervening Supreme Court decision actually overruled or conflicted with it."); *Cottrell v. Caldwell*, 85 F.3d 1480, 1485 (11th Cir.1996) ("Where prior panel precedent conflicts with a subsequent Supreme Court decision, we follow the Supreme Court decision."). But a panel is justified in disregarding a prior panel decision because of the Supreme Court's holding in a later case only when that intervening holding is squarely on point.

*Johnson v. K Mart Corp.,* 273 F.3d 1035, 1067 (11th Cir. 2001).

Because *Quigley* did not decide the question whether *Howard* dictates a different answer to the question of retroactivity, this Court would not be overruling *Quigley* to hold to the contrary:

> We begin our discussion with a recognition of the fundamental principle announced long ago by our Florida Supreme Court that "[f]or one case to have the effect of overruling another, the same questions must be involved; they must be affected by a like set of facts and a conclusion must be reached in hopeless conflict with that in the former case." *State ex rel. Garland v. City of West Palm Beach*, 141 Fla. 244, 247-248, 193 So. 297, 298 (1940).

*Wood v. Fraser*, 677 So.2d 15, 17 (Fla. 2nd DCA 1996).

But even if this Court were required to overrule *Quigley*, that would be merited. The lengthy analysis of *Shelton* retroactivity set forth above from *Howard* and *Talley* convincingly establish that *Shelton* must be applied retroactively for post-conviction

relief purposes.[15] *Quigley* asserts without explanation that *Shelton* "creates no new right to counsel, but merely refines an already existing right." [*Quigley* slip opinion at p. 7] This was the same conclusion reached by the district court and reversed by the Eleventh Circuit Court of Appeals in *Howard* after an exhaustive analysis of the question:

> The district court ruled that the right recognized in *Shelton* was not a "newly recognized" one. We disagree.
>
> In deciding "newly recognized" right issues arising under § 2255 ¶ 6(3), we have applied decisions involving the *Teague* retroactivity doctrine. *See Garcia v. United States,* 278 F.3d 1210, 1212-15 (11th Cir.2002) (accepting parties' concession that right was newly recognized to satisfy *Teague* 's new rule requirement, and applying *Teague* 's retroactivity analysis); *Dodd v. United States,* 365 F.3d 1273, 1278 (11th Cir.2004) (concluding that a right was newly recognized based on precedent establishing that a new rule had been announced for *Teague* purposes). Under that doctrine, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1989) (internal citations omitted).
>
> A result is not dictated by precedent just because "the result the habeas petitioner seeks is within the logical compass of a prior Supreme Court decision," or because "prior Supreme Court decisions inform, or even control or govern, the analysis of the claim." *Spaziano v. Singletary,* 36

[15] This is so irrespective of the retroactivity model applied to the question, whether *Teague* or *Witt*, given that it is accepted that the *Witt* model, coming pre-*Teague*, is a more liberal standard for determining retroactivity. If *Shelton* is retroactive under *Teague,* then perforce it is retroactive under *Witt*.

F.3d 1028, 1042 (11th Cir.1994) (internal quotation marks omitted). For these purposes, a result is dictated by precedent only if the court considering the claim at the time the conviction became final "would have felt compelled by existing precedent to conclude that the rule [the defendant] seeks was required by the Constitution." *Glock v. Singletary,* 65 F.3d 878, 884 (11th Cir.1995) (internal quotation marks omitted). It is not a dictated result if the case's outcome was "susceptible to debate among reasonable minds." *Id.*

The Supreme Court held in *Shelton* that "a suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged." *Shelton,* 535 U.S. at 658, 122 S.Ct. at 1767 (quoting *Argersinger v. Hamlin,* 407 U.S. 25, 40, 92 S.Ct. 2006, 2014, 32 L.Ed.2d 530 (1972)). It said that two prior decisions "controlled" its judgment in the *Shelton* case: *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), and *Scott v. Illinois,* 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). *Shelton,* 535 U.S. at 657, 122 S.Ct. at 1767. In *Argersinger,* the Supreme Court held that defense counsel must be appointed in any criminal prosecution "that actually leads to imprisonment even for a brief period." *Argersinger,* 407 U.S. at 33, 37, 92 S.Ct. at 2006, 2012. In *Scott,* the Supreme Court "drew the line at 'actual imprisonment,' holding that counsel need not be appointed when the defendant is fined for the charged crime, but is not sentenced to a term of imprisonment." *Shelton,* 535 U.S. at 657, 122 S.Ct. at 1767 (quoting *Scott,* 440 U.S. at 373-74, 99 S.Ct. at 1162).

