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IN THE SUPREME COURT OF FLORIDA
Case No. SC17-576 (L.T. No. 3D14-1635)

STATE OF FLORIDA,

Petitioner,

vs.

EARVIN SMITH,

Respondent.

STATE OF FLORIDA'S BRIEF ON CONFLICT JURISDICTION[1]

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

PAMELA JO BONDI
ATTORNEY GENERAL

JEFFREY R. GELDENS
Assistant Attorney General
Florida Bar No. 0673986
Office of the Attorney General
1 S.E. 3rd Avenue, #900
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (Fax)
Primary: CrimAppMia@myfloridalegal.com
Secondary: jeffrey.geldens@myfloridalegal.com
Counsel for Respondent, State of Florida

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[1] The Third District Court of Appeal also certified a question of great public importance; the State's Rule 9.120(b) notice invokes that basis, too; this brief only addresses conflict jurisdiction. *See* Fla. R. App. P. 9.120(d).

TABLE OF CONTENTS

PAGE
TABLE OF CONTENTS…….....i
TABLE OF CITATIONS…….....ii
STATEMENT OF THE CASE AND FACTS…….....1
SUMMARY OF THE ARGUMENT……2
ARGUMENT…….....2

I. DISCRETIONARY CONFLICT JURISDICTION EXISTS WHEN THERE IS AN EXPRESS AND DIRECT CONFLICT AMONG THE DISTRICT COURTS OF APPEAL, OR WITH THIS COURT……..2

II. THE DISTRCT COURT OPINION IN THIS CASE TRIGGERS THIS COURT'S CONFLICT JURISDICTION; THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT……3

A. The facts and the District Court's conclusion in *Smith*……3

B. The conflict with this Court's cases on a question of law: the *Smith* opinion finds fundamental error without assessing the facts……...5

C. The conflict with other District Courts on a question of law: the *Smith* opinion permits a disavowal of trial strategy on direct appeal; other courts treat trial strategy as a bar to the claim…….…….....8

CONCLUSION ……..10
CERTIFICATE OF SERVICE……11
CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS
……11

TABLE OF CITATIONS

Cases

Brown v. State,
124 So. 2d 481 (Fla. 1960) 5
Coulliette v. State,
949 So. 2d 1078 (Fla. 1st DCA 2007) 8
Farina v. State,
937 So. 2d 612 (Fla. 2006) 8
Farrar v. State,
42 So. 3d 265 (Fla. 5th DCA 2010).....10
Ferguson v. State,
631 So. 2d 351 (Fla. 5th DCA 1994) 9
Gonzalez v. State,
136 So. 3d 1125 (Fla. 2014) 9
Harrell v. State,
894 So. 2d 935 (Fla. 2005) 8
Horton v. Mayo,
15 So. 2d (Fla. 1943) 7
Kincaid v. World Ins. Co.,
157 So. 2d 517 (Fla. 1963) 3
Mancini v. State,
312 So. 2d 732 (Fla. 1975) 3
Martinez v. State,
981 So. 2d 449 (Fla. 2008) 8
Mathis v. State,
204 So. 3d 104 (Fla. 1st DCA 2016) 9, 10
Mead v. State,
101 So. 2d 373 (Fla. 1958) 7
Mitchell v. State,
25 So. 2d 73 (Fla. 1946) 7
Morris v. State,
909 So. 2d 428 (Fla. 5th DCA 2005) 10

Nelson v. State,
17 Fla. 195 (1879) 7
Ray v. State,
403 So. 2d 956 (Fla. 1981) 6
Sanford v. Rubin,
237 So. 2d 134 (Fla. 1970) 6
Silver v. State,
149 So. 3d 54 (Fla. 4th DCA 2014) 8
Smith v. State,
2016 WL 7403663 (Fla. 3d DCA Dec. 21, 2016) 1, 2, 4, 5
State v. King,
282 So. 2d 162 7
State v. Robbins,
780 So. 2d 89 (Fla. 2d DCA 2000) 10
State v. Smith,
573 So. 2d 306 (Fla. 1990) 9
State v. Vickery,
961 So. 2d 309 (Fla. 2007) 3
Sturdivan v. State,
419 So. 2d 300 (Fla. 1982) 7

