IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. WARREN STANG, Respondent.	Case No. SC09-1409

ON PETITION FOR REVIEW FROM THE SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The State relies on the Statement of the Case and Facts filed in the Amended Initial Brief with the following additions.

The Florida Department of Corrections filed an Amicus Brief in this case, and this Court allowed the Department to file the Brief on February 9, 2010. The Department attached an appendix to the brief which included the transcript of Respondent's sentencing hearing from the Fifteenth Judicial Circuit, Palm Beach County. (Amicus Appendix (hereinafter "A.A.") 1) During the sentencing hearing, the trial court specifically announced the amount of credit for time served twice. (A.A. 118-19) The first time the trial court stated,

> I think you're a consummate con-man and unfortunately for you the time is up. I hereby sentence you in case number 95-3736, I find you guilty of the violation of probation and I sentence in counts 44, and 65, to five years in the Department of Corrections, to be served consecutively. To count 72, to which I sentence you to five years in the Department of Corrections. On count 78 and 48, I sentence you to five years consecutive in the Department of Corrections. On counts 70, 77, and 81, I sentence you to five years consecutive and in count 75, I sentence you to two years consecutive for a total of twenty-seven years in the Department of Corrections with credit for 1,915 days.

(A.A. 118) The trial court recessed and returned a few minutes later to clarify the sentence. (A.A. 118-19)

> All right. For clarification, my intent is

> to give the top of guidelines with out bumping a grid for twenty-seven years. So, you're hereby sentenced to five years in the Department of Corrections on counts 44, and 65. Five years in the Department of Corrections on count 72, consecutive. Five years in the Department of Corrections on count 78 and 48, consecutive. Five years on counts 70 and 77, consecutive. Five years on counts 81 consecutive. Two years consecutive on count 75, for a total of twenty-seven years in the Department of Corrections with 1,915 days credit.

(A.A. 119) Both times the trial court concluded with "a total of twenty-seven years in the Department of Corrections with credit for 1,915 days" and "a total of twenty-seven years in the Department of Corrections with 1,915 days credit." (A.A. 118-19)

SUMMARY OF THE ARGUMENT

The Second District granted relief when Respondent collaterally attacked his judgment and sentence from the Fifteenth Judicial Circuit, Palm Beach County. By granting such relief, the Second District placed Respondent's case in direct conflict with this Court's prior precedent requiring all collateral attacks to be raised in the sentencing court. Each claim raised by Respondent in the habeas petition, double jeopardy, due process and jurisdiction, are collateral attacks, as is the underlying claim of credit for time served. Collateral attacks are properly brought in the sentencing court because that court is properly equipped to analyze the facts and then apply the correct law. The sentencing court has access to the full court record, which provides a history of the case, and can hold hearings and call witness, even the prosecutor, defense attorney and original trial judge, if needed. The Second District usurped the authority of the Fifteenth Judicial Circuit, who actually has jurisdiction over collateral attacks of Respondent's judgment and sentence.

ARGUMENT

ISSUE

WHETHER THE SECOND DISTRICT ERRED IN PROVIDING RELIEF FOR A CLAIM COLLATERALLY ATTACKING A JUDGMENT AND SENTENCE WHEN THE SENTENCING COURT WAS NOT LOCATED WITHIN THEIR JURISDICTION.

Respondent raises various claims regarding this Court's conflict jurisdiction and the Second District granting habeas relief. Upon closer inspection, each of Respondent's claims fails because no matter how he couches his claims, the Second District did not have jurisdiction to grant relief. Every argument raised by Respondent is actually a collateral attack of his sentence. Only the trial court can provide relief of claims that collaterally attack a judgment and sentence. The Second District usurped the authority of the sentencing court by granting relief in this case even though it had no jurisdiction to do so.

Respondent claims that this Court improvidently granted jurisdiction because State v. Mancino, 714 So. 2d 429 (Fla. 1998), State v. McBride, 848 So. 2d 287 (Fla. 2003), and Baker v. State, 878 So. 2d 1236 (Fla. 2004), cited in the State's jurisdictional brief, do not directly conflict with Stang v. State, 34 Fla. L. Weekly D1541 (Fla. 2d DCA July 31, 2009). Jurisdiction and procedural bars are at issue in every case.

The procedural bar of collateral estoppel was at issue in

Stang. The court acknowledged that the same issue had been raised in the postconviction motion in the Fifteenth Judicial Circuit, Palm Beach County. Stang, 34 Fla. L. Weekly at D1541. The court provided no legal analysis on the issue. Ignoring collateral estoppel precedent does not prevent conflict. This Court has stated that the same parties cannot argue the same issues in a subsequent postconviction hearing. McBride, 848 So. 2d at 290-91. When the Second District ignored that precedent, conflict of law was created.

