IN THE

SUPREME COURT OF FLORIDA

Case No. 65,191

STATE OF FLORIDA, by and through the State Attorney for the Twelfth Judicial Circuit,

Plaintiff-Petitioner,

vs.

GENERAL DEVELOPMENT CORPORATION, a Delaware corporation, authorized to do business in Florida,

Defendant-Respondent.

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Proceedings to Invoke Discretionary Jurisdiction to Review a Decision of the District Court of Appeal of Florida, Second District

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BRIEF ON JURISDICTION OF DEFENDANT-RESPONDENT GENERAL DEVELOPMENT CORPORATION

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POINT ON APPEAL

THE DISTRICT COURT OF APPEAL CORRECTLY PREVENTED THE STATE ATTORNEY FOR THE TWELFTH JUDICIAL CIRCUIT FROM USURPING THE RESPONSIBILITIES OF THE FLORIDA DEPARTMENT OF ENVIRONMENTAL REGULATION IN VIOLATION OF LEGAL REQUIREMENTS, AND DISCRETIONARY JURISDICTION SHOULD NOT BE GRANTED HERE AS SHOWN BY THE STATE ATTORNEY'S JURISDICTIONAL BRIEF.

STATEMENT OF THE CASE AND OF THE FACTS

Defendant-Respondent General Development Corporation ("GDC") objects to the Statement of Facts submitted by the State of Florida, by and through the State Attorney for the Twelfth Judicial Circuit ("State Attorney"). It is an improper attempt to argue the merits of an appeal rather than a jurisdictional analysis and an incorrect statement of the facts. The facts, as the District Court of Appeal decision states, are:

1. GDC maintained that it was given approval in connection with Chapter 298 proceedings to proceed with work now challenged by the State Attorney.

2. The Florida Department of Environmental Regulation ("DER") asserted jurisdiction under Section 403 of the Florida Statutes.

3. The State Attorney, in the trial Court and in the District Court, argued that he had "broad independent authority to proceed on behalf of all state agencies" based solely on Section 27.02 or, in the alternative, the State Attorney had discretionary authority to act as an "agency" under Chapter 120, the Administrative Procedure Act, and to enjoy agency standing without being limited Chapter 120 requirements applicable to all other state agencies.

The State Attorney's assertions here, that he is a constitutional law officer under Article V and that Article V is involved, are inconsistent

with the State Attorney's claims below involving only statutory issues and only this one State Attorney, who was trying to substitute himself for the DER.

ARGUMENT

Contrary to the State Attorney's Corrected Jurisdictional Brief ("State Attorney's Brief"), this Court should not exercise jurisdiction under Rule 9.030(a)(2)(A)(ii) and (iii) of the Florida Rules of Appellate Procedure. This is because:

I. The District Court did not expressly construe a provision of the Florida Constitution so as to provide jurisdiction.

The State Attorney incorrectly requests jurisdiction based upon a theory of indirect construction of a constitutional provision to justify his assertion that the Court should grant jurisdiction here.

As is shown by the District Court of Appeal decision, the issues presented by this case did not involve a constitutional interpretation. Rather, the argument of the State Attorney was that under the special enabling act or Chapter 403 or, alternatively, under provisions of Chapter 120 the State Attorney could obtain standing.

The Constitution was not in question, or applied or interpreted by the Court below. All the parties agreed that there is a constitutional provision that requires general enabling legislation. The State Attorney was trying to argue that Section 27.02 or Section 403 or, alternatively, Section 120.69(1) of the Florida Statutes would create standing.

As a matter of law this Court has ruled that such statutory issues do not create jurisdiction, since they do not expressly construe the Constitution.

Thus, as confirmed in Armstrong v. City of Tampa, 106 So.2d 407 (Fla. 1958), the indirect involvement or interpretation approach is not a basis for jurisdiction. In Armstrong, supra at 409, this Court noted (in rejecting a similar argument) that it had occasion to consider this matter in other cases and that:

> In the cited cases we undertook to point out that the mere fact that a constitutional provision is indirectly involved in the ultimate judgment of the trial court does not in and of itself convey jurisdiction by direct appeal to this court. We agree with those courts which hold that in order to sustain the jurisdiction of this court there must be an actual construction of the constitutional provision. That is to say, by way of illustration, that the trial judge must undertake to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision.