Statutes

Fla. Const. Art. V, § 3(b)(3) 3

STATEMENT OF THE CASE AND FACTS

In the Third District, Earvin Smith successfully argued that, despite his successful statute of limitations challenges in the trial court as to certain charges, he could raise on appeal a statute of limitations challenge to a charge he allowed to procced to the jury. The Third District summarized the litigation as follows:

> Smith was arrested and charged with three counts of armed kidnapping, three counts of aggravated assault with a firearm, and one count each of attempted armed robbery, armed burglary, and armed sexual battery. The crimes charged took place in September of 1990; however, Smith was not arrested or charged until 2011, when a DNA test of evidence collected by the Rape Treatment Center at the time of the offense yielded a match to Smith.
> During the pretrial stages, Smith moved to dismiss several of the charges as barred by the statute of limitations. Specifically, Smith moved to dismiss the three counts of aggravated assault with a firearm. After a hearing, the State agreed with Smith's motion . . . .
>
> . . . . [A]t trial following presentation of the State's case, Smith moved for dismissal of the attempted armed robbery charge, based upon the statute of limitations . . . . The trial court granted the motion, and dismissed the attempted armed robbery charge, leaving for the jury's consideration the charges of armed burglary and armed sexual battery. The jury found Smith guilty of both charges. The court imposed two concurrent, twenty-two year prison sentences with a three-year minimum mandatory for actual possession of a firearm.
> As it turned out, the armed burglary, as charged in the information, was not a life felony (which has no statute of limitations) but a first-degree felony punishable by life (which is subject to a four-year statute of limitations). However, Smith did not . . . raise a statute-of-limitations challenge to that count in the trial court.

Smith v. State, 42 Fla. L. Weekly D27, 2016 WL 7403663 at *1-2 (Fla. 3d DCA Dec. 21, 2016) (footnotes omitted).

The State argued that Mr. Smith's actions showed a waiver. The Third District concluded that Mr. Smith could raise the statute of limitations on appeal, and reversed. The Third District also certified the following question:

> Must a defendant, who claims that the offense as charged in the information is barred by the statute of limitations, raise the issue in the trial court in order to preserve the issue for direct appeal?

Smith, 2016 WL 7403663 at 10 (Fla. 3d DCA Dec. 21, 2016). The State invoked this Court's jurisdiction on that question, too, but this brief addresses only the conflict arising from the decision.

SUMMARY OF THE ARGUMENT

The *Smith* opinion conflicts with authority from this Court and other District Courts of Appeal because it concludes that: a) a statute of limitations claim always invokes fundamental error that can be raised for the first time on direct appeal regardless of possible trial strategy; and b) the statute of limitations defense was not waived, despite record evidence that would support a waiver and require the challenge be raised on collateral review.

ARGUMENT

I. DISCRETIONARY CONFLICT JURISDICTION EXISTS WHEN THERE IS AN EXPRESS AND DIRECT CONFLICT AMONG THE DISTRICT COURTS OF APPEAL, OR WITH THIS COURT.

This Court "[m]ay review any decision of a district court of appeal . . . that expressly and directly conflicts with a decision of another district court of appeal

or of the supreme court on the same question of law." Fla. Const. Art. V, § 3(b)(3). Absent a certified conflict, "jurisdiction to review the case depends on whether the decision actually expressly and directly conflicts with the decision of another court." *State v. Vickery*, 961 So. 2d 309, 312 (Fla. 2007). This requires either "(1) the announcement of a rule of law which conflicts with a rule previously announced by this court or another district, or (2) the application of a rule of law to produce a different result in a case which involves substantially the same facts as a prior case." *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975). "The constitutional standard is whether the decision of the District Court *on its face* collides with a prior decision of this Court or another District Court on the same point of law so as to create an *inconsistency or conflict among the precedent*." *Kincaid v. World Ins. Co.*, 157 So. 2d 517, 517 (Fla. 1963).

