IN THE SUPREME COURT OF FLORIDA

66447

STATE OF FLORIDA,

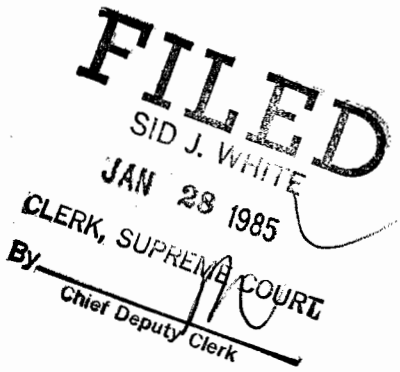
Petitioner,

vs.

CECIL B. STACEY,

Respondent.

_____/



PETITIONER'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

GREGORY G. COSTAS
ASSISTANT ATTORNEY GENERAL

THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0290

COUNSEL FOR PETITIONER

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PRELIMINARY STATEMENT

Cecil B. Stacey, the criminal defendant and Appellant below in Stacey v. State, 10 F.L.W. 64 (Fla. 1st DCA Dec. 20, 1984), will be referred to herein as Respondent. The State of Florida, the prosecution and appellee below, will be referred to herein as Petitioner.

An Appendix containing the opinion of the court below and pertinent pleadings has been attached hereto. Citations to the Appendix will be indicated parenthetically as "A" with the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

Respondent was found guilty of robbery with a firearm and sentenced to 99 years in prison. The trial court retained jurisdiction for the first one third of the sentence (A 3). Thereafter Respondent perfected an appeal to the First District. Evidently Respondent's counsel filed an Anders brief and Respondent filed a pro se brief. The cause was affirmed. Stacey v. State, 421 So.2d 824, 825 (Fla. 1st DCA 1982).

Subsequently, Respondent filed a motion for post-conviction relief which evidently was technically deficient (A 4). A second corrected motion (A 4-8) was filed raising as grounds for relief (1) that the trial court erred in retaining jurisdiction over his sentence because Florida Statutes §947.16 (3) (Supp. 1978), was effective after the date of his offense and (2) ineffective assistance of trial counsel (A 1). The trial court denied Respondent's motion finding that the retention of jurisdiction issue was unreviewable because Respondent did not object to retention at sentencing and the issue was not raised on direct appeal, and that the allegations concerning the ineffectiveness claim were refuted by the record and even if true were legally insufficient (A 1, 2).

Respondent then appealed denial of his motion for post-conviction relief to the lower tribunal which found that neither Respondent's failure to object to retention at sentencing, nor his failure to raise the issue on direct appeal precluded

review via a Rule 3.850 motion and accordingly reversed and remanded the cause for an evidentiary hearing on the retention issue. The lower court left intact the trial court's ruling on the ineffectiveness claim (A 1,2).

Thereafter, Petitioner timely filed in the lower court its Notice to Invoke Discretionary Jurisdiction pursuant to Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) (A 9). Petitioner's Brief on Jurisdiction follows.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke this Court's discretionary review of the decision below pursuant to Article V, Section 3 (b)(3) of the Constitution of the State of Florida and Fla.R. App.P. 9.030(a)(2)(A)(iv) on the ground that said decision is in express and direct conflict with decisions of this Court and another district court of appeal on the same question of law.

ISSUE ON APPEAL

THE FIRST DISTRICT'S DECISION HEREIN EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND THE SECOND DISTRICT COURT OF APPEAL.

The lower court's reversal of the trial court's order denying post-conviction relief under Fla.R.Crim.P. 3.850 and remand for an evidentiary hearing on the retention of jurisdiction issue on the basis that Petitioner's failure to object to ex post

facto application of the retention statute, Section 947.16(3), Florida Statutes (Supp. 1978), at sentencing and concomitant failure to raise the issue on direct appeal, does not preclude review via a Rule 3.850 motion, expressly and directly conflicts with this Court's decisions in Armstrong v. State, 429 So.2d 287 (Fla. 1983), Booker v. State, 441 So.2d 148 (Fla. 1983), Hargrave v. State, 396 So.2d 1127 (Fla. 1981), Meeks v. State, 382 So.2d 673 (Fla. 1980), Adams v. State, 380 So.2d 432 (Fla. 1980), Henry v. State, 377 So.2d 692 (Fla. 1979), Sullivan v. State, 372 So.2d 938 (Fla. 1979), Spinkelink v. State, 350 So.2d 85 (Fla. 1977), cert. denied, 434 U.S. 960 (1977), Ford v. Wainwright, 451 So.2d 471 (Fla. 1984), and McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983), and with the Secind District's decision in Pedroso v. State, 420 So.2d 908 (Fla. 2d DCA 1982).

