

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

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

**ANTHONY W. BROOM,**  
Defendant,

v.

**STATE OF FLORIDA,**  
Plaintiff.

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**BELATED AND SUCCESSIVE  
MOTION FOR POST-CONVICTION RELIEF  
Rule 3.850(b)(2), Florida Rules of Criminal Procedure  
“A Change In Law”**

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Defendant:

Anthony W. Broom  
DC# 081443  
Mayo Correctional Institution Annex  
8784 W. U.S. 27  
Mayo, FL 32066-3458

*Pro se*

## STATEMENT OF THE CASE

In the Circuit Court of the Tenth Judicial Circuit, in and for Polk County, Florida, case number CF81-1860A1-XX, Anthony W. Broom ("Broom") was charged by Indictment, returned August 21, 1981, with one count of First-Degree Premeditated Murder, §782.04, Fla. Stat., allegedly committed June 24, 1981, and trial commenced on November 30, 1981, and concluded on December 2, 1981. The jury returned a verdict of guilty to the lesser-included offense of Second-Degree Depraved Mind Murder, §782.04(2), Fla. Stat. On December 23, 1981, the court exceeded the experimental mandatory sentencing guidelines range of twenty (20) to twenty-five (25) years and imposed an upward departure sentence of natural life with a three (3) year minimum mandatory. Counsel of record at all stages of the trial court proceedings was Richard Barest, Esq., 2920 Franklin Street, Lakeland, FL 33801.

Notice of Appeal to the Second District Court of Appeal was filed on December 30, 1981, DCA docket number: 87-17, raising, *inter alia*, "the evidence was insufficient to support the conviction." On September 24, 1982, the court per curiam affirmed without opinion. Broom v. State, 422 So.2d 848 (Fla. 2nd DCA 1982) (Table), *cert. denied*, 424 So.2d 760 (Fla. 1982) (Table). Counsel on appeal was Jack T. Edmond, Esq., Bartow, Florida 33801.

On January 4, 1983, Broom, *pro se*, filed a Motion for Mitigation of

Sentence in the trial court. On January 7, 1983, the court corrected the sentence to reflect credit for 179 days jail time, and denied the Motion on January 10, 1983.

On February 24, 1983, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus, 28 U.S.C. §2254, in the United States District Court, Middle District of Florida, raising, *inter alia*, “failure to prove the corpus delicti.” The court denied the Petition without a hearing on March 24, 1985, and on August 23, 1983, the Eleventh Circuit Court of Appeals per curiam affirmed without opinion. Broom v. Fortner, 772 F.2d 916 (11th Cir. 1983) (Unpublished).

On December 10, 1985, Broom, *pro se*, filed his first Rule 3.850 Motion raising:

- I: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO FILE A MOTION TO DISMISS THE CHARGE UNDER FLA.R.CRIM.P. 3.190(c)(4);
- II: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO IMPEACH STATE’S WITNESSES;
- III: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO OBJECT TO MISLEADING JURY INSTRUCTIONS.

On December 13, 1985, an Amended Motion was filed to alter Ground One to allege:

- I: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR FAILURE TO FILE A PETITION FOR WRIT OF HABEAS CORPUS TO HAVE THE CHARGE DISMISSED UNDER §907.045, FLA. STAT.

On February 7, 1986, the court denied the Motion without an evidentiary hearing, rehearing denied February 20, 1986.

On February 27, 1986, a *pro se* Notice of Appeal to the Second District Court of Appeal was filed, case number 86-538. On March 21, 1986, the court per curiam affirmed without opinion. Broom v. State, 487 So.2d 298 (Fla. 2nd DCA 1986) (Table). Mandate issued on May 12, 1986.

On September 19, 1986, Broom, *pro se*, filed his second Rule 3.850 Motion with Memorandum of Law, raising:

- I: THE INDICTMENT WAS OBTAINED THROUGH THE KNOWING USE OF FALSE INFORMATION;
- II: INSUFFICIENT EVIDENCE;
- III: INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL FOR 1) FAILING TO INVESTIGATE OR CALL WITNESSES; 2) FAILING TO MOVE TO DISMISS THE PROBABLE CAUSE AFFIDAVIT; AND 3) DENYING BROOM THE RIGHT TO TESTIFY;
- IV: CUMULATIVE FUNDAMENTAL ERROR.

On February 11, 1987, the court summarily denied the Motion without an evidentiary hearing.

