366 So.2d 1240
(Cite as: 366 So.2d 1240)

District Court of Appeal of Florida, Third District.
Daniel L. McGOWAN, Appellant,
v.
The STATE of Florida, Appellee.
No. 77-1980.

Feb. 6, 1979.

The Circuit Court for Dade County, Natalie Baskin, J., denied, without a hearing, defendant's motion for postconviction relief, and he appealed. The District Court of Appeal held that defendant was entitled to an evidentiary hearing on his motion, where it set forth facts which, if established, would show that he was mentally and physically incapable of making a defense at the time of his trial, and the record did not conclusively refute that claim.

Reversed and remanded.

West Headnotes

Criminal Law 110 1655(5)

110 Criminal Law
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1651 Necessity for Hearing
110k1655 Particular Issues
110k1655(5) k. Mental Capacity. Most Cited Cases
(Formerly 110k998(19))
Defendant was entitled to an evidentiary hearing on his motion for postconviction relief, where the motion set forth facts which, if established, would show that he was mentally and physically incapable of making a defense at the time of his trial, and the record did not conclusively refute that claim. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.850.

***1240** Bennett H. Brummer, Public Defender, and Kurt Marmar, Asst. Public Defender, for appellant.

Jim Smith, Atty. Gen., Joel D. Rosenblatt, Asst. Atty. Gen., and Clifford M. Miller, Legal Intern, for appellee.

Before PEARSON, KEHOE and SCHWARTZ, JJ.

PER CURIAM.

This appeal is taken by the defendant pursuant to Florida Rule of Appellate Procedure 9.140(g), which provides for an appeal from an order denying relief under Florida Rules of Criminal Procedure 3.850 without a hearing. We find that the defendant's motion for post-conviction relief sets forth facts which, if established, would show that he was mentally and physically incapable of making a defense at the time of his trial; also, the record does not conclusively refute that claim. Therefore, the order appealed is reversed and the cause is remanded for an evidentiary hearing.

It is so ordered.

Fla.App., 1979.
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