Here, there was no doubt as to the language in Article V, Section 17 of the Florida Constitution. The District Court, in even the portion of its decision quoted by the State Attorney's Brief at page 6, confirmed that the only question was whether a specific general law granted authority and that was the question being reviewed. The District Court also noted that the Constitution was not being expressly construed, since construction of Article V, Section 17 was "consistent with the scope of authority traditionally granted to and exercised by a state prosecuting attorney" under a "specific general law." See the District Court's decision, cited in the State Attorney's Brief at page 6 and in his Appendix at pages 11-12.

Thus, here as in Armstrong, supra at 409 there were no "existing doubts arising from the language or terms of the constitutional provision" but, rather, doubts as to the statutory provisions relied upon by this one State Attorney.

As the Court noted in Ogle v. Pepin, 273 So.2d 391, 392 (Fla. 1973), cited but not explained in the State Attorney's Brief at page 5, this Court has rejected the argument that if a "district court inherently 'construed' provisions in our state constitution" this created jurisdiction.

This Court in Ogle, supra specifically adopted the Armstrong rule[1] and its statements there are dispositive here:

> Upon a thorough examination of these divergent viewpoints, we have concluded that the Armstrong rule, as distinguished from the inherency doctrine relative to a statute, should apply to trial court orders and district court decisions "construing a controlling provision of the state or federal constitution." (At 392).

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[1]Other cases cited in the State Attorney's Brief show that Armstrong is controlling law today. See: (1) Rojas v. State, 288 So.2d 234 (Fla. 1973). (State Attorney's Brief, pg. 5). Rojas followed Armstrong and Ogle, supra, and stated: "we may not accept a direct appeal based upon an inherent construction of a constitutional provision; it is insufficient to invoke our direct appeals jurisdiction that there was an inherent construction of a constitutional provision in the judgment appeal from, but rather there must be a ruling by the trial court which explains, defines or overtly expresses a view which eliminates some existing doubt as to a constitutional provision in order to support a direct appeal." The Court in Rojas, surpa at 236 also stated: "Applying is not synonymous with construing; the former is NOT a basis for our jurisdiction, while the express construction of a constitutional provision is." (2) Florida Commission on Ethics v. Plante, 369 So.2d 332 (Fla. 1979) (State Attorney's Brief, pg. 7), expressly construed a provision of the Constitution and stated in its introductory paragraph "at issue is the meaning of the words 'public report' in article II, section 8(f). We hold that these words mean a report which includes a conclusion and that such an interpretation does not violate the concept of separation of powers between branches of government." (3) Estate of Murphy, 340 So.2d 107 (Fla. 1976) (State Attorney's Brief, pg. 7), also expressly interpretated a constitutional provision in its introductory paragraph stating: "We have jurisdiction of the appeal because the trial court entered a judgment 'construing a provision of the state ... constitution.' Article V, Section 3(b)(1), Florida Constitution. The trial court construed Article X, Section 4(c), Florida Constitution." This Court interpreted a constitutional homestead exclusion relevant if there were no "minor" children, since an appellant attained his majority prior to any time involved in the proceedings -- which required a constitutional construction. The foregoing decisions show that the Armstrong rule is applicable here and precludes jurisdiction.

> Based upon the foregoing, we do not have jurisdiction to decide this appeal because the decision below failed to explain or define any constitutional terms or language as required by the Armstrong rule, revitalized here. (Olge, supra, at 393).

II. The District Court, as a result of its decision, did not expressly affect a class of constitutional or state officers so as to provide jurisdiction.

The very authorities cited in the State Attorney's Brief show that this case does not affect a class of constitutional or state officers.

The State Attorney at page 4 of his Brief relies upon Richardson v. State, 246 So.2d 771, 773 (Fla. 1971), for the proposition that discretionary jurisdiction would lie here to "review decisions which, in the ultimate, would affect all constitutional or state officers exercising the same powers, even though only one such officers [sic] might be involved in the particular litigation." The State Attorney also cites Florida State Board of Health v. Lewis, 149 So.2d 41 (Fla. 1963), for the same proposition. However, the following should be noted:

A. This Court specifically retreated from its decision in Richardson, supra. As this Court in Spradley v. State, 293 So.2d 697, 701 (Fla. 1974), concluded:

> We are of the opinion that our jurisdictional holding in Richardson was, therefore, much too broad and inconsistent with the off-stated philosophy behind the formation our District Courts of Appeal -- that these courts are to be courts of final appellate jurisdiction except in a limited number of specific situations enumerated in the Constitution. We therefore recede from our jurisdictional holding in Richardson. (At 701).

