087

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

Case No. 74,106

ARDEN M. MERCKLE,

Second District Court # 89-233

Respondent.

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 Petitoner'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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