

IN THE SUPREME COURT OF FLORIDA

**FILED**  
SID J. WHITE  
Aug  
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CLERK SUPREME COURT  
CASE NO. 70-852  
Deputy Clerk

DAVID M. HARRIEL, )  
 )  
Petitioner, )  
 )  
v. )  
 )  
STATE OF FLORIDA, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as found on page two (2) of Petitioner's Brief on Jurisdiction, with the following clarification:

Petitioner's offenses were committed before the effective date of Section 27.3455, Fla. Stat. (1985).

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal is not in direct and express conflict with the decisions of other district courts of appeal where the Fourth District has not applied the same rule of law to reach a different result. The decision of the Fourth District was predicated on an analysis distinct and different from the rule of law applied from the other district courts of appeal.

## ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISIONS IN WEBBER v. STATE, 497 So. 2d 995 (FLA. 5th DCA 1986) AND RAMSEY v. STATE, 12 F.L.W. 1318 (Fla. 2nd DCA MAY 20, 1987).

To properly invoke the "conflict certiorari" jurisdiction of this Court, Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein, and those holdings of other Florida appellate courts on this Honorable Court on the same rule of law to produce a different result, than other state appellate courts faced with substantially the same facts. Dodi Publishing v. Editorial America, S.A., 385 So.2d 1369 (Fla. 1980); Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Artical V, § 3(b)(3), Fla. Const. (1980); Fla.R.App.P. 9.030 (a)(2)(A)(iv). Petitioner has not and cannot demonstrate that the decision of the Fourth District in the instant case expressly and directly conflicts with another state appellate decision.

Respondent submits that no express and direct conflict exists where the Fourth District has not applied the same rule of law as the Fifth District in Webber v. State, 497 So.2d 995 (Fla. 5th DCA 1986) to reach a different result. In the instant case, the Fourth District concluded that Petitioner waived his right to raise the ex post facto application of the costs statute on appeal where he did not object to the imposition of costs at trial and the issue does not involve the facial unconstitutionality

of the statute. (A2-3). It is clear from the decision of the Fifth District in Webber that the Fifth District is not applying the same rule of law applied in the case at bar, and consequently, no conflict has been shown between the two decisions. In Webber, the Fifth District held that the ex post facto imposition of costs under Section 27.3455, Fla. Stat. (1985) is the type of sentencing error which may be raised on appeal notwithstanding the defendant's failure to object because it results in an illegal sentence, relying on State v. Whitfield, 487 So.2d 1045 (Fla. 1986) for this proposition. Thus, it is evident that both decisions are not applying the same rule of law to reach different results where the underlying rationale for each decision is different.

Respondent maintains there is no direct and express conflict apparent on the face of the instant opinion where the Fourth District found that there was no need to object to the facial unconstitutionality of a statute to preserve the issue for review and the decision of Webber which holds that there is no need to object to a sentencing error which results in an illegal sentence. Obviously, the precise argument as to preservation made in the instant case was not presented in Webber. There is no reason to believe that if the same argument made in the case at bar was advanced in the Fifth District it would be rejected.

Moreover, the decision of the Fourth District is in accord with established principles requiring an objection to the unconstitutional application of a statute. It is axiomatic that the issue of the unconstitutional application of a statute to the



facts of a particular case must first have been raised at the trial level. Trushin v. State, 425 So.2d 1126 (Fla. 1982); Manning v. State, 461 So.2d 1025 (Fla. 4th DCA 1985). Ex post facto issues are generally not fundamental error and therefore must be raised at trial to be properly preserved. Johnson v. State, 495 So.2d 188 (Fla. 2nd DCA 1986).

Petitioner next contends the decision of the Fourth District is in conflict with the decision of the Second District in Ramsey v. State, 12 F.L.W. 1318 (Fla. 2nd DCA May 20, 1987). Petitioner misapprehends the holding of Ramsey. In Ramsey, the Second District recognized that an objection to the imposition of costs was required, but that since that particular defendant was not aware that the costs were being imposed under Section 27.3455 he had no reason to object. The Second District expressly recognizes that an objection at trial is necessary to preserve for review the issue of the constitutional application of the statute. Atkins v. State, 12 F.L.W. 710 (Fla. 2nd DCA March 6, 1987); Parker v. State, 12 F.L.W. 218 (Fla. 2nd DCA Jan. 7, 1987); Treadway v. State, 12 F.L.W. 154 (Fla. 2nd DCA Dec. 30, 1986); Maldonado v. State, 12 F.L.W. 124 (Fla. 2nd DCA Dec. 17, 1986); Johnson v. State, supra. Thus, the decision of the Fourth District which requires an objection at trial as to the constitutional application of this statute is consistent with Ramsey, supra, and no conflict has been demonstrated.

Petitioner has failed to show express and direct conflict between the decision sub judice and any other appellate decision and Respondent, therefore, maintains that this Honorable Court lacks jurisdiction to grant Petitioner's application for discretionary review.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief on Jurisdiction has been furnished by courier to Tanja Ostapoff, Assistant Public Defender, 301 North Olive Avenue, 9th Floor, West Palm Beach, Florida 33401, this 30th day of July, 1987.

*Amy Lynn Diem*

OF COUNSEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to Tanja Ostapoff, Assistant Public Defender, 301 North Olive Avenue, 9th Floor West Palm Beach, Florida 33401, this 30th day of July, 1987.

Amy Lynn Dean

OF COUNSEL