II. THE DISTRICT COURT OPINION IN THIS CASE TRIGGERS THIS COURT'S CONFLICT JURISDICTION; THIS COURT SHOULD ACCEPT JURISDICTION TO RESOLVE THE CONFLICT.

A. The facts and the District Court's conclusion in *Smith*

The Third District summarized Mr. Smith's actions at trial, as follows:

> During the pretrial stages, Smith moved to dismiss several of the charges as barred by the statute of limitations . . . . After a hearing, the State agreed with Smith's motion and nolle prossed those three counts. At that time, the trial court inquired whether the defense was seeking dismissal of any other counts based upon the statute of limitations, and defense counsel indicated they were not seeking dismissal of any other counts, and that all of the remaining counts were life felonies.

> Nevertheless, at trial following presentation of the State's case, Smith moved for dismissal of the attempted armed robbery charge, based upon the statute of limitations . . . . The trial court granted the motion, and dismissed the attempted armed robbery charge, leaving for the jury's consideration the charges of armed burglary and armed sexual battery. The jury found Smith guilty of both charges. . .
> . . . [T]he armed burglary, as charged in the information, was . . . a first-degree felony punishable by life (which is subject to a four-year statute of limitations). However, Smith did not . . . raise a statute-of-limitations challenge to that count in the trial court.

Smith, 2016 WL 7403663 at *1-2 (footnotes omitted).

The Third District explained four legal principles relating to its analysis:

> First, the statute of limitations is waivable by a defendant, either expressly or through his own actions . . . .
> Second, because it is waivable, the statute of limitations necessarily cannot be considered "jurisdictional," at least not in the sense of depriving the trial court of subject-matter jurisdiction. . . . If the statute of limitations was to be viewed as depriving the trial court of subject-matter jurisdiction, such an issue could not be waived, as the parties cannot confer subject-matter jurisdiction by consent, agreement, acquiescence, waiver or failure to object. . . .
> Third, in the context of a defendant who seeks the benefit of the bargain—that is, a defendant who knowingly and voluntarily enters a negotiated plea to a lesser-included offense that is otherwise time-barred (or receives a negotiated lesser sentence)—he is either estopped from asserting, or deemed to have waived, a statute of limitations claim on appeal. . . .
> Fourth, at the conclusion of a trial, a trial court is prohibited from instructing a jury on any time-barred, lesser-included offense (and the jury is prohibited from considering same) unless the defendant knowingly agrees, personally and on the record, to waive any claim that such a lesser-included offense is barred by the statute of limitations . . . .

Smith, 2016 WL 7403663 at *5-6 (footnotes and case citations omitted).

Then, the Third District framed the issue as follows:

> The question we must decide is whether the express-waiver analysis announced in *Tucker* should be contextually limited to situations involving a jury's consideration of time-barred, lesser-included offenses, or expanded to apply to the instant case. . . . [T]he very different and narrow question presented is whether a defendant may assert, for the first time on appeal, that the statute of limitations bars prosecution *for the crime as charged in the information* or whether, by failing to raise the issue below, the defendant has waived the [issue].

Smith, 2016 WL 7403663 at *6. As to this issue, the Third District concluded:

> We are nevertheless bound by the existing decisions of the Florida Supreme Court to hold that the defendant may under these circumstances raise the statute of limitations for the first time on appeal. . . . We reverse the judgment and sentence for armed burglary, with directions to dismiss that charge as time-barred. . . .

Smith, 2016 WL 7403663 at *10.

B. The conflict with this Court's cases on a question of law: the *Smith* opinion finds fundamental error without assessing the facts.

The *Smith* opinion reversed on a claim not raised in the trial court; but it did not assess the facts that might bar relief.

