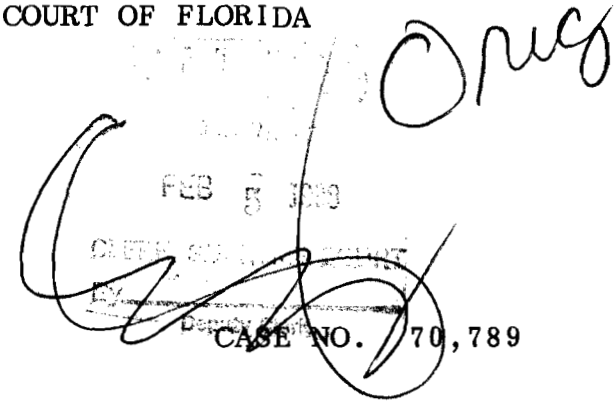
O/A 1-6-88

IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

-vs.

CASE NO. 70,789

JAMES HENDERSON,

Respondent.
_____/

RESPONDENT'S SUPPLEMENTAL ANSWER BRIEF

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AUTHORITIES CITED

POINT ONE

RESPONDENT ADMITS THAT DOUBLE JEOPARDY DOES NOT APPLY TO THE INSTANT CASE BUT THE ISSUE OF JURISDICTION DOES APPLY AND THIS COURT WOULD HAVE NO JURISDICTION TO EFFECT THE DISCHARGE OF THE DEFENDANT AT THE TRIAL COURT.

The Respondent acknowledges that double jeopardy does not bar reinstatement of the jury verdict should this Court quash the decision of the District Court even though the Respondent was discharged by the Trial Court. The Respondent does acknowledge that double jeopardy is not an issue and is not a curtain for the Respondent to hide behind. The issue which the Petitioner has failed to address is the issue of jurisdiction.

The District Court of Appeal issued an opinion in the case at bar on April 9, 1987 and on April 23, 1987, the Petitioner filed a Motion for Rehearing. On May 22, 1987, that Motion for Rehearing was denied and a Mandate was issued and filed on June 11, 1987. That Mandate, in essence, required that the Defendant be discharged as to Counts I and II of the Information which he had been convicted upon and that he be resentenced in Count III of the Information which he was convicted upon.

The lower court, on June 15, 1987, entered an Order discharging the Defendant from Counts I and II, those being Second Degree Murder and Possession of a Firearm in Commission

of a Felony, and corrected the Defendant's sentence in Count III to read that the Defendant was committed to the custody of the Sheriff of Orange County for a term of 364 days with credit for 364 days time served. The Order of the lower court was as a result of the opinion of April 9, 1987 by the Fifth District Court of Appeal and the Mandate issued June 11, 1987. At no time, even up to the present, was a motion filed by the Petitioner to Stay the issuance of the Mandate from the Fifth District Court of Appeal.

The Petitioner then filed on June 19, 1987, some four days after the Order of the Trial Court granting a Directed Verdict of Acquittal and approximately eight days after the Mandate was issued and filed from the Fifth District Court of Appeal, its Notice to Invoke Discretionary Jurisdiction in the Supreme Court of Florida. A careful reading of the Notice to Invoke Discretionary Jurisdiction states

> "notice is given that the Appellee/Petitioner, the State of Florida, hereby invokes the discretionay jurisdiction of the Florida Supreme Court to review the decision of this Court rendered April 9, 1987.".

It is clear that the Notice to Invoke Discretionary Jurisdiction does not seek to review the Mandate but only the opinion entered by the Fifth District Court of Appeal. It is clear that the State/Petitioner was not seeking review of the Mandate and at no time did the State move to Stay the Mandate in this cause.

Under Rule 9.120, Florida Rules of Appellate Procedure, jurisdiction of the Supreme Court is to be invoked by filing two copies of the notice along with a filing fee within thirty days of the rendition of the Order to be reviewed. The thirty day time requirement for filing the Petition for Writ of Common Law Certiorari is jurisdictional and failure to observe the time period prescribed for filing the petition will result in a dismissal of the proceedings. Department of Highway Safety v. Spells, 502 So.2d 19 (2nd DCA 1986). It is clear from the Notice to Invoke Discretionary Review that the Petitioner was only seeking review of the opinion of the Fifth District Court of Appeal and took no action to Stay the actual Order or Mandate of the Fifth District Court of Appeal.

All courts in the State of Florida have lost jurisdiction to review the Mandate or the Order of the lower court dated June 15, 1987, thirty days after said Mandate and lower court Order were entered. Should this Court reverse the Fifth District Court of Appeal as to its opinion issued April 9, 1987, there still would be no jurisdiction for this Court or any other court to order a retraction of the Mandate or to review and Order a retraction of the Order of the Trial Court dated June 15, 1987.

As was stated in State Ex. Rel. Mitchell v. Beverly, 352 So.2d 535 (1st DCA 1977)

> "The proper remedy for the uncertainty resulting from the issuance of our Mandate in a

> criminal case is, of course, for the losing party to take available steps to prevent issuance of our Mandate when Certiorari proceedings are contemplated: the losing party may forego filing a Petition for Rehearing on the appeal to this Court and within fifteen days file a Petition for Certiorari in the Supreme Court and a certificate "of filing the same" in this Court, thus staying issuance of our Mandate; or the losing party may petition this Court for rehearing and simultaneously for a fifteen day stay of the Mandate if rehearing should be denied."

In the Mitchell case, supra, the Supreme Court stayed all proceedings after the Mandate was issued. In the case at bar there has never been a Stay Ordered by either the Fifth District Court of Appeal or the Supreme Court.

It is clear that had the State/Petitioner applied to either the Fifth District Court of Appeal for Stay of Mandate or to this Honorable Court for Stay of Mandate perhaps we would be in a different circumstance but as the State failed to ask for a Stay of Mandate and the Mandate did issue and further, the Defendant was discharged on June 15, 1987, from the convictions pursuant to the Mandate there is no jurisdiction within any court to review the Mandate which was not appealed.

CONCLUSION

Based on the foregoing argument and cases presented therein the Respondent respectfully prays this Honorable Court find that there is no jurisdiction for this Court or any other Court in the State of Florida to review the issuance of the Mandate which is the final Order from the Fifth District Court of Appeal or the Order entered by the Honorable Rom Powell, Circuit Judge, on June 15, 1987, and further find that any opinion rendered by this Honorable Court would have no effect on the Respondent's status regarding incarceration.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by mail to: KELLIE A. NIELAN, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014 this 3 day of February, 1988.

MARK S. BLECHMAN, ESQUIRE