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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

ARDEN M. MERCKLE,

Respondent.

case No. 74,106

Second District Court #89-233

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

BRIEF OF RESPONDENT ON THE MERITS

ARDEN MAYS MERCKLE
PRO SE

1341 Eudora *Street*
Denver, Colorado 80220

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STATEMENT OF THE CASE AND FACTS

Merckle accepts the State's Statement of the Case and Facts.

SUMMARY OF THE ARGUMENT

Merckle was sentenced in violation of principles of double jeopardy as guaranteed by the Florida and federal constitutions. Merckle properly presented this double jeopardy issue via FLA RCRP 3.850. The trial court erred by denying said motion without a hearing. The Second District properly reversed the trial court's order on the basis of this Court's decision in Carawan infra.

ARGUMENT

ISSUE

CARAWAN-BASED DOUBLE JEOPARDY CLAIMS MAY BE RAISED VIA RULE 3.850 MOTIONS FOR POST-CONVICTION RELIEF.

Merckle was convicted of bribery, recieving unlawful compensation, extortion by a state officer, and misbehavior in office. He was sentenced to five (5) years in state prison on the bribery conviction followed by consecutive terms of probation for the remaining offenses. These convictions and sentences were affirmed on appeal Merckle v. State 512 So.2nd 948 (Fla.2d DCA 1987). This Appellate decision was approved by this Court in Merckle v. State 529 So.2d 269 (Fla. 1988).

After the above proceedings were concluded, Merckle filed a Motion to Vacate Judgment and Sentence pursuant to Florida Rule of Criminal Procedure 3.850. Merckle claimed that the multiple sentences imposed violated double jeopardy provisions because all convictions and sentences stem from a single act requiring the same proof. Merckle relied on this Court's decision in Carawan v. State 515 So.2d 161 (Fla. 1987). The trial court denied this motion without a hearing.

Merckle again appealed to the Florida Second District Court of Appeals. That Court reversed and remanded the case to the trial court. The Second District specifically found that Carawan substantially modified the law regarding double jeopardy. The Second District found that Carawan had not been decided at the time Merkle pursued his direct appeal. The Second District further found that Carawan principles should be applied retroactively and presented through Florida Rule of Criminal Procedure

3.850. The Florida Second District relied upon its prior decision in *Glenn* v. State 537 So.2d 611 (Fla. 2d DCA 1988).

The State sought review of the *Merckle* decision in this *court* based upon perceived conflict between the decisions of different District Courts. This Court accepted jursidiction for this apparent reason.

In Carawan v. State 515 So.2d 161 (Fla. 1987) this Court reviewed the double jeopardy law which has evolved in Florida. The *Carawan* Court stated the issue before it as follows:

> The central question before us is the proper method of construing criminal statutes in light of the prohibition against double jeopardy contained in the state and federal constitutions. The two double jepoardy clauses forbid not only successive trials for the same offense, but also prohibit subjecting a defendant to multiple punishments for the same offense. Carawan at 163.

The Carawan opinion continues:

> ". . . we recognize that the power to define crimes and punishments in derogation of the common law inheres in the legislative branch. . . subject to constitutional limitations. It is presumed, however, that this legislative prerogative is not exercised *by* punishing the same offense under more than one statutory provision, since the legislature can achieve the same result with greater economy *by* merely increasing the penalty for the single underlying offense. Thus, before reaching the question of *any* possible constitutional violation, *courts* necessarily must first determine what the legislature intended to punish and precisely how. The double jeopardy issue has not been raised in *any case* in which the legislature clearly, unambiguously and precisely stated an intent to punish the exact same offense under seprate statutory provisions, and we do not reach this question today. Rather, the issue has *arisen* in those cases where it cannot be said with certainty what the legislature intended." Carawan at 164.

In determining whether a jeopardy violation occurred under the state and federal constitutions this *court* looked to three rules of statutory

construction to guide its decision making process.

> "The first is that absent a violation of constitutional right, specific, clear and precise statements of legislative intent control regarding intended penalties. Only where no clear intent exists does *any other* rule of construction come into play. . . .
>
> The *second* rule is that, in absence of *any* clearly discernable legislative intent, the *court* begins *by* using the test established in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) to assist in determing this intent. E.g., Houser v. State, 474 So.2s 1196 (Fla. 1985). Simply stated the Blockburger test compares the elements of the crimes in question. If both have *one* element the other does not, then a presumption arises that the offenses are separate, a presumption that nevertheless can be defeated *by* evidence of a contrary legislative intent. On the *other* hand, if the test is not met, the *court* must treat the offenses as equivalent based *on* a presumption that the offenses are the same and that the legislature does not intend to punish the same offense twice. We have recognized that the legislature has codified this rule of construction in section 775.021(4), Florida Statutes (1985). . .
>
> The Third rule is that *courts* must resolve all doubts in favor of lenity toward the accused. This "rule of lenity," a part of our common law, has been codified in section 775.021(1), Florida Statutes (1985): The provisions of this *code* and offenses defined *by* other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused." Carawan at 165.