This Court has established that "in order to be of such fundamental nature as to justify a reversal in the absence of timely objection the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State*, 124 So. 2d 481, 484 (Fla. 1960). This Court later clarified that "[f]undamental

error, which can be considered on appeal without objection in the lower court, is error which goes to the foundation of the case or goes to the merits of the cause of action" and "[t]he Appellate Court should [use] . . . the doctrine of fundamental error very guardedly." *Sanford v. Rubin*, 237 So. 2d 134, 137 (Fla. 1970)

In *Ray v. State*, this Court explained the limitations of fundamental error:

> This Court has previously **refused to adopt an absolute rule** that would allow a defendant to object for the first time on appeal. **We refuse to do so in this instance as well** . . . the doctrine of fundamental error should be applied only in the rare cases where a jurisdictional error appears or where the interests of justice present a compelling demand for its application.
> An accused . . . must comply with established rules of procedure designed to assure both fairness and reliability in the ascertainment of guilt and innocence. The **failure to object is a strong indication that, at the time and under the circumstances, the defendant did not regard the alleged fundamental error as harmful** . . .

Ray v. State, 403 So. 2d 956, 960 (Fla. 1981) (emphasis added, citations and quotation marks omitted).

The Third District's opinion conflicts with this authority in its application of fundamental error; the Third District stated that it would have affirmed if writing on a "clean slate," but determined this Court's precedent dictated that the limitations claim could be raised for the first time on appeal "under these circumstances." But those cases involved a claim asserted at trial, and do not foreclose a waiver determination. The *Mead* case involved a preserved (not

fundamental) error[2], as the *Mead* court noted that although the motions to dismiss did not raise the statute of limitations, "[t]he appellant did raise the point in his motion for new trial" and concluded "we think this was all that was required." *Mead v. State*, 101 So. 2d 373, 375 (Fla. 1958). In *Mitchell*, this Court reviewed denial of a "motion[] to quash the indictment"; the defendant argued "the supposed or alleged shooting or killing in said indictment mentioned was, as a matter of fact, done more than two years prior to the date of the filing and finding of said indictment and is barred by the Statute of Limitations." *Mitchell v. State*, 25 So. 2d 73, 74 (Fla. 1946). And in *Nelson*, the defendant appealed denial of a motion for discharge, after "the [trial] court declined to grant the same,"; the *Nelson* court reversed because "the indictment charges that [the offense] was committed more than four years before prosecution, and the evidence, according to the bill of exceptions before us, shows that it was committed on or about the time as alleged in the indictment" *Nelson v. State*, 17 Fla. 195, 196-97 (1879).

The Third District recognized that *Sturdivan v. State*, 419 So. 2d 300, 302 (Fla. 1982), acknowledged the defendant's actions could cause waiver, but here it created conflict by finding fundamental error without assessing those actions. 2016 WL7403663 at *9. The Third District overlooked the possible *reasons for* waiver

[2] The opinions in *Horton v. Mayo*, 15 So. 2d 329 (Fla. 1943) and *State v. King*, 282 So. 2d 162 (Fla. 1973), also addressed issues first litigated in the trial court.

and found fundamental error. This Court's opinions regarding fundamental error require examining the alleged fundamental error *in the context of the record*. *See, e.g.*, *Martinez v. State*, 981 So. 2d 449, 455 (Fla. 2008) (stating that "[u]pon our review of the complete record in this case, we conclude that the erroneous forcible-felony instruction did not deprive Martinez of a fair trial and, therefore, fundamental error did not occur."); *Farina v. State*, 937 So. 2d 612, 632 (Fla. 2006)(concluding "the prosecutor's questions, which were objectionable and could possibly have resulted in reversal of the conviction had the issue been preserved, did not rise to the level of fundamental error" after examining the context); *Harrell v. State*, 894 So. 2d 935, 941 (Fla. 2005) (concluding "[t]he interests of justice do not demand application of the fundamental error doctrine" as to plea formality).

C. The conflict with other District Courts on a question of law: the *Smith* opinion permits a disavowal of trial strategy on direct appeal; other courts treat trial strategy as a bar to the claim.

