

067

IN THE FLORIDA SUPREME COURT

FILED  
MAY 20 1990  
CLERK OF THE COURT  
By: [Signature]  
Deputy Clerk

STATE OF FLORIDA,  
Petitioner,

v.

Case No. 74,106

ARDEN M. MERCKLE,  
Respondent.

Second District Court # 89-233

DISCRETIONARY REVIEW OF THE DECISION OF  
THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent accepts petitioner's Preliminary Statement.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the petitioner's Statement of the *Case* and Facts.

SUMMARY OF ARGUMENT

Since the Merckle, decision *infra*, does not conflict with Harris, *infra* or Clark, *infra*, this Court lacks jurisdiction to review the Merckle case.

ARGUMENT

ISSUE

WHETHER THE DECISION IN MERCKLE V. STATE, No. 89-233 (Fla. 2d DCA, April 12, 1989) [14 F.L.W. 950] IS AN EXPRESS AND DIRECT CONFLICT WITH HARRIS V. STATE, 520 So.2d 639 (Fla. 1st DCA), review denied, No. 71,999 (Fla. Oct. 12, 1988) AND CLARK V. STATE, 530 So.2d 519 (Fla. 5th DCA 1988).

The decision in Merckle does not expressly and directly conflict with the decisions in Harris and Clark. Consequently, this Court lacks jurisdiction to entertain this matter.

In Merckle, the Court was clearly dealing with a constitutional claim relating to double jeopardy. The Merckle Court relied on the double jeopardy language of Carawan v. State, 515 So.2d 161 (Fla. 1987). The Merckle Court determined that such double jeopardy issues could be applied retroactively citing Glenn v. State, 537 So.2d 611 (Fla. 2DCA 1988).

In Glenn, supra the Second District certified conflict between Glenn and Harris. The Glenn Court relied upon Kraus v. State, 491 So.2d 1278

(Fla. 2DCA 1986). Apparently, it **was this** perceived conflict between Kraus and Harris which led to the certification. Kraus **was** also a double jeopardy case. Harris is a statutory construction *case*. **There** is no conflict.

Harris relied on Hall v. State, 517 So.2d 678 (Fla. 1988). Hall cited the statutory construction principle found in Carawan. Hall did not cite the double jeopardy principles from Carawan. Both Hall and Harris **are** statutory construction cases, not jeopardy cases.

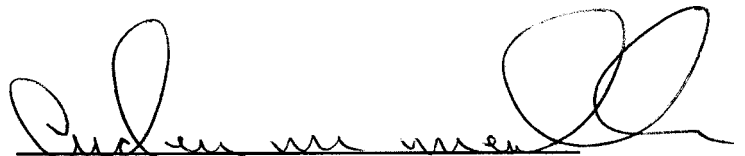
In Clark, the Court **was addressing** an ineffective assistance of appellate counsel claim. Appellate counsel did not raise a double jeopardy claim but the Court **raised** the double jeopardy claim *sua sponte*. The Court denied the claim on the basis on the then **existing** case law. The Court was not inclined to find Appellate counsel ineffective for failing to anticipate a change in law. The Clark Court denied relief. In dicta, the Clark Court suggested that **nothing** in Carawan made it applicable to the ineffective assistance of counsel claim. The Court noted that the Carawan opinion did not **make** the principles of that decision retroactive. The Clark case did not say that Carawan **was** not re ———'ve. The Clark Court did not say that the Glenn opinion was wrong in making double jeopardy claims **retroactive**. Clark did not say that double jeopardy claims could not be pursued **via** Florida **Rule** of Criminal Procedure 3.850. **None** of the issues which were addressed in the Merckle opinion were **determined otherwise in Clark**. Consequently, **there** is no direct and irreconcilable conflict between the Merckle and Clark opinions.

CONCLUSION

Based on the foregoing argument and authorities, Respondent respectfully requests that this Court deny Petitioner's request for review by this Court since this Court lacks jurisdiction to entertain such review.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S.Mail to Katherine V. Blanco, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602 this 10 day of May, 1989.



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