IN THE SUPREME COURT OF FLORIDA

CORBBLIN BUSH,

Petitioner,

v.

STATE OF FLORIDA, et al.,

Respondents.

Supreme Court Case No.: SC04-2306

DCA Case No.: 5D04-42

L.T. Case No.: 90-3798-CFA

Petitioner Corbblin Bush's Reply Brief

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STATEMENT OF THE CASE AND FACTS

Petitioner Corbblin Bush relies upon his version of the Statement of Case and Facts contained in the Initial Brief.

SUMMARY OF ARGUMENT

The State concurs that venue for Mr. Bush's pending mandamus petition is in the Leon County Circuit Court. Contrary to the State's argument in its Answer Brief, however, these is no occasion (and no need) for this Court to overrule its prior decision in Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003). There has been no showing of a change of circumstances or an error in legal analysis, which are the necessary showings for this Court to depart from stare decisis.

The Fifth District erred by affirming the sentencing court's dismissal of Mr. Bush's pending mandamus petition instead of transferring such petition to the Leon County Circuit Court. This Court should direct that Mr. Bush's pending mandamus petition be transferred to the Leon County Circuit Court and decided on its merits without regard to any procedural bar.

STANDARD OF REVIEW

Petitioner relies upon the standards of review contained in the Initial Brief.

ARGUMENT

The State of Florida in its Answer Brief advocates for this Court to overrule its previous decision in Schmidt v. Crusoe, 878 So. 2d 361 (Fla. 2003). That drastic remedy is not required here, as explained below.

I. THE STATE CONCURS WITH MR. BUSH THAT VENUE FOR HIS PENDING MANDAMUS PETITION IS IN THE SECOND JUDICIAL CIRCUIT COURT IN LEON COUNTY, FLORIDA.

The State concurs with Mr. Bush's position that proper venue for his pending mandamus petition is the Leon County Circuit Court. The State also acknowledged the significant confusion that occurred when the Leon County Circuit Court began dismissing these mandamus petitions post-Schmidt.

As this Court is well aware, Mr. Bush is a casualty of the judicial ping-pong match that resulted. He filed his original mandamus petition in the Leon County Circuit Court seeking the identical relief he seeks in his pending mandamus petition. The reason why Mr. Bush filed his pending mandamus petition in the sentencing court was that he was instructed to do so by Judge Francis, after that court incorrectly dismissed Mr. Bush's original mandamus petition for lack of subject matter jurisdiction. This Court should direct the lower courts in the instant action that Mr. Bush's pending mandamus petition be transferred to the Leon County Circuit Court and considered on its merits without any procedural bar.

The State's raises an argument in its Answer Brief that Mr. Bush does not necessarily have to address in order to achieve the result noted above. Mr. Bush, however, is sensitive to the fact that the State's direct challenge to Schmidt would go unaddressed if Mr. Bush did not respond to the State's attempt to overrule Schmidt. Thus, Mr. Bush briefly responds to the State's argument on this matter.

This Court adheres to the doctrine of stare decisis. This Court time and again has explained that it will only overrule its prior precedent where there has been a significant change in circumstances or where there has been an error in legal analysis. See, e.g., Puryear v. State, 810 So. 2d 901, 905 (Fla. 2002). Neither of those principles apply here.

The issue in Schmidt involved whether an inmate who challenges in court a Department of Correction's administrative decision forfeiting gain time must pay a filing fee on account of section 57.085, Florida Statutes, the Prisoner Indigency Statute. That statute specifically exempts inmates from having to pay a filing fee in a "collateral criminal proceeding." See §57.085(10), Fla. Stat.

This Court in Schmidt extensively analyzed the history of this state statute and compared it to its federal counterpart. In that case, this Court focused in large part on what the writ petition sought – a review of an administrative decision that directly effected the length of time an inmate served in prison. Ultimately, this

Court decided that a court proceeding reviewing a department's decision on gain time affected the length of the inmate's sentence and therefore was a "collateral criminal proceeding" within the meaning of the statute.

While the State contends that this Court should re-think Schmidt, the State does not challenge this Court's core holding that an administrative decision on gain time affects the length of an inmate's sentence. Mr. Bush posits that this is a fatal weakness in the State's argument.

Instead, the State contends (without any record evidence) that there is an increase of writ petitions. Additionally, the State is concerned about inmates "mixing" their postconviction claims with their "pancake and peanut butter petitions" challenging prison treatment. An. Br. at 8. The State's solution is to require inmates to pay filing fees in challenges to gain time decisions – which is precisely what the Legislature directed was not to occur. See §57.085(10), Fla. Stat.

Respectfully, the State's position is without merit. Even if the State is correct that there has been an increase in the number of writ petitions post-Schmidt, that "fact" does not mean there has been a change of circumstances. Nor does it demonstrate an error in legal analysis. Instead, such "fact" demonstrates that the Legislature's command that inmates do not have to pay a filing fee in

collateral criminal proceedings is being followed. To be sure, two legislative sessions have elapsed since this Court released Schmidt and the Legislature has not amended the Prisoner Indigency Statute in any material way relevant here. The passage of time is deemed legislative acceptance and approval of a judicial construction. See Goldenberg v. Sawczak, 791 So. 2d 1078, 1081 (Fla. 2001).