Respondent states his case is one of manifest injustice, and, therefore, there is no conflict. Respondent raises manifest injustice for the first time in his answer brief. The concept of manifest injustice applies to postconviction claims. See Eason v. State, 932 So. 2d 465, 467 (Fla. 1st DCA 2006). Because Respondent collaterally attacks his judgment and sentence, any true claim of manifest injustice would allow a successive postconviction claim, instead of a successive habeas writ. Even so, the facts of Respondent's case do not demonstrate manifest injustice: the trial court orally pronounced 1,915 days of credit for time served, and Respondent's claim for thousands of days in excess does not amount to manifest injustice.

The Second District discussed its jurisdiction to provide relief by improperly citing to pretrial habeas cases. Stang, 34

Fla. L. Weekly at D1542 (finding Murray v. Regier, 872 So. 2d 217 (Fla. 2004) and Alachua Reg'l Juv. Det. Ctr. v. T.O., 684 So. 2d 814 (Fla. 1996) applicable authority for posttrial habeas jurisdiction). The Second District's improper exercise of jurisdiction over a collateral attack of a judgment and sentence is in direct conflict with this Court's legal precedent in Baker. This Court held that habeas corpus could not be used to collaterally attack judgments and sentences; instead, such claims should be filed as postconviction motions. Baker, 878 So. 2d at 1245.

The issues raised by Respondent in his habeas petition are collateral attacks of his judgment and sentence. Respondent's underlying claim is that the trial court improperly awarded him credit for time served. This claim is a collateral attack of a judgment and sentence and must be raised in the trial court under Rule 3.800(a) or 3.850. See Mancino, 714 So. 2d at 431. Respondent is not claiming that the Department of Corrections provided him an incorrect amount of credit based on a valid amended order. That would properly be raised as a habeas petition. See Bush v. State, 945 So. 2d 1207, 1210 (Fla. 2006). The credit for time served was awarded at the March 30, 2005 sentencing hearing and documented in an amended sentencing order. Respondent is contesting the award of credit in that amended written sentencing order from the trial court.

Respondent believes he can raise his credit for time served claim in a habeas petition because he makes a statement that his sentence has expired. That belief is not entirely correct. Respondent relies on cases where prisoners claim the Department of Corrections was not enforcing trial courts' orders. Diggs v. Dep't of Corr., 503 So. 2d 412, 413 (Fla. 1st DCA 1987) (stating that the prisoner's claim was that the Department refused to credit his sentence as ordered by the sentencing court). See also Nedd v. Wainwright, 449 So. 2d 982 (Fla. 1st DCA 1984) (raising claims of misconstruction of sentences as consecutive and improper credit where the sentencing court's order stated otherwise).[1] Such a claim against the Department can properly be raised in a habeas petition because the prisoner is actually attacking his confinement. But Respondent is not making such a claim. Respondent is claiming that the trial court itself has done something incorrectly. This claim is a collateral attack against his judgment and sentence.

The only way Respondent's claim becomes an expired sentence

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[1] Respondent also asserts that Kirkman v. Wainwright, 465 So. 2d 1262 (Fla. 5th DCA 1985) applies to his case. Kirkman is an anomaly. Unlike Respondent's case, in Kirkman, the Fifth District Court of Appeal had jurisdiction over the Rule 3.850 appeal and the habeas appeal. Id. at 1263. Through this concurrent jurisdiction, the Fifth District collaterally attacked the sentence by adding 4 years of credit that was not originally awarded and then ordered his immediate release. Id. at 1263-64.

is if he collaterally attacks his judgment and sentence. Once the amended written sentence order was entered, Respondent has to collaterally attack that order to revert back to the original order. Then Respondent would have to convince a court that the original written order was not internally inconsistent. Currently, the original written order provides conflicting amounts of credit for time served (a total amount on page one and another amount on page two). All the while, the court would have to ignore the oral pronouncement, which is the controlling sentence. Ashley v. State, 850 So. 2d 1265, 1268 (Fla. 2003). Finally, the court could determine if the sentence has expired, i.e. analyze the law on credit awards and calculate the credit. However, none of these steps can be taken with a habeas petition because they are collateral attacks of a judgment and sentence.