On February 23, 1987, Broom, *pro se*, filed a Notice of Appeal to the Second District Court of Appeal, case number 87-608. On March 27, 1987, the court per curiam affirmed without opinion. Mandate issued April 17, 1987.

On or about December 23, 1986, Broom, *pro se*, filed a Petition for Writ of

Habeas Corpus in the Sixth Judicial Circuit Court, in and for Pinellas County, Florida (where incarcerated). The court denied the Petition on March 24, 1987, but granted rehearing on May 27, 1987, and on July 28, 1987, granted the Petition.

The State appealed to the Second District Court of Appeal, which reversed on March 4, 1998. State v. Broom, 523 So.2d 639 (Fla. 2nd DCA 1988).

On or about October 4, 2001, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the trial court. On November 15, 2001, the court denied the petition, rehearing denied May 9, 2002.

On July 14, 2002, Broom, *pro se*, filed a Notice of Appeal to the Second District Court of Appeal, case number 2D02-2623. On May 30, 2003, the court per curiam affirmed without opinion, rehearing denied July 22, 2003.

On September 19, 2003, Broom, *pro se*, filed a Rule 3.850(h) Motion in the trial court. On September 25, 2003, the court dismissed the Motion.

On April 19, 2005, Broom, *pro se*, filed a Motion for Leave to File a Successive Rule 3.850 Motion beyond the 2-year limit or alternatively a Petition for Writ of Habeas Corpus under Rule 3.850(h). On June 21, 2005, the court denied the Motion, rehearing denied July 8, 2005.

On October 13, 2005, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the Supreme Court of Florida. On January 20, 2006, the court dismissed this Petition, rehearing denied April 13, 2006.

On April 9, 2006, Broom, *pro se*, filed a Motion to Correct Illegal Sentence in the trial court. On August 17, 2006, the court denied the Motion, rehearing denied unknown.

On May 17, 2006, Broom, *pro se*, filed a "Great Writ" in the United States Supreme Court, which was returned without action.

On or about July 17, 2006, Broom, *pro se*, filed an Application to File a Second or Successive Petition, pursuant to 28 U.S.C. §2244(b), in the Eleventh Circuit Court of Appeals. On August 4, 2006, the court denied the Application.

On November 17, 2006, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the First District Court of Appeal. On or about December 15, 2006, the court denied the Petition, rehearing denied February 5, 2007.

On July 16, 2007, Broom, *pro se*, mailed a letter to the Florida Supreme Court which the court construed as a Petition for Writ of Habeas Corpus and dismissed on August 22, 2007.

On April 24, 2008, Broom, *pro se*, filed a Petition for Writ of Habeas Corpus in the United States District Court, Northern District. On April 30, 2008, the court transferred the Petition to the United States District Court, Middle District of Florida. On June 23, 2008, the court dismissed the Petition.

On July 7, 2008, Broom, *pro se*, filed a Motion for Relief from Judgment in the United States District Court, Middle District of Florida. The court denied the

Motion on July 10, 2008.

On July 28, 2008, Broom, *pro se*, filed an Application for Certificate of Appealability in the Eleventh Circuit Court of Appeals. On December 2, 2008, the court denied the Application, Motion for Reconsideration denied January 22, 2009.

Petition for Writ of Certiorari filed October 13, 2009, in the 2<sup>nd</sup> DCA, Case #1D09-164-CA.

Motion for Certificate of Appealability following denial of COA request by District Court (Circuit Rule 22-1(d)) October 29, 2009, Case #09-14940B.

Motion for Relief from Judgment, November 11, 2009, 10<sup>th</sup> Jud. Cir., Case #CF81-001860-AIXX.

Motion to Leave to Amend First Motion for Motion for Post-Conviction Relief, November 12, 2009, Case #CF81-1860A1-XX.

Motion Denying Defendant's Motion for Leave to Amend First Motion for Post-Conviction Relief and Amended Motion for Post-Conviction Relief, Case #81-001860-A1-XX.

Order Denying Defendant's Motion for Leave from Judgment Case #CF81-001860-A1XX, December 17, 2009.

Rehearing, December 31, 2009 Case #CF81-001860-AIXX.

Order Dismissing Rehearing, Case #CF81-001860-A1XX, January 25, 2010.

Appeal to Order Denying Defendant's Motion for Leave to Amend First

Motion for Post-Conviction Relief and Amended Motion for Post-Conviction Relief, Case #2D10-270, January 15, 2010.