The district court in this case concluded that *Shelton* was dictated by *Argersinger* and *Scott.* It viewed *Shelton* as a routine application of the "actual imprisonment" rule of those two earlier decisions, even though *Shelton* applied the requirement of counsel to a suspended sentence where an actual deprivation of liberty is entirely contingent. Shelton had been convicted in an uncounseled proceeding of third-degree assault and sentenced to a jail term of 30 days. *Id.* at 658, 122 S.Ct. at 1767-68. The trial court had suspended that sentence and placed Shelton on probation for two years. *Id.* Shelton appealed his suspended sentence, a sentence

which had not resulted in even a minute's incarceration. In no sense had Shelton been subjected to "actual imprisonment." *Id.* In that way, the *Shelton* case was different from the *Argersinger* case. And, of course, it was different from the *Scott* case because Shelton did receive a suspended sentence and not merely a fine as Scott had.

In deciding whether the *Shelton* decision was dictated by prior decisions, it is helpful to break its holdings down into two parts. The *Shelton* Court first held that where the state had not provided counsel to an indigent defendant in a proceeding resulting in a suspended sentence, it violates the Sixth Amendment to jail the defendant thereafter for some or all of the term of that sentence because of a subsequent probation violation. *Id.* at 662, 122 S.Ct. at 1770. The Court reasoned that when a suspended sentence is unsuspended following a probation violation, the resulting incarceration is not for the probation transgression but for the original offense. *Id.* It is the uncounseled conviction that results in actual imprisonment, the Court said. *Id.*

We doubt that first holding of *Shelton* was dictated by *Argersinger,* the rule of which is that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense ... unless he was represented by counsel at his trial." *Id.* at 662,122 S.Ct. at 1770 (quoting *Argersinger,* 407 U.S. at 37, 92 S.Ct. at 2012). Before the Court spoke in *Shelton,* it was not clear that *Argersinger* 's actual imprisonment rule applied when there would have been no imprisonment but for a subsequent probation violation. *Argersinger* itself was a non-contingent actual imprisonment case. It was not a case of contingent imprisonment that became actual only after another event occurred. The defendant in *Argersinger,* unlike the one in *Shelton,* was going to jail even if his post-conviction conduct was purely angelic.

Even if we could say that the first holding of *Shelton* was dictated by *Argersinger,* the Supreme Court went further to reach the result it did. The appeal in *Shelton* did not involve a defendant who had actually been sent to jail. Shelton was unhappy because he had the threat of imprisonment hanging over him; he wanted to avoid the prospect of jail time if he did violate probation. To reach its ultimate holding-that "a

suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged,"*Shelton,* 535 U.S. at 658, 122 S.Ct. at 1767 (quoting *Argersinger,* 407 U.S. at 40, 92 S.Ct. at 2014)-the Supreme Court had to go beyond its first holding, and way beyond the holding in *Argersinger*. The Court went from a rule requiring counsel in proceedings which directly result in a sentence of actual imprisonment to one requiring counsel in proceedings which result in a sentence that contains only the possibility of imprisonment. The journey from *Argersinger* to *Shelton* may be good constitutional law, but it is still a journey of some distance. The destinations are different.