Respondent also alleges he is entitled to relief because his sentence is void. The idea that void judgments or sentences may be attacked through the habeas writ is a holdover from before the creation of postconviction motions. See Solano v. State, 1D08-5580 (Fla. 1st DCA Feb. 18, 2010) (analyzing void convictions, habeas petitions, postconviction motions and collateral attacks). The first statute directing prisoners on habeas relief was the Judiciary Act of 1789. See Wainwright v. Sykes, 433 U.S. 72, 77-78 (1977). Chief Justice John Marshall explained that claims of void judgments could be raised through

the habeas writ, but only if the judgment was an absolute nullity. Ex Parte Watkins, 28 U.S. 193, 203 (1830). Chief Justice Marshall explained that a judgment is not a legal nullity if the court has general jurisdiction of the subject, even if the judgment is erroneous. Id. Courts began connecting claims for habeas relief to void judgments or sentences. See Johnson v. Zerbst, 304 U.S. 458, 467-68 (1938) (stating that a conviction without compliance with the Sixth Amendment's right to counsel creates a void judgment). Because Congress provided ever more expansive collateral attacks of judgments and sentences through the habeas writs, construing everything as void no longer became necessary. See Waley v. Johnston, 316 U.S. 101, 104-05 (1942) (allowing habeas writs for constitutional claims, not just void judgments).

Then, in 1948, Congress diverted all collateral attacks of judgments and sentences from the habeas writ to motions to vacate sentences. See United States v. Hayman, 342 U.S. 205, 218 (1952). In Florida, the postconviction motion used to collaterally attack judgments and sentences encompassed jurisdictional issues. Fla. R. Crim. P. 3.850(a). Claims of void judgments or sentences are claims that a court does not have jurisdiction; such claims would be raised under Rule 3.850, not though a habeas petition.

The cases that Respondent cites demonstrate an adherence to

the old idea that claims should be defined as being void so they can be raised as habeas writs. In Dallas v. Wainwright, this Court implied that the claim should have been raised as a postconviction motion but granted the habeas petition for fundamental error on the "face of the sentence which renders it void." 175 So. 2d 785 (Fla. 1965). The fundamental error (sentence exceeded the statutory limit) does not actually amount to a void sentence equal to a removal of general jurisdiction of the trial court. Even if such an error did amount to removal of jurisdiction, or a void sentence, this Court acknowledged that the claim should have been brought in a postconviction motion. Id. Cf. Roy v. Wainwright, 151 So. 2d 825, 827 (Fla. 1963) (documenting Rule 1, which specifically lists sentences in excess of the maximum authorized by law). Florida courts continued to hold that void sentences could be raised in habeas petitions. See Leichtman v. Singletary, 674 So. 2d 889, 891 (Fla. 4th DCA 1996); Yates v. Buchanan, 170 So. 2d 72, 73 (Fla. 3d DCA 1965). Yet those courts failed to understand that a truly void judgment and sentence is a jurisdictional issue that should be raised in a postconviction motion. Fla. R. Crim. P. 3.850(a)(2),(3).

Much like the expired sentence claim, all of Respondent's arguments that his sentence is void are in fact collateral attacks of his amended sentencing order. Due process, double

jeopardy and jurisdiction pending appeal are all issues that can be raised in a postconviction motion filed pursuant to Rule 3.850. Due process claims or double jeopardy claims do not make a judgment or sentence void because a court still retains general jurisdiction to enter the sentencing order. An appellate court may be able to order a trial court to rescind an order entered while an appeal was pending, although there may be an argument that the trial court retains jurisdiction to correct scrivener's errors. Respondent would have to raise these claims in the sentencing court because they are collateral attacks of the judgment and sentence.

Highlighting the multiple legal and factual errors in Respondent's habeas petition, and likewise in the Second District's opinion, demonstrates why collateral attacks must be raised in the sentencing court and reviewed by the appellate court that has jurisdiction over the sentencing court. The March 30, 2005 oral pronouncement stated 27 years in prison with 1,915 days of credit. That credit award was reflected on page one of the March 30, 2005 sentencing order. Page two of the order was inconsistent with page one and created confusion. Respondent wanted the Second District to ignore page one and focus exclusively on page two. Page two standing alone was an incomplete and confusing document; page two with page one was internally inconsistent. In contrast, the trial court was able

to look at the March 30, 2005 order, compare it to the sentencing transcript, and remove the scrivener's error that was creating the confusion. The June 7, 2005 amended order accurately reflected the oral pronouncement from the March 30, 2005 sentencing hearing.

By advising this Court of the law on credit for time served, the role of double jeopardy in sentencing and the supremacy of sentencing oral pronouncements, the State presented an analysis of this issue that the Second District failed to consider. These variables demonstrate that the Second District, without the trial court record and without a thorough legal analysis, was not properly equipped to provide relief. Collateral attacks of judgments and sentences, including claims of void judgments or sentences, should be raised in the sentencing court. The sentencing court is better equipped to analyze the facts and apply the correct law.

CONCLUSION

Petitioner respectfully requests that this Court disapprove of the Second District's opinion in Stang because the Second District provided relief when it had no jurisdiction. This Court should approve its prior precedents that place jurisdiction and venue of collateral attacks of judgments and sentences in the sentencing court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to David Luck, Esq., Carlton Fields, 4000 International Place, 100 Southeast Second Street, Miami, Florida 33131-2114 this ___ day of February, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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