This Court noted in Spradley, supra that it was not enough to simply modify or construe or add to the case law but, rather, to address

this Court with certiorari jurisdiction "a decision must directly in, some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers."

Just as in Spradley, supra a rule that arguably could be applied to State Attorneys, throughout the State, did not satisfy the jurisdictional test, so here, the holding of the District Court only applied to authority of one particular State Attorney (in relation to the specific facts of this case) and involved his attempt to proceed as if he were an agency so that he could bring a suit in a manner inconsistent with the DER's determination.

B. Contrary to the argument of the State Attorney, in his Brief at page 4, the fact that "only one such officers [sic] might be involved" does not create jurisdiction. Thus, in Florida State Board of Health v. Lewis, 149 So.2d 41 (Fla. 1963), cited at pages 4 and 5 of the State Attorney's Brief, this Court refused discretionary jurisdiction because only one state officer was involved. Although there were a number of individuals trying to proceed as a board in an action, the Court in Lewis refused to allow jurisdiction.[2]

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[2]See e.g. Shevin v. Cenville Communities, Inc., 338 So.2d 1281 (Fla. 1976), confirming that discretionary jurisdiction not only requires a decision that expressly affects a class of officers but, also, that if the State Attorney were an agency as he claims, since only he seeks to usurp the DER's authority that is insufficient to create jurisdiction. Shevin v. Cenville Communities, supra at 1282 reconfirms the validity of Spradley, supra and the concurring opinion of Justice England states: "it follows that there is no 'class' of constitutional or state officers affected by the district court's limited order and that only one agency of state government, the Department of Legal Affairs, is affected."

Other cases relied upon by the State Attorney in a string of citations in his Brief, which are unexplained, actually refute the State Attorney's position.[3]

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[3]For other cases relied on by the State Attorney but which do not support his request for jurisdiction see: (1) Smith v. State, 95 So.2d 525 (Fla. 1957) (State Attorney's Brief, pg. 4), merely stating that the State Attorney is a constitutional officer and an arm of the Court. If anything this refutes the State Attorney's claim below that he can be a state agency. It was prior to Spradley and does not support his proposition that this Court has jurisdiction. (2) Collier v. Baker, 20 So.2d 652 (Fla. 1939) (State Attorney's Brief, pg. 4), is also cited by the State Attorney for the proposition that he holds an office "created by the Constitution"; but it was prior to Spradley and does not support his assertions of jurisdiction here. (3) State v. Coleman, 189 So.2d 691 (Fla. 1939) (State Attorney's Brief, pg. 4), only supports the proposition that the State Attorney is a creature of the Constitution. It was prior to Spradley and does not suggest an interpretation to support jurisdiction requested. (4) Satz v. Perlmutter, 379 So.2d 359 (Fla. 1980) (State Attorney's Brief, pg. 4) it involved the question of whether a competent adult patient, with no minor dependents suffering from a terminal illness, had a constitutional right to refuse or discontinue, extraordinary medical treatment. The case involved a constitutional interpretation distinguished from this matter and the Court cited the Spradley rule in support of its position. (5) Taylor v. Tampa Electric Co., 356 So.2d 260 (Fla. 1978) (State Attorney's Brief, pg. 5), is cited by the State Attorney without explanation; but, unlike this case involving a specific State Attorney it involved the question of whether all clerks under "taking" proceedings in Chapter 74, Florida Statutes, could exact commissions on disbursed court registry funds. Taylor, supra at 261 referred to other cases involving other clerks' attempts to collect commissions confirming it involved a situation similar to Spradley, supra, as opposed to the instant case. (6) State v. Robinson, 132 So.2d 156, at 157 (Fla. 1961) (State Attorney's Brief, pg. 5), involved "duties of all justices of the peace of the state" and was prior to the Spradley decision. Thus, these decisions demonstrate that even if a State Attorney may be a class of constitutional or state officer that is not sufficient to create jurisdiction. The cases prior to Spradley are not relevant and those after Spradley follow its rule. There must be a class of officers expressly affected, and arguments of one State Attorney that he may be affected are insufficient to create jurisdiction.

CONCLUSION

For the foregoing reasons GDC requests that this Court decline jurisdiction.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing was served by United States mail this 14th day of May, 1984, on:

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