IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAMS, JR.	:	
Petitioner,	:	
VS.	:	CASE NO. SC03-1657
STATE OF FLORIDA,	:	
Respondent.	:	
_____	:	

AMENDED JURISDICTIONAL BRIEF OF PETITIONER

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JURISDICTIONAL

BRIEF OF PETITIONER

I STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal. State v. Williams, no. 1D02-946, ____ So.2d ____ (Fla. 1st DCA July 21, 2003), rehearing denied August 28, 2003.

Petitioner, James Williams, filed a 3.800(a) motion alleg-ing that his conviction of two counts of sexual battery vio-lated double jeopardy because there was no temporal or spatial break to justify two counts.

The trial court granted the motion on the merits; the state appealed. The First District reversed on procedural grounds and did not reach the merits:

> The trial court erred in considering Appellee's motion pursuant to Rule 3.800 and in granting his motion to set aside one of his convictions for sexual battery. Appellee's claim constitutes, in reality, a challenge to his convictions rather his sentence. . .
> Because Rule 3.800 provides only an avenue for cor-recting, modifying, or reducing a sentence, appel-lee's post-conviction challenge to his conviction should have been raised in a timely

> filed motion pursuant to Rule 3.850, which allows a defendant to attack either sentence or conviction. Because Appel-lee's motion was filed more than two years after his convictions became final, we agree with the State that Appellee's double jeopardy claim is time barred.

II SUMMARY OF ARGUMENT

The question before the court is whether a meritorious double jeopardy claim is time-barred because it challenges the conviction as well as the sentence, and not the sentence alone. This court has held that double jeopardy claims may be raised at any time. The court has not limited this holding to sentence challenges only, and petitioner contends the principle includes double jeopardy challenges to conviction as well. Thus, the district court’s decision below, because it is based on a conviction/sentence dichotomy that is not constitutionally valid and has never been upheld by this court, conflicts with this court’s decisions in Hopping and Johnson, which hold that double jeopardy claims apparent on the face of the record can be raised at any time.

III ARGUMENT

ISSUE PRESENTED

THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN HOPPING V. STATE AND STATE V. JOHNSON, ON WHETHER A DOUBLE JEOPARDY CLAIM AS TO A CONVICTION CAN BE RAISED ON A 3.800(A) MOTION AND/OR MORE THAN TWO YEARS AFTER THE CONVIC-TIONS BECAME FINAL.

The question before the court is whether a meritorious double jeopardy claim is time-barred because it challenges both the conviction and the sentence, and not the sentence alone. This court has held that double jeopardy claims may be raised at any time. The court has not limited this holding to sentence challenges only, and petitioner contends the principle includes double jeopardy challenges to conviction as well. Thus, the district court's decision below, because it is based on a conviction/sentence dichotomy that is not constitutionally valid and has never been upheld by this court, conflicts with other cases.

The trial court below granted petitioner Williams' double jeopardy claim on the merits. As a result, the court vacated his conviction, recalculated the scoresheet, and reduced his sentence on another conviction.[1] The state appealed, and the First District reversed, holding the claim

[1]In 1997, Williams was sentenced to 107.1 months in prison, which was reduced in this proceeding to 60 months. Williams, supra. The sentence has expired, and Williams has been released from prison. Although his release is dehors the opinion, it is inferable from the facts stated in the opinion. The district court's decision will almost certainly return him to prison.

was time-barred. The district court did not reach the merits.

While it is possible the court may prescribe certain con-ditions, such as that the claim must be apparent on the face of the record and not waived, this court has held that a double jeopardy claim can be raised "at any time." A claim that can be raised "at any time" cannot be time-barred. Hopping v. State, 708 So.2d 263 (Fla. 1998)(double jeopardy claim on sen-tence can be raised on 3.800(a) motion where facts are apparent on the face of the record); State v. Johnson 483 So.2d 420 (Fla. 1986)(double jeopardy claim on conviction (not sentence) can be raised at any time). Not only **could** Williams' claim be decided without an evidentiary hearing; it **was** granted by the trial court without evidentiary hearing. Thus, the contrary decision of the First District Court below conflicts with Hopping and Johnson.

That is why this court **may** grant review. The court **should** grant review because this issue and many like it appear regu-larly in all the courts of Florida, and because it is a post-conviction motion, many or most of the defendants are pro se, as demonstrated by the fact that the appellants in all the cases cited by the district court below were pro se.

Moreover, at least since Maddox, this court has been refining the issue of which sentencing errors may be raised at any time, as opposed to which may be time-barred. See

Carter v. State, 786 So.2d 1173 (Fla. 2001); Maddox v. State, 760 So.2d 89 (Fla. 2000). Yet, assuming arguendo that Johnson and Hopping require further explication or refinement, this court has not yet addressed the corollary issue of the effect of Hopping on double jeopardy claims generally, or whether the court would divide double jeopardy claims into two camps - those that may be time-barred and those that may not. As this is a frequently recurring issue, no less than the sentencing errors reviewed in Maddox and Carter, this court should grant review in this case.

The opinion below could be viewed as rejecting the motion Williams used. The district court opinion could be read as rejecting both a 3.800(a) motion as limited to sentence claims only and a 3.850 motion, due to the time limits. This could eliminate every apparent procedure for raising a claim that can be raised "at any time." However, as counsel reads the opin-ion, it is not based on what type of procedure Williams should use, but rather, it rules that his claim is time-barred, no matter what the motion might be called. That ruling on time-liness was incorrect and in conflict.