Petition for Writ of Habeas Corpus, Case #2D10-285, filed January 19, 2010.

Habeas Corpus, Case #2D10-285, dismissed February 8, 2010.

Appeal 2<sup>nd</sup> DCA, Case #2D10-270, Initial Brief of Appellant, February 22, 2010.

Case #2D10-270, Per Curiam Affirmed, May 7, 2010.

Mandate from 2<sup>nd</sup> DCA in Case #2D10-270, June 2, 2010.

Petition for Writ of Habeas Corpus, 1<sup>st</sup> DCA, Case #1D10-3883, July 16, 2010.

Per Curiam Affirmed, Case #1D10-3883, 1<sup>st</sup> DCA, Habeas Corpus, August 13, 2010.

Motion for Rehearing, Case #1D10-3883, Habeas Corpus, September 20, 2010.

Petition for Writ of Certiorari, Florida Supreme Court, October 13, 2010.

Petition for All Writs/Habeas Corpus To Correct Manifest Injustice, Case #SC10-2049, October 13, 2010.

Letter, October 26, 2010, All Writ as Habeas Corpus, Case #SC10-2049, Florida Supreme Court. – New Case.



Florida Supreme Court, October 26, 2010, Acknowledgment of New Case #SC10-2049, All Writ/Habeas Corpus to Correct Manifest Injustice.

Mandamus, denied, Florida Supreme Court, January 7, 2011, Florida Supreme Court, Case #SC10-2059, L.T. Case #1D10-3883, Trial Case #CF81-1860AI-XX.

Original Writ of Habeas Corpus, filed February 8, 2011, in the United States Supreme Court under 28 U.S.C. 2243, Case #SC10-2049.

Petition for Writ of Habeas Corpus, 1<sup>st</sup> DCA, Case #1D11-3995, filed July 21, 2011.

Habeas Corpus, Per Curiam Denied, August 31, 2011, Case #1D11-3995.

Motion for Rehearing, Case #1D11-3995, filed September 14, 2011.

Rehearing to Correct Manifest Injustice, denied October 14, 2011, Case #1D11-3995.

Notice of Appeal, Case #1D11-3995, filed November 7, 2011.

Appeal – Effect on the Proper Administration of Justice, filed November 10, 2011, Case #SC11-2229.

Letter with New Case #SC11-2229, from Florida Supreme Court, November 21, 2011.

Appeal Case #1D11-3995, dismissed November 21, 2011.

Petition for All Writ, Case #SC11-2313, filed November 16, 2011, with

Appendix in support of All Writ.

Letter from Florida Supreme Court excepting All Writ as Habeas Corpus, Case #SC11-2313, December 12, 2011, pending.

This is not a complete statement of the case, for the Defendant has no way of keeping copies of all filings. The Court will have to rely on the Court Docket Sheet for the complete filings.

The Ground in this post-conviction 3.850(b)(2) motion is based on new decision issued by the Supreme Court of Florida in Coicou v. State, 39 So.3d 237 (April 2010), that must be applied retroactively in this instant case because it is substantive in nature.

## GROUND

CONVICTION OF AN OFFENSE NOT CHARGED  
VIOLATED DUE PROCESS UNDER AMENDS. 5  
AND 14, U.S. CONST.

Facts – In Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983)(*en banc*), the Court recognized that second-degree depraved mind murder was not listed in the Florida Standard Jury Instructions in Criminal Cases as a lesser included offense in the table – or “schedule” – but concluded that Rule 3.490 controlled. *Id.* at 255-56.

The Court opined:

Second degree depraved mind murder is a lesser degree of felony murder under section 782.04, Florida Statutes (1981), and, as we have stated above, could be supported by the evidence in this case. Defendant was not indicted for second degree depraved mind murder, but rule 3.490 does not require that a defendant be charged with a lesser degree offense in order for the rule to apply.

*Id.* at 255. The rule provides:

If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence. The judge shall not instruct on any degree as to which there is no evidence.

Fla.R.Crim.P. 3.490, as construed in Order and Opinion of Supreme Court of Florida Adopting Florida Standard Jury Instructions in Criminal Cases, Nos. 57,734 and 58,799 (Fla. April 16, 1981)(reprinted on pp. v-xiv of Florida Standard Jury Instructions (1981 ed.))(referring to Brown v. State, 206 So.2d 377 (Fla.

1968)).

