IN THE SUPREME COURT OF FLORIDA

DEL-RIO ALLEN
PETITIONER

-VS-

STATE OF FLORIDA
RESPONDENT

_____/

CASE NO: SC12-194
L.T. CASE NO: 4D10-4080

PETITIONER'S JURISDICTIONAL BRIEF ON REVIEW FROM THE DISTRICT COURT OF APPEAL , FOURTH DISTRICT , STATE OF FLORIDA

PETITIONER - PRO SE:

DEL-RIO ALLEN #W24362
GULF C.I. / ANNEX
699 IKE STEELE ROAD
WEWAHITCHKA, FLORIDA

STATEMENTS OF THE CASE AND FACTS

The Petitioner filed a Rule 3.850 motion in the 15th Judicial Circuit Court for Palm Beach County Florida on ***July 22nd 2010,*** which seeked relief from the petitioner 2003 Judgment of Conviction and sentence for the offense of Attempted Burglary.

Petitioner's Rule 3.850 motion raised the claim of ***"Defect in the court's Subject Matter Jurisdiction,"*** that the Office of the State Attorney willfully committed the criminal act of **"PERJURY"** to invoke the Circuit Court Subject Matter Jurisdiction, thereby resulting in a *"Serious Defect"* in the circuit court subject matter jurisdiction to have lawfully heard, decided, and adjudicated a matter brought before the court by Government Officials (State Attorney Office) pursuant to the criminal act of perjury, willful perjury.

Although the U. S. Supreme Court made it clear in the case of **U.S. -vs- Cotton 122 S.Ct. 1781(2002)** that a claim/issue of Defect in a court's subject matter jurisdiction *can never be waived or forfeit,* and the Fourth DCA of Florida having also held in the case of **Gunn -vs- State 947 So. 2d. 551 (Fla. 4th DCA 2006)** that the *"trial court should consider the merits of a jurisdictional error claim even in an* ***untimely*** *rule 3.850 motion,"* the 15th Judicial Circuit Court nevertheless disregarded the U.S. Supreme court holdings in **Cotton Supra**, as well as disregarded the Fourth DCA holdings in **Gunn Supra**, and declined to

consider the merits of the petitioner's jurisdictional error claim, declined to do so based upon the trial court holdings of the rule 3.850 motion being *"untimely"*, but see **Gunn -vs- State Supra. and U.S. -vs- Cotton Supra.**

The petitioner appealed to the Fourth DCA the trial court denial on the grounds of "untimely," the Fourth DCA entered an order on **January 18th 2012** which expressly declared the appeal to be **FRIVOLOUS,** and further directed the clerk of the court to provide the institution with a copy of the order for consideration of disciplinary actions to be taken against the petitioner pursuant to *Section 944.279(1),(2010).*, **(SEE APPENDIX "A")**

JURISDICTIONAL STATEMENTS

The Florida Supreme Court has discretionary Jurisdiction to review a decision of a district court of appeal that constitute an expressed and direct conflict as a results of the ***"MISAPPLICATION"*** of a decision of the Florida Supreme Court on the same question of law. **See- Article V, Section 3(b)(3) Fla. Const. (1980)., Fla. R. APP. Proc. 9.030 (a)(2)(A)(iv).,** ***and*** **Engle -vs- Liggett Group Inc. 945 So. 2d. 1246 (Fla. 2006); also Aguilera -vs- Inservices, Inc., 905 So. 2d. 84 (Fla. 2005).**

ARGUMENT

The expressed decision of the 4th DCA in this case of the petitioner, which hold that the petitioner's appeal from the trial court denial of his Rule 3.850 motion is a *FRIVOLOUS APPEAL*, (APPENDIX "A"), constitute an expressed and direct conflict as a results of the "misapplication" of the *binding and precedent* decision of this honorable court in the case of **Treat -vs- State, ex rel. Melton 163 So. 883 (Fla. 1935),** concerning the term frivolous. This court made it clear in the **Treat, Supra**, that:

> "A frivolous appeal is not merely one that likely to be unsuccessful, it is one that is so readily recognizable as devoid of merits on the face of the records that there is little, if any prospect whatsoever that it can ever succeed...**An appeal is not frivolous where there is a substantial justiciable question that can be spelled out of it or from any part of it."**

As this court clearly stated, **"An Appeal is not frivolous where a substantial justiciable question can be spelled out of it or from any part of it,"**

The Fourth DCA decision of petitioner's appeal being frivolous (APPENDIX "A") is therefore a blatant "misapplication" of this court holding/decision in **Treat -vs- State ex. rel Melton Supra.** concerning a frivolous appeal, thereby constituting an expressed and direct conflict on the same

question of law..see- **Engle –vs- Liggett Group Inc. Supra.** and **Aguilera –vs- Inservices, Inc. Supra.**

The Justices of the U.S. Supreme Court having made it clear in the case of **U.S. –vs- Cotton Supra,** *that a defect in court subject matter jurisdiction can never be waived or forfeit for reviewing on the merits,* and the Fourth DCA itself having further made it clear in the case of **Gunn –vs- State Supra** that a jurisdictional error *should be considered on its merits even if its raised in an untimely Rule 3.850 motion,* clearly prohibits petitioner's appeal from the trial court denial of his Rule 3.850 motion as being a frivolous appeal. This is true especially where the petitioner Rule 3.850 motion conclusively demonstrate a "serious defect" in the trial court subject matter jurisdiction by virtue of the State Attorney Office (Government Officials) intentional and knowingly criminal act of perjury to invoke the circuit court jurisdiction. For the trial court to deny the motion raising such claim of jurisdictional error, on the grounds of untimely, cause the appeal from the denial to be one in which "a substantial justiciable question can be spelled out of it or from parts of it, and therefore not a frivolous appeal"..see **Treat –vs- State ex. rel. Melton Supra.**

Where the petitioner provided the trial court with SWORN FACTS, AND RECORD-EVIDENCE in his Rule 3.850 motion which conclusively demonstrated the criminal act of perjury committed by the State to invoke the trial

court subject matter jurisdiction, and the trial court nevertheless decline to address the merits and/or decline to make findings on the merits by applying the procedure bar of an untimely motion, then clearly the Fourth DCA expressed decision of a Frivolous appeal from such denial by the trial court, is a "misapplication" of this court *legal definition* of the term frivolous appeal, requiring this court to exercise its discretionary jurisdiction to review the decision.

CONCLUSION

The petitioner plea to this honorable court to exercise its discretionary jurisdiction to review the decision below, and thereby allow the petitioner an opportunity to submit an initial brief *on the merits*.

Respectfully Submitted,

Del-Rio Allen #W24362
Gulf C.I. / Annex
699 Ike Steele Road
Wewahitchka, Florida
32465

CERTIFICATE OF SERVICE

I, hereby declare that a true and correct copy of the foregoing brief has been placed in the Hands of Gulf C. I. Correctional Official for Mailing by U.S. Mail to the Attorney General Office 1515 N. Flagler Ave. (STE # 900) West Palm Beach Florida (33401) on this 30th day of January, 2012

Del-Rio Allen #W24362

CERTIFICATE OF COMPLIANCE

I, Hereby certify that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate procedures.

Del-Rio Allen #W24362