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AUG 14 1989

CLERK, SUPREME COURT

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Deputy Clerk

IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

case No. 74,106

v.

ARDEN M. MERCKLE,

Second District Court #89-233

Respondent.

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

BRIEF OF RESPONDENT ON THE MERITS

ARDEN MAYS MERCKLE
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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*, receiving 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* Merckle 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 jurisdiction 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 jeopardy** 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 separate 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 **determining** 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 multiple 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 position 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 multiple 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.

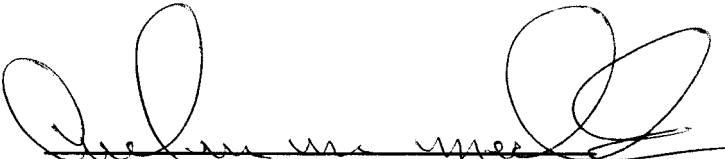
In Palmer v. State 438 So2d 1 (Fla. 1983), this Court **held** that minimum mandatory sentences **could not be imposed** consequetively for separate offenses **arising** from a single criminal transaction or **episode**. This ruling was not based on constitutional considerations. Nevertheless, in Bass 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 Merckle'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 11 dy of August, 1989.


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