Linehan was approved in Linehan v. State, 476 So.2d 1262 (Fla. 1985)(“We suggest that Florida Rule of Criminal Procedure 3.490 be reviewed in light of this decision and Judge Grimes’ concurring opinion in the district court decision below, and that the schedule of lesser included offenses be appropriately amended.”). After repeating this suggestion in Scurry v. State, 521 So.2d 1077, 1078 (Fla. 1988), the recommended change was subsequently incorporated into the schedule of lesser-included offenses in Standard Jury Instruction – Criminal Case No. 92-1, 603 So.2d 1175 (Fla. 1992).

In Coicou v. State, 39 So.3d 237 (Fla. June 28, 2010), the Court agreed with Justice Shaw’s dissent in Linehan, 476 So.2d at 1266 (Fla. 1985)(Shaw, J., dissenting), that the majority of the Court had departed from Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), codified in §775.021(4), Fla. Stat. (1983), in looking to the evidence rather than to the statutory elements of first-degree felony murder and second-degree depraved mind murder and, following Sanders v. State, 944 So.2d 203, 206 (Fla. 2006)(“Necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense.” (Emphasis added)), held “that attempted second-degree murder is not a necessarily lesser-included offense of attempted first-degree felony murder. This is because

attempted second-degree murder contains an element, a depraved mind, that is not an element of the greater offense.” *Id.* at 242-43. “For the same reason, and for the reasons expressed in Justice Shaw’s dissent to Linehan, it is equally clear that second-degree murder cannot and should not be considered a necessarily lesser-included offense of first-degree felony murder.” *Id.* at 243. Moreover, “we also find that attempted second-degree murder is not a permissive lesser-included offense, because the allegations in the charging document and the proof at trial do not support a finding that Coicou acted with a depraved mind without regard for human life. (Citation omitted).” *Id.* at 243. Finally, “Section 924.34 does not permit an appellate court to direct entry of a conviction for a crime where the jury has not determined all of the elements of that crime beyond a reasonable doubt. To do so would amount to a violation of the Defendant’s Sixth Amendment right to a trial by jury. (Citation omitted).” *Id.* at 243-44. Accordingly, the Court receded from Linehan and Scurry.

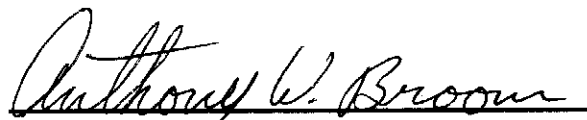
In the instant case, Defendant was likewise denied due process under Amends. 5 and 14, U.S. Const. as construed in Blockburger, supra, and codified in §775.021(4), Fla. Stat. (1983), because he was charged with first-degree premeditated murder with a firearm, but ultimately convicted, pursuant to the authority of Fla.R.Crim.P. 3.490, of second-degree depraved mind murder with a firearm, whereas the offense for which defendant was convicted contains an

element of depraved mind murder without any premeditation that is not contained in the offense charged. Having been convicted of an offense not charged, in violation of due process, resulting in a miscarriage of justice, the judgment and sentence is void and/or illegal and/or in excess of the trial court's jurisdiction and must be vacated. Sustaining the conviction and sentence for an offense lesser in degree than the offense charged but where all of its elements were not charged, under the authority of Fla.R.Crim.P. 3.490 and Linehan, is contrary to and/or an unreasonable application of Blockburger.

**RELIEF SOUGHT**

**WHEREFORE**, premises considered, the Defendant moves this Court to vacate the judgment and sentence and to immediately discharge the Defendant; and to grant all such further relief to which Defendant is entitled and that this Court deems just and proper.

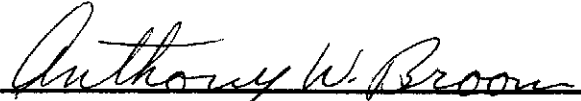
Respectfully Submitted,

  
Anthony W. Broom, *pro se*

**UNNOTARIZED OATH/VERIFICATION**

PURSUANT TO §92.525, FLORIDA STATUTES

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

  
Anthony W. Broom, *pro se*


**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true copy of the foregoing document was placed in the hands of Mayo Correctional Institution officials to forward by U.S.

Mail to: Office of the State Attorney, Jerry Hill, 255 N. Broadway Avenue, P.O.

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

February, 2011.

  
Anthony W. Broom, *pro se*

DC# 081443

Mayo Correctional Institution Annex

8784 W. U.S. 27

Mayo, FL 32066

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