The State also points to the Fifth District's recent decision in Rankin v. State, 910 So. 2d 387 (Fla. 5th DCA 2005), to support its proposition that Schmidt should be overruled. In Rankin, the trial court on authority of the Prisoner Indigency Statute required the inmate to pay a filing fee to bring a rule 3.850 motion. Citing Schmidt, the Fifth District reversed the trial court and explained that a postconviction motion is a collateral criminal proceeding that is specifically exempt from that statute. See id. at 388.

The Rankin decision is merely a logical following of Schmidt. It did not address the venue question at all, and it did nothing other than to conclude that a postconviction motion could affect the computation of an inmate's sentence. Thus, Rankin does not demonstrate a "change in circumstance," nor does Rankin demonstrate an error in legal analysis contained in Schmidt. Simply, Rankin is the a logical holding following Schmidt, and it demonstrates that the district court correctly and faithfully applied Schmidt. Indeed, none of the members of that

panel – Judges Pleus, Griffin, and Orfinger – expressed any confusion concerning Schmidt.

The State also cites Bernard v. State, 30 Fla. L. Weekly D2332 (Fla. 5th DCA Sept. 30, 2005), Thomas v. State, 904 So. 2d 502 (Fla. 4th DCA 2005), and Knox v. State, 873 So. 2d 1250 (Fla. 5th DCA 2004), as putative examples of the "need" to require prison inmates to pay filing fees when filing a collateral criminal proceeding. Yet, those cases do not demonstrate any error in legal analysis or change in circumstances. If the State is concerned that inmates are abusing the legal system and filing frivolous legal actions, the State may ask for, and a court may impose sanctions on inmates who abuse the judicial system, such as requiring a licensed attorney to file further law suits.

Because the State has not demonstrated a change in circumstances post-Schmidt nor demonstrated that Schmidt is the product of an error in legal analysis, there is no basis for this Court to overrule its decision in Schmidt.

II. THE FIFTH DISTRICT SHOULD HAVE REQUIRED THE TRIAL COURT TO TRANSFER THE PENDING MANDAMUS PETITION INSTEAD OF AFFIRMING A DISMISSAL.

The State effectively acknowledges that the decision under review expressly and directly conflicts with the Second District's decision in Griffith v. Crosby, 898 So. 2d 212 (Fla. 2d DCA 2005). The State's attempt to distinguish that case from

the decision under review, Bush v. State, 886 So. 2d 339 (Fla. 5th DCA 2004), on an irrelevant point does not avoid the conflict.

The State contends that practically speaking, in lieu of requiring transfer, the better practice is for a trial court to dismiss a petition filed in the wrong court. The State cites two cases where the trial court's dismissal was upheld because the inmate failed to exhaust administrative remedies. Here, however, Mr. Bush attached evidence that he did, in fact, exhaust his administrative remedies. R. 16-22. Thus, Brinkley v. State, 884 So. 2d 125 (Fla. 2d DCA 2004), and Richmond v. State, 876 So. 2d 1277 (Fla. 3d DCA 2004), do not apply.

The State also contends that the trial court's decision to transfer vis a vis dismissing without prejudice is committed to the trial court's discretion. That contention, however, overlooks the constitutional command as implemented by rule from this Court that an action pending in the wrong court must not be dismissed. See art. V, §2(a), Fla. Const.; Fla. R. Civ. P. 1.060. Thus, the better and constitutional practice is for the court to transfer, not dismiss the matter.

Finally, the State contends that this Court does not need to provide that the courts below shall reach the merits of the petition because it is "speculative" as to whether the State would raise a procedural bar argument. Mr. Bush points out the obvious – the State has not stated that it would not raise such an argument.

Here, Mr. Bush timely filed his original mandamus petition in the correct court – the Leon County Circuit Court. That court improperly dismissed Mr. Bush's petition without prejudice to permit him to raise the same claims in his sentencing court, because Judge Francis concluded he was without subject matter jurisdiction to address that petition. Mr. Bush timely complied with the court's directive. Mr. Bush must not be a victim of the Second Judicial Circuit Court's erroneous reading of Schmidt. As the State acknowledges, there was significant confusion post-Schmidt in which Mr. Bush found himself an unwitting participant.

It is time that the merits of Mr. Bush's pending mandamus petition be reached. This Court should provide that the lower courts are to consider the merits of his pending mandamus petition without regard to any procedural bar.

CONCLUSION

Proper venue for Mr. Bush's pending mandamus petition is the Leon County Circuit Court. This Court's decision in Schmidt did not alter that well-established law.

The State has not demonstrated that this Court's decision in Schmidt contained an error in legal analysis, nor has there been a showing of a change in circumstances. Accordingly, the State has not shown a basis for this Court to break with stare decisis and overrule Schmidt.

This Court should quash the Fifth District's decision in Bush v. State, 886 So. 2d 339 (Fla. 5th DCA 2004), reinstate Mr. Bush's pending mandamus petition, and direct the sentencing court to transfer that petition to the Leon County Circuit Court. The ends of justice also require that this Court prospectively provide that the Leon County Circuit Court shall determine the merits of Mr. Bush's pending mandamus petition without finding any procedural or time bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY, this ___ day of November 2005, that a copy of the foregoing Reply Brief of Petitioner Corbblin Bush has been furnished by **first class U.S. Mail** to:

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I FURTHER CERTIFY, this ___ day of November, 2005, that the type size and style used throughout Petitioner's Reply Brief is Times New Roman 14-Point Font.

_____
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