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IN THE SUPREME COURT OF FLORIDA

TOMMY THOMAS,

Petitioner,

v. **CASE NO. 94,469**

STATE OF FLORIDA,

Respondent.

_____/

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The statement of the case and facts as presented by Petitioner is essentially correct for purposes of this jurisdictional phase of litigation.

SUMMARY OF THE ARGUMENT

The Thomas scrivener's error [the failure of a written order of probation revocation to conform to the trial court's oral pronouncement] is not fundamental error. This sentencing error was not preserved for direct review. The Harriel decision focused on a guilty plea and holds that if there is fundamental error [the sentence is illegal in that it exceeds the statutory maximum], then direct review is appropriate. Such is not the case at bar and the Thomas scrivener's error can be corrected collaterally under Florida Rule of Criminal Procedure 3.800(b). The Thomas decision is not in direct and express conflict with Harriel.

ISSUE I

WHETHER THE INSTANT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH OPINIONS FROM OTHER FLORIDA DISTRICT COURTS OF APPEAL?

(As Stated by Respondent)

This Court has the authority to resolve express and direct conflict of decisions generated by the district courts of appeal. See, Art. V, § 3(b)(3), Fla.Const. and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P. Respondent disagrees with Petitioner and would urge that there is no conflict of holdings and would urge this Court to decline to exercise its jurisdiction. The decision of the Second District must be in *express* conflict with the decision cited by Petitioner. The conflict must be *express* and not implied.

At bar, the Second District's opinion reads as follows:

> Tommy Thomas appeals the trial court's revocation of his probation and also seeks correction of a scrivener's error in the revocation order. The evidence presented at the revocation hearing supports the trial court's determination that Thomas wilfully violated his probation and, therefore, we affirm the revocation order. Because Thomas failed to seek correction of the scrivener's error in the trial court and because the error is not fundamental, he is precluded from raising this issue on appeal. See §924.051, Fla.Stat. (Supp. 1996).
>
> Affirmed.
>
> (Pet.Ex. A/pp 1-2)

The error in question remains legally inconsequential. In fact, it is a housekeeping matter which can be addressed at any time in the trial court pursuant to Rule 3.800, Fla.R.Crim.P. This is why the Florida Legislature promulgated §924.051, Fla.Stat. (Supp. 1996).

A different *conflict* is set out in Maddox v. State, 708 So.2d 617 (Fla. 5th DCA 1998)[en banc][1]. There, the Fifth Circuit on direct review held that David Maddox could not challenge certain costs imposed as he had failed to preserve his challenge of such costs for review on direct appeal. This Court granted review in Maddox v. State, 718 So.2d 169 (Fla. No. 92,805)(1998)[submitted on the merits and pending]. Respondent would stress that the Thomas decision is in harmony with the First District's opinion in West v. State, 718 So.2d 908 (Fla. 1st DCA 1998) which states:

> In this direct criminal appeal, appellant raises only one issue. She claims that the written judgment adjudicating her guilty of burglary of a structure incorrectly identifies that offense as a first-degree

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[1]Both the First and Fourth Districts have disagreed with the Fifth District's Maddox opinion. See, Harriel v. State, 710 So.2d 102 (Fla. 4th DCA 1998); Nelson v. State, 719 So.2d 1230 (Fla. 1st DCA 1998); and, McKnight v. State, ___ So.2d ___, 1998 WL 736323, 23 Fla. L. Weekly D2402 (Fla. 1st DCA No. 97-1845)[Motion to Stay Mandate granted 11/02/98], *discretionary review granted*, State v. McKnight, Fla. No. 94,256 [Respondent's merits brief due 12/28/98]. And, the First District has declined to follow Maddox in Mason v. State, 710 So.2d 82 (Fla. 1st DCA 1998).

> felony punishable by a term of years not exceeding life in prison when, in fact, the offense is a third-degree felony. The state responds that we must affirm because the issue raised does not result in any prejudice to appellant and was not preserved, and does not constitute fundamental error. We agree. See §924.051(3), Fla. State. (1997). The scrivener's error might easily have been corrected, thereby avoiding expenditure of the time and money associated with his appeal, had appellant simply brought it to the trial court's attention pursuant to Florida Rule of Criminal Procedure 3.800(b).

Petitioner asserts *conflict* with Harriel v. State, 710 So.2d 102 (Fla. 4th DCA 1998)[en banc]. The Harriel decision addressed Florida Rule of Appellate Procedure 9.140(b)(2)(B)(iv) which provides: "A defendant who pleads guilty or nolo contendere may otherwise directly appeal only ... a sentencing error, if preserved ...". The Harriel decision expressly notes: "A sentencing error must also be preserved by contemporaneous objection or by motion to correct the sentence under Florida Rule of Criminal Procedure 3.800(b). Otherwise, such errors may not be raised on appeal. See Fla.R.App.P. 9.140(d)." The Harriel decision also recognizes that an illegal sentence [one, for example, which exceeds the statutory maximum] may be raised at any time. The Harriel decision is final; but, it was certified to be conflict with Maddox as the latter held that a sentence which exceeded the statutory maximum was not fundamental error.

The instant case presents a scrivener's error [a written order of probation revocation did not conform with the trial court's oral pronouncement]. This is not fundamental error and can be corrected anytime by the trial court. Where sentencing error is neither fundamental nor preserved, it is barred on a direct review and Harriel does not hold otherwise. This simple error can be corrected under Florida Rule of Criminal Procedure 3.800(b). The Thomas decision does not conflict with Harriel.

CONCLUSION

Based on the foregoing facts, arguments, and authorities, the "State" would pray that this Court would make and render an Order denying discretionary jurisdiction as the Thomas decision does not expressly and directly conflict with a decision of another district court of appeal on the same question of law.

Respectfully submitted,
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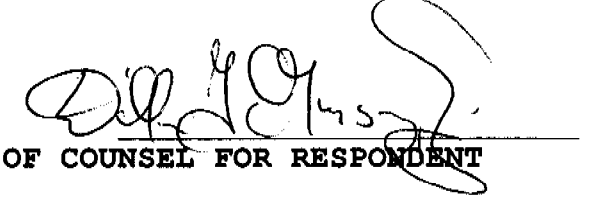
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Ass't Public Defender, Office of the Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33831 on this 15th day of December, 1998.



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December 15, 1998

FILED
SID J. WHITE
DEC 17 1998
CLERK, SUPREME COURT
By_____
Chief Deputy Clerk

Honorable Sid J. White, Clerk
Supreme Court of Florida
500 South Duval Street
Tallahassee, Florida 32399

Re: Tommy Thomas v. State of Florida
Case No. 94,469

Dear Mr. White:

Enclosed for filing is an original and five copies of Brief of Respondent on Jurisdiction in the above styled cause.

WILLIAM I. MUNSEY, JR.
Assistant Attorney General
WIM/mah

cc:
Robert D. Rosen, Esquire