The Court did say that *Argersinger* and *Scott* "control[led]" its judgment in *Shelton, id.* at 657, 122 S.Ct. at 1767, but we know that statement does not mean that either of those two earlier decisions dictated the result the later one reached. We know that because the Supreme Court itself has told us that for these purposes "controlled" does not equate with "dictated." *Saffle v. Parks,* 494 U.S. 484, 491, 110 S.Ct. 1257, 1261, 108 L.Ed.2d 415 (1990); *see also Spaziano v. Singletary,* 36 F.3d 1028, 1042 (11th Cir.1994) (citing *Saffle* for the same proposition). As the *Shelton* dissent pointed out, *Scott* identified as the central premise of *Argersinger* "that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment,"*Scott,* 440 U.S. at 373, 99 S.Ct. at 1162, and *Scott* drew the line defining the right to counsel at actual imprisonment. *Shelton,* 535 U.S. at 675, 122 S.Ct. at 1776 (Scalia, J., dissenting). The Court in *Shelton* erased that line and drew another one far enough out to encompass a mere threat of imprisonment. Of course, none of this lessens the force of the rule crafted by the *Shelton* majority which is, by definition, the law of the land. And we take at full value the *Shelton* majority's statement that *Argersinger* and *Scott* controlled the result in that case. But neither *Shelton* nor any other Supreme Court decision has ever said that the rule in that case was dictated by *Argersinger* and *Scott* or any other decision.

Nor has the Supreme Court ever suggested that the outcome in *Shelton* was not "susceptible to debate among reasonable minds," which is

another measure of whether a decision is dictated by prior precedent, *see Glock v. Singletary,* 65 F.3d at 884. The susceptibility of the *Shelton* issue to debate among reasonable minds is shown by the status of that issue among the lower courts before the Supreme Court resolved the matter. *Compare United States v. Reilley,* 948 F.2d 648, 654 (10th Cir.1991) (appointment of counsel is a constitutional prerequisite to imposition of conditional or suspended prison sentence), *United States v. Foster,* 904 F.2d 20, 21 (9th Cir.1990) (same), *and United States v. White,* 529 F.2d 1390, 1394 (8th Cir.1976) (same), *with Cottle v. Wainwright,* 477 F.2d 269, 274-75 (5th Cir.1973) (rejecting counsel prerequisite to imposition of suspended sentence), *vacated on other grounds,*414 U.S. 895, 94 S.Ct. 221, 38 L.Ed.2d 138 (1973), *Griswold v. Commonwealth,* 252 Va. 113, 472 S.E.2d 789, 791 (1996) (same), *and State v. Hansen,* 273 Mont. 321, 903 P.2d 194, 197 (1995) (same). The pre-*Shelton* split on the question shows that it was "susceptible to debate among reasonable minds," which means that the answer had not been dictated previously. *See Glock,* 65 F.3d at 884.

The situation here is similar to the one we faced in *Turner v. Crosby,* 339 F.3d 1247 (11th Cir.2003). There we held that the Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), was not dictated by its earlier decision in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). *Turner,* 339 F.3d at 1284. In *Apprendi,* the Court had held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490, 120 S.Ct. at 2362-63. *Ring* applied *Apprendi* to the capital sentencing context, holding that aggravating factors at sentencing, because they act as the "functional equivalent of an element of a greater offense," must be found by a jury beyond a reasonable doubt. *Ring,* 536 U.S. at 609, 122 S.Ct. at 2443. *Ring* 's treatment of aggravating factors as elements of a greater offense extended *Apprendi,* much as *Shelton* 's treatment of suspended sentences as actual sentences extended *Argersinger.* Both *Ring* and *Shelton* extended an existing rule into a new and different context.

> For all of these reasons, we conclude that the rule of the *Shelton* case does involve a "newly recognized" right within the meaning of § 2255 ¶ 6(3).

*United States v. Howard*, 374 F.3d 1068, 1073-1076 (11th Cir. 2004).

*Quigley* was simply wrongly decided.[16]

## E. FLORIDA'S TWO YEAR WINDOW OF RETROACTIVITY FOR PURPOSES OF RULE 3.850(b)(2) OPENS ON THE DATE OF THE DECISION MAKING THE NEW RULE RETROACTIVE, NOT ON THE DATE OF THE DECISION OF THE UNDERLYING NEW CONSTITUTIONAL RULE.