By disregarding the possibility of trial strategy and finding fundamental error, the Third District's opinion directly conflicts with cases that treat possible trial strategy as a bar to fundamental error. *See, e.g.*, *Silver v. State*, 149 So. 3d 54, 60 (Fla. 4th DCA 2014) (concluding the record showed strategic decisions waived the claim of fundamental error regarding the attempted manslaughter instruction); *Coulliette v. State*, 949 So. 2d 1078, 1079 (Fla. 1st DCA 2007) (rejecting a fundamental error claim because "[w]e cannot rule out the possibility that defense

counsel may have allowed such questioning to continue as part of her trial strategy"); *Ferguson v. State*, 631 So. 2d 351, 351 (Fla. 5th DCA 1994)(noting that the irrelevant statements were improper, but that "[i]t would have been consistent with good trial strategy for defense counsel to simply let the prosecutor talk" and rejecting a claim of fundamental error); *accord Gonzalez v. State*, 136 So. 3d 1125, 1147–48 (Fla. 2014) (recognizing trial strategy can bar a claim of fundamental error); *State v. Smith*, 573 So. 2d 306, 310 (Fla. 1990) (rejecting a claim of fundamental error and acknowledging the possibility of strategic waiver).

The Third District's decision also expressly and directly conflicts with other District Courts, which treat the waiver question, since it involves trial strategy, as a question of ineffective assistance of counsel and not fundamental error. For example, in *Mathis v. State*, Mathis faced "(1) sexual battery on a child under twelve—commonly known as capital sexual battery, (2) unlawful sexual activity with a child between twelve and sixteen; and (3) unlawful sexual activity with a child aged sixteen or seventeen" *Mathis v. State*, 204 So. 3d 104, 105 (Fla. 1st DCA 2016). Mathis argued on direct appeal that the capital sexual battery could stand, but that the First District "should reverse his other two convictions based on ineffective assistance of counsel" on the face of the record because "any reasonably effective attorney would have moved to dismiss . . . [those] charges based on the statute of limitations." *Mathis*, 204 So. 3d at 105. The First District

disagreed, stating "[i]n this case, it is at least conceivable that Mathis's attorney strategically chose risking convictions on the lesser counts . . . to increase the chances of an acquittal on the most serious charge. Mathis stood comparatively less to lose with convictions on counts two or three, and perhaps much to gain." *Mathis*, 204 So. 3d at 106. The *Mathis* court rejected a claim of ineffective assistance on the face of the record. *Id.*; *Morris v. State*, 909 So. 2d 428, 432 (Fla. 5th DCA 2005)(stating "Morris may have accepted the state's plea offer, even if it meant a conviction on the burglary charge, in order to avoid a harsher sentence.").

Similarly, other District Courts recognize waiver can be a trial strategy, and reject fundamental error where trial strategy can explain the waiver. In those courts, the statute can be waived as part of the benefit of a plea. *See Farrar v. State*, 42 So. 3d 265, 266 (Fla. 5th DCA 2010) (stating "statutes of limitations on crimes . . . can be waived" and "Farrar *expressly* waived any statute of limitations defense"); *State v. Robbins*, 780 So. 2d 89, 90 (Fla. 2d DCA 2000) (stating that a claim to withdraw a plea should have been denied, despite a claim of fundamental error relying upon the statute of limitations for one of the charges).

CONCLUSION

The Third District's opinion reversed based on a statute of limitations issue as fundamental error. The opinion conflicts with this Court's precedent on fundamental error, and with other Districts' precedent on waiver.

Respectfully submitted,
PAMELA JO BONDI
ATTORNEY GENERAL
/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS
Assistant Attorney General
Florida Bar No. 0673986
Attorney for Petitioner, State of Florida
Office of the Attorney General
1 S.E. 3rd Avenue, #900
Miami, Florida 33131
(305) 377-5441
(305) 377-5655 (Fax)
Primary: CrimAppMia@myfloridalegal.com
Secondary: jeffrey.geldens@myfloridalegal.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing State of Florida's Brief on Conflict Jurisdiction was emailed to appellatedefender@pdmiami.com, and SLerner@pdmiami.com, this 10th day of April, 2017.

/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH FONT REQUIREMENTS

I HEREBY CERTIFY that this Answer Brief was typed using Times New Roman 14 point font and complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ Jeffrey R. Geldens
JEFFREY R. GELDENS
Assistant Attorney General