In applying these three tests the conclusion reached is that the jeopardy provisions of the state and federal constitutions either are, or are not, violated. Where a violation *occurs,* the result is of constitutional. significance and not merely a violation of the rules of construction which assist the *court* in determining whether the constitution was violated. This

fundamental distinction must be kept clearly in focus.

In *Glenn* and Merckle the Second District following the Carawan test found that both petitions demonstrated a prima facie entitlement to relief under a mltiple sentence double jeopardy analysis. The state ignores the plain statement of the issue in Carawan and suggests that Carawan was "merely a brief evolutionary decision *on* legislative intent concerning the issue of multiple punishment". Essentially, the state chooses to present an issue which it finds to be more beneficial to the State's postion rather than dealing with the issue specifically presented in Carawan, *Glenn,* and Merckle. All three cases dealt with multiple *sentence* double jeopardy issues not naked statutory construction issues.

In state v. smith _____ So.2d _____ (Fla. 1989); 14 FLA 308 (June 23, 1989) this Court found that the Florida legislature rejected the Carawan result when it amended Florida Statute 775.021(4). The Smith *court* specifically refused to retroactively apply the Smith decision. The net effect was to find that the Carawan mltiple sentence double jeopardy analysis would be applied to offenses occurring prior to the amendment, but that Carawan would not apply to offenses occurring after the amendment. There is nothing inconsistent between the smith and Carawan decisions. The legislature simply stated its intent in a clear fashion by amending the statute. Consequently, the courts must recognize this specifically stated intent in cases which arose after the amendment. There is no occasion for the Court to consider the doctrine of Lenity in post-amendment cases. The legislative action in no way undermines the Carawan analysis as it relates to cases which arose prior to the statutory amendment.

It is against this background that this Court must determine whether a multiple sentence double jeopardy claim may be presented via Rule 3.850. In

Glenn infra the Court specifically determined that double jeopardy arguments *may* be presented via Florida Me of Criminal Procedure 3.850. The Court cited Kraus v. *State* 491 So2d 1278 (Fla. 2d DCA 1986). The state ignores Kraus in its brief. The Kraus decision cited Cantrell v. State 405 So2d. 986 (Fla. 1st DCA 1981), reversed *on* other *grounds* 417 So.2d 260 (1982). The State ignores Cantrell as well.

In McCuiston v. State 534 So2d 1144 (Fla. 1988) this *Court,* citing Witt v. State 387 So2d 922 (Fla. 1980), *recognized* that a change in law of fundamental or constitutional significance could be presented via Fla. R. Cr. Pro. 3.850. Merckle's case presents such a constitutional claim.

In Palmer v. State 438 So2d 1 (Fla. 1983), this Court held that minimum mandatory sentences could not be imposed consequetively for separate offenses arising from a single criminal transaction or episode. This ruling was not based on constitutional considerations. Nevertheless, in Bass v. State 530 So.2d 282 (Fla. 1988) this Court specifically held that Palmer would be retroactive. The Court went *on* to *say* that such a theory could be presented pursuant to FLa. R. *Cr.* Pro. 3.850. It is inconceivable that such a non-constitutional principle relating to consecutive minimum mandatory sentences would be subject to collateral attack and Merkle's consecutive sentence claim based on constitutional principles would not. Bass mandates the retroactive application of Carawan.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent submits that the Second District correctly decided the Merckle case and that the decision of the *Second* District should be approved. However, Merckle submits that the records of this Court from his previous appeal clearly establish that he is entitled to have the sentences (probation) in Counts two through four vacated. Consequently, Merckle requests that this Court vacate the sentences on Counts two through four so that Merckle will be relieved of the constitutional violation presently imposed upon him.

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, Asistant Attorney General, Park Trammell Building, 1313 Tampa street, Suite 804, Tampa, Florida 33602 this \| dy of August, 1989.

ARDEN M. MERCKLE, PRO SE
1341 Eudora Street
Denver, Colorado 80220