Moreover, the district court's ruling depends on a convic-tion/sentence dichotomy which is constitutionally unsound. The opinion does not explain why an illegal sentence can be chal-lenged at any time, but an illegal conviction cannot, and this dichotomy does not withstand analysis. If the conviction is invalid, then its sentence

is also invalid and illegal. This is especially true in multiple-conviction cases under the sen-tencing guidelines, such as Williams,' where the invalid con-viction also contributes points to the sentence imposed on the other convictions.[2] Further, because the sentence depends on the conviction, the defendant's liberty interest in the sen-tence cannot be divorced from his liberty interest in the conviction.

This court has held, contrary to the First District's ruling, that double jeopardy claims - even pertaining to con-viction rather than sentence - can be raised at any time. Johnson is such a case; it found a double jeopardy violation in the conviction, and not merely the sentence. However, the court noted:

> . . .there may be limited circumstances when the assertion of the double jeopardy defense may be knowingly waived.

483 So.2d at 421.

As the Fifth District has said, waiver must be express. "Waiver. . . will not be implied from mere silence or a failure to object." Ford v. State, 749 So.2d 570, 571 n.4 (Fla. 5th DCA 2000). "It has been repeatedly held that double jeopardy rights are fundamental in nature and are not waived, absent a knowing waiver." 749 So.2d at 571.

The most common waiver of a double jeopardy claim occurs when the defendant agrees to a plea bargain.

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[2]It is beyond the scope of this brief to consider whether this remains true under the Criminal Punishment Code.

Entering into a negotiated plea agreement waives double jeopardy objections to multiple convictions or sentences. Novaton v. State, 634 So.2d 607, 609 (Fla. 1994). However, Novaton has exceptions when:

> (a) the plea is a general plea as distinguished from a plea bargain;
>
> (b) **the double jeopardy violation is apparent from the record**; and
>
> (c) there is **nothing** in the record **to indicate a waiver** of the double jeopardy violation. (emphasis added)

Williams did not plead; he went to trial; his claim is apparent on the face of the record, and he did not waive it. Thus, his double jeopardy claim can be raised at any time.

The state will undoubtedly argue that Johnson is distin-guishable because Mr. Johnson raised his double jeopardy claim on a 3.850 motion, but if his claim were limited to a 3.850 motion, surely this court would have said so. A 3.850 motion and its time limit is **not** the limitation that Johnson recog-nized. Rather, the only limitation Johnson recognized was waiver, and Williams did not waive.

The state is also anticipated to argue that Hopping is distinguishable because it was a pure sentencing issue, but the state will fail to explain why a facially apparent "pure" sentencing claim is constitutionally superior to a facially apparent conviction and sentence claim. Petitioner contends it is not superior, and this court has never so held, which puts the district court opinion below in conflict.

Finally, the analysis which the trial court employed in granting Williams relief is based on the time and space rela-tionships of closely related acts. The analysis is virtually identical to the analysis in which this court engaged in determining whether there was one taking or two takings of car keys and a car in deciding whether the defendant could be convicted of both robbery of the keys and theft of the car. Hayes v. State, 803 So.2d 695 (Fla. 2001). No doubt the state will argue that Hayes' claim - which lost on the facts - was raised on direct appeal, but the state will fail to explain why Williams' facially apparent claim with better facts should be time-barred.

While the result may be somewhat different, the analysis of Williams' claim is also very similar to the single-episode analysis of a Hale claim. Hale v. State, 630 So.2d 521 (Fla. 1993)(habitual offender sentences may not be imposed consecu-tively for crimes committed in a single episode). Where a Hale claim is apparent on the face of the record and does not require an evidentiary hearing, the claim may be raised on a 3.800(a) motion, that is, at any time. Burgess v. State, 831 So.2d 137 (Fla. 2002)("face of the record" includes trial transcript, but not a police report), approving Valdes v. State, 765 So.2d 774 (Fla. 1st DCA 2000).

While the instant case does not involve retroactivity, this court's ruling on the retroactivity of Hale is noteworthy for the discussion of when decisional finality

gives way to other considerations. "The fundamental consideration is the balancing of the need for decisional finality against the concern for fairness and uniformity in individual cases." State v. Callaway, 658 So.2d 983, 986 (Fla. 1995). Where a decision is applied retroactively, the court has determined that concerns for basic fairness and uniformity of treatment among similarly situated defendants outweigh any adverse impact that retroactive application of the rule might have on deci-sional finality. See Callaway, 658 So.2d at 987.

Because this court long ago established the principle that double jeopardy claims can be raised at any time, and Williams' claim is apparent on the face of the record and was granted by the trial court, the court's interest in decisional finality to time bar Williams' claim is not superior to his constitutional liberty interest in asserting a claim which requires no eviden-tiary hearing and certainly no retrial. The district court's ruling that his claim may be time-barred conflicts with this court's opinions.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court exercise its discretion to accept jurisdiction of this case and order brief-ing on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been mailed to Barbara Yates, Assistant Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, and to Mr. James Williams, 4608 Lott Road, Eight Mile, AL 36613, this _____ day of September, 2003.

CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Courier New 12 point font in compliance with the font require- ments of Florida Rule of Appellate Procedure 9.210(a)(2).

KATHLEEN STOVER

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APPENDIX

1. State v. Williams, no. 1D02-946 (Fla. 1st DCA July 21, 2003)
2. Order denying rehearing, August 23, 2003