IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

PETITIONER,

-VS- CASE NO. 64,890

STEVEN SNOW,

RESPONDENT.

PETITIONER'S JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Respondent was charged with kidnapping Carla Mae Corry, a sixteen year old child, and sexually battering her. He was duly convicted by a jury of said crimes and upon being adjudicated guilty was sentenced to concurrent terms of imprisonment for a period of sixty (60) years (App. 1-5). The trial judge at sentencing retained jurisdiction for one-third of the sentence as authorized by Chapter 947, Fla.Stat. (App. 6-9). Judge Miner stated that he was retaining jurisdiction because respondent "did terrify, terrorize a 16-year old girl" (App. 8).

Counsel objected to the retention, however, he did not object to the alleged failure to specify the justification for retention by the trial judge. Indeed, he stated no grounds for the objection. Moreover, no post trial motion attacking the

judgment and sentence was filed challenging the legality of the sentence by trial counsel.

An appeal was instituted by the respondent to the District Court of Appeal, First District, urging the retention of jurisdiction be vacated. Petitioner urged that respondent did not properly raise the procedural defect in the trial court and that the judgment and sentence should be affirmed, without consideration of the merits. Moreover, petitioner urged the procedural defect was barred from consideration on appeal or by post-conviction relief, citing to the case of Pedroso v. State, 420 So.2d 908 (Fla.2d DCA 1983).

The lower tribunal agreed with respondent that petitioner could not be heard to complain on the direct appeal but dismissed the appeal "without prejudice for Snow to raise this issue by motion pursuant to Florida Rule of Criminal Procedure 3.850" (App. 10; Opinion at p. 1).

Petitioner, State of Florida, filed a timely notice invoking the discretionary jurisdiction of this Court on the basis that the decision rendered by the lower tribunal was in direct and express conflict with the decision of another district court on the same point of law.

ISSUE

THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IS IN DIRECT AND EXPRESS CONFLICT WITH THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT, RENDERED IN PEDROSO V. STATE, 420 So.2d 908 (Fla.2d DCA 1983).

ARGUMENT

The lower tribunal, like every other district court, correctly identified the alleged deficiency as a procedural violation of Section 947.16(3)(a). Sawyer v. State, 401 So.2d 939 (Fla.1st DCA 1981); Landrau v. State, ___ So.2d ___ (Fla.4th DCA 1984), 9 F.L.W. 8; and Alexander v. State, 425 So.2d 1197 (Fla.2d DCA 1983). The lower court likewise correctly held that since it was not properly preserved, it could not be entertained on direct appeal. Alexander and Landrau, supra. This is merely an application of the well recognized principle of appellate law that errors, which do not rise to the level of fundamental error, may not be raised for the first time on appeal. Clark v. State, 363 So.2d 331 (Fla.1978) and State v. Cumbie, 380 So.2d 1031 (Fla.1980).

The lower tribunal, notwithstanding the procedural default, held the dismissal of the appeal was without prejudice to his right to seek collateral review pursuant to Rule 3.850. Petitioner insists that in so doing the court collided with Pedroso, supra.

In Pedroso, supra, the Second District Court of Appeal affirmed an order summarily denying relief sought pursuant to 3.850 which attempted to raise the claim that the trial judge violated §947.16(3)(a) in retaining jurisdiction. The Court said:

> [1,2] A rule 3.850 motion is not a substitute for a direct appeal. Raulerson v. State, 420 So.2d 567, at 569 (Fla.Aug.26, 1982). In other words, where issues raised on a Rule 3.850 motion could have been or were raised on a direct appeal, denial of the motion is proper. Id.; Meeks v. State, 382 So.2d 673, 675 (Fla.1980). Appellant could have raised the retention of jurisdiction issue on direct appeal. Thus, the issue is not now cognizable for collateral attack.
>
> We respectfully disagree with our sister court's decision in Sawyer v. State, 401 So.2d 939 (Fla.1st DCA 1981), dismissing a direct appeal alleging improper retention of jurisdiction without prejudice to raise the issue on a Rule 3.850 motion.
>
> Accordingly, the trial judge's denial of the Rule 3.850 motion is AFFIRMED.

420 So.2d at 908.

Not only is the decision sought to be reviewed in direct and express conflict with Pedroso, supra, it is clearly erroneous. It directly contradicts the plethora of decisions emanating from this Court which, like Pedroso, holds that Rule 3.850 may not be used as a substitute for direct appeal and that a legal claim which could have been raised at trial and on direct appeal, if necessary, whether litigated or not, is not cognizable in a collateral proceeding initiated pursuant to Rule 3.850. In addition to Meeks v. State, 382 So.2d 673,675 (Fla.1983) cited to in Pedroso, see: State v. Matera, 266 So.2d 661 (Fla.1972);

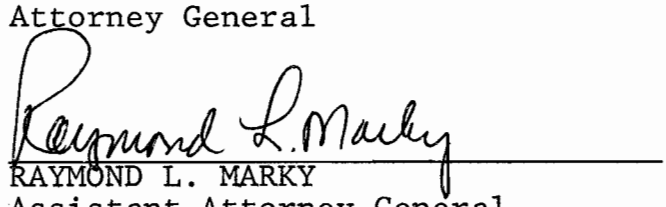
Spenkellink v. State, 350 So.2d 85 (Fla.1977); Hargrave v. State, 396 So.2d 1127 (Fla.1981); Demps v. State, 416 So.2d 808,809 (Fla.1982); Booker v. State, 441 So.2d 148,150 (Fla.1983) and Jones v. State, ___ So.2d ___ (Fla.1984), Opinion filed February 4, 1984, and the cases cited therein.

CONCLUSION

The decision of the lower court is in direct and express conflict with Pedroso v. State, supra, and this Court has jurisdiction under Article V, Sec. 3(b)(3). Since it is clearly erroneous, this Court should grant discretionary review and should summarily vacate that portion of the decision which holds respondent may raise the issue in a 3.850 proceeding.

Respectfully submitted,

JIM SMITH
Attorney General



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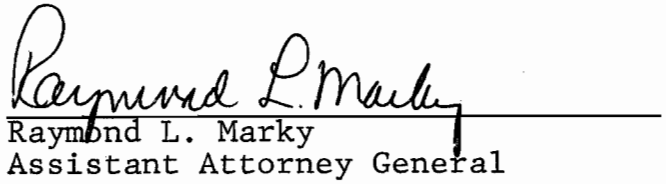
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Brief has been forwarded to Mr. P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, FL 32302, via U. S. Mail, this 27th day of February 1984.



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