Judge Boyer's alternative basis for denying relief was that even were *Shelton* subject to retroactive application for post-conviction relief purposes, Mitchell was untimely in seeking relief under *Shelton*, ruling that Mitchell was required to file his *Shelton* claim within two years of the decision in *Shelton*.[17]

The trial court clearly erred in this ruling and the Circuit Court acting in its

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[16] The discussion in *Quigley* about the application of Rule 3.111 and Rule 3.160, Florida Rules of Criminal Procedure, has no application to Mitchell's case, because Mitchell established that the original trial judge advised him that he had no right to counsel.

[17] Perhaps Judge Boyer was thinking of the United States Supreme Court decision in *Dodd v. United States*, 545 U.S. 353, 125 S.Ct. 2478 (2005), which so held for purposes of a *federal* habeas petition under 28 U.S.C. § 2255. The *Dodd* decision has no application to Florida's Rule 3.850, however, because it was predicated on the language of the time limit provision in § 2255, which is not the same as that in Rule 3.850, and even if it were, the *Danforth* principle would permit Florida, as it does, to apply a more liberal interpretation of its own post-conviction procedures.

appellate capacity erred in affirming this decision while refusing to decide whether *Shelton* is retroactive or not. The Florida Supreme Court has expressly held that a 3.850 petitioner relying upon a new rule of Constitutional law held retroactive for post-conviction relief purposes has two years *from the date the decision is held retroactive* within which to bring a 3.850 claim:

> In view of the limited number of opinions that are given retroactive effect and the uncertainty that exists over whether a particular decision will be accorded retroactive effect, we consider it reasonable to calculate the two-year time period for eligible defendants to file their claims from the time our decision announcing retroactivity becomes final. This principle not only comports with rule 3.850, but also provides a reasonable time period for all eligible petitioners to file their claims, including those whose claims were rejected before the decision on retroactivity was announced.

*Dixon v. State*, 730 So.2d 265, 268-269 (Fla. 1999).

Therefore, under *Dixon*, Mitchell filed his *Shelton* claim in a timely manner by filing it within two years of the decision in *Howard* holding *Shelton* retroactive.

**CERTIORARI STANDARD SATISFIED**

Based on the foregoing authority and arguments, Mitchell suggests that the order of Judge Don H. Lester constitutes a departure from the essential requirements of law and this honorable Court should grant certiorari. Clearly the duty of the Circuit Court acting in its capacity as a court of appeal was to decide the single issue presented by the appeal, whether *Shelton* is retroactive or not for purposes of Rule

3.850. The Circuit Court departed from the essential requirements of law in accepting the State's argument that only the United States Supreme Court or the Florida Supreme Court can decide retroactivity.

> "The State counters that retroactivity can be decided only by the United States Supreme Court or by the Florida Supreme Court. . . . Neither the United States Supreme Court nor the Florida Supreme [*sic*] has, to date, made retroactive the right to counsel announced in *Shelton*. *It is not for this Court to speculate whether at some future date either of those courts will make Shelton retroactive*."

Slip opinion, pages 3-4 (emphasis supplied).

The State and Circuit Court were both apparently confusing the requirement that the new constitutional rule or decision *emanate* from either the United States Supreme Court or the Florida Supreme Court, with the question whether a lower court, trial or appellate, could determine whether such a new rule or decision once issued by either the United States Supreme Court or Florida Supreme Court is to be applied retroactively or not. The lower trial and appellate courts routinely are called upon to make such determinations and are required to do so when the question is presented. This is not "speculation," rather, it is appellate adjudication, which is required of the Circuit Court when acting in its appellate capacity.

Likewise, once called upon to decide the question, based on the legal authority presented it is clear that the Circuit Court departed from the essential requirement of law in not holding that *Shelton* is retroactive.

## CONCLUSION

WHEREFORE, the Petitioner, GARY MITCHELL, respectfully requests this Honorable Court grant this petition for certiorari and remand the case with instructions that *Shelton* is to be applied retroactively for purposes of Rule 3.850 and on that basis Mitchell be permitted to withdraw his plea.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished to the Office of the State Attorney, 340 East Bay Street, Jacksonville, Florida, Florida, and to the Office of the Attorney General, The Capitol, Tallahassee, Florida and to the Honorable Don H. Lester, by U.S. Postal Service, postage prepaid, this 7th day of September, 2010.

_____

William Mallory Kent