This Court has unequivocally established that where issues are raised in collateral proceedings which could have been presented on direct appeal or were presented and determined on direct appeal, or which were waived at trial by lack of objection or waived on appeal by lack of argument, such issues are completely foreclosed and are not subject to collateral attack. Armstrong v. State, supra at 288; Booker v. State, supra at 150; Hargrave v. State, supra; Meeks v. State, supra at 675; Adams v. State, supra at 427; Henry v. State, supra; Sullivan v. State, supra at 939; Spinkelink v. State, supra; Ford v. Wainwright, supra at 474; McCrae v. Wainwright, supra at 870. Consequently, the lower court's decision holding that the

retention issue, which had been waived at sentencing by a failure to object and had not been raised on direct appeal, was properly subject to review in a Rule 3.850 motion, expressly and directly conflicts with the above-cited decisions of this Court.

In Pedroso v. State, supra, the appellant was adjudicated guilty of armed robbery and sentenced to thirty years imprisonment with the trial court retaining jurisdiction over the first third of the sentence. He appealed the conviction but not the sentence and the district court affirmed the cause without a written opinion. Subsequently, the appellant filed a Rule 3.850 motion alleging that the trial judge did not state the reasons for retaining jurisdiction with particularity as required by Florida Statutes §947.16(3)(a) (1979). The trial judge denied the motion and the district court affirmed holding that:

> A Rule 3.850 motion is not a substitute for direct appeal . . . In other words, where issues raised on a Rule 3.850 motion could have been or were raised on direct appeal, denial of the motion is proper . . . Appellant could have raised the retention of jurisdiction issue on direct appeal. Thus, the issue is not now cognizable for collateral attack. (Citations omitted).
>
> 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.

Id at 908. Again, the lower court's decision holding that the retention issue, which had been waived by lack of objection in the trial court and had not been raised on direct appeal, was properly reviewable by way of a Rule 3.850 motion, expressly

and directly conflicts with the Second District's decision to the contrary in Pedroso v. State, supra.

At this point, Petitioner notes that in this Court's recent decision in State v. Snow, 10 F.L.W. 40 (Fla. Jan. 10, 1985), the Court granted discretionary review on the ground that the First District's decision in Snow v. State, 443 So.2d 1074 (Fla. 1st DCA 1984) was in express and direct conflict with Pedroso v. State, supra. In Snow v. State, supra, the appellant challenged his sentence claiming that the trial court erred in retaining jurisdiction without stating the reasons for doing so with individual particularity as required by Florida Stautes §947.16(3) (1981). The district court declined to consider the retention issue because it had not been raised in the trial court and dismissed the appeal without prejudice to appellant's raising the issue in a Rule 3.850 motion. (Emphasis added). State v. Snow, supra at 40.

This Court quashed the district court's decision and remanded the cause for consideration of the retention issue on the merits. In so ruling, this Court did not address the issue of whether the district court should have dismissed the appeal without prejudice to raise the retention issue in a Rule 3.850 motion. Rather, this Court found, on the authority of State v. Rhoden, 448 So.2d 1013 (Fla. 1984), that Snow's failure to object in the trial court did not prelcude his raising the issue on direct appeal because the putative setencing error concerned a failure to follow the mandatory requirements of the retention statute. State v. Snow, supra at 41. State v. Snow, supra, did

not involve a Rule 3.850 motion.

The instant case, on the other hand, involves a claim going to the ex post facto application of the retention statute--a matter, which does not amount to fundamental error which would obviate the need for a contemporaneous objection to preserve the issue for appellate review, as the lower tribunal has so held. Fredricks v. State, 440 So.2d 433, 434 (Fla. 1st DCA 1983). Moreover, the failure to object to the ex post facto application of the retention statute does not involve alleged noncompliance with a mandatory statutory requirement and therefore cannot be excused on the authority of State v. Rhoden, supra. Thus, this Court's decision in State v. Snow, supra, has not resolved the conflict between Pedroso v. State, supra, which would not permit raising in a Rule 3.850 motion a putative sentencing error which was waived by a failure to object at sentencing and was concomitantly barred from review on direct appeal, and the lower court's decision which would permit raising such an issue collaterally.

CONCLUSION

Based upon the foregoing argument and the authority cited herein, Petitioner submits that the requisite conflict between the instant decision and decisions of this Court and the Second District Court of Appeal has been established.

WHEREFORE, Petitioner respectfully moves this Honorable Court to grant conflict certiorari review over the decision below, set the cause for oral argument, and following briefing on the merits, quash the decision sought to be reviewed.

Respectfully submitted:

JIM SMITH
ATTORNEY GENERAL

GREGORY C. COSTAS
Assistant Attorney General

The Capitol
Tallahassee, Florida 32301
(904) 488-0290

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded to Cecil Buford Stacey #080178, Post Office Box 221 2T-16, Raiford, Florida 32083, this 28th day of January, 1985.

GREGORY C. COSTAS