IN THE SUPREME COURT OF FLORIDA

CLYDE McPHADDER,

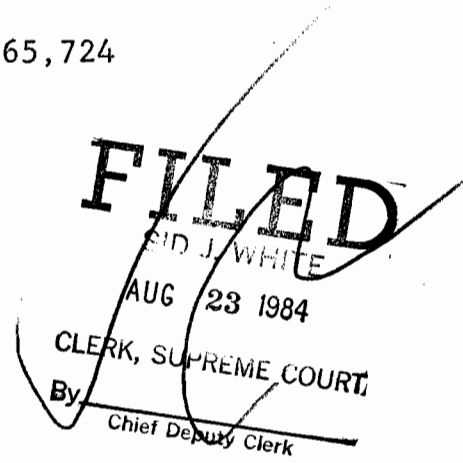
Petitioner,

vs. Case No. 65,724

STATE OF FLORIDA,

Respondent,

_____/



BRIEF OF RESPONDENT
ON JURISDICTION

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BRIEF OF RESPONDENT

PRELIMINARY STATEMENT

Clyde Ellis McPhadder, the criminal defendant and appellee below in State v. McPhadder, ___So.2d___ (Fla. 1st DCA 1984), 9 F.L.W. 1444, and the petitioner here, will be referred to as "P." The State of Florida, the prosecuting authority and appellant below, and the respondent here, will be referred to as "the State."

All emphasis will be supplied by the State unless indicated.

STATEMENT OF THE CASE AND FACTS

The State rejects petitioner's statement of the case and facts because such is second best to the unanimous opinion of the First District in State v. McPhadder reversing the order of suppression entered in petitioner's favor, which the State substitutes as its statement of the case and facts.

STATEMENT OF JURISDICTION

Petitioner seeks to invoke the discretionary jurisdiction of the Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A)(iv) by alleging that the decision below expressly and directly conflicts with a decision of the Third District upon the same question of law.

ISSUE

THIS COURT SHOULD NOT GRANT CERTIORARI REVIEW OVER THE DECISION BELOW ON THE BASIS OF THE ALLEGED CONFLICT WITH THE DECISION OF THE THIRD DISTRICT IN STATE V. STEINBRECKER, 409 So.2d 510 (FLA. 3RD DCA 1982).

ARGUMENT

Fla.R.App.P. 9.140(c)(1)(B) provides that the State "may appeal an order . . . [s]uppressing before trial confessions, admissions, or evidence obtained by search and seizure." In State v. McPhadder, the First District held that the order of a trial judge suppressing as hearsay portions of incriminating tape recordings obtained via electronic search and seizure was reviewable by direct appeal under 9.140(c)(1)(B). In State v. Steinbrecher, 409 So.2d 510 (Fla. 3rd DCA 1982), the Third District had earlier held that the order of a trial judge suppressing as inaudible portions of incriminating tape recordings obtained via electronic search and seizure was not reviewable by direct appeal under 9.140(c)(1)(B), but was reviewable by petition for writ of certiorari. Petitioner here alleges that this academic disagreement between the First and Third Districts as to the State's proper vehicle in overturning an erroneous trial court ruling suppressing portions of incriminating tape recordings obtained via electronic search and seizure justifies invocation of this court's conflict certiorari jurisdiction to review the decision in State v. McPhadder. The State strenuously disagrees.

The State believes that, in order for two court decisions to be in express and direct conflict for the purpose of invoking this court's discretionary jurisdiction under Fla.R.App.P. 9.030(a)(2)(A)(iv), the decisions should reach different conclusions concerning the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of its sister court. See generally Mancini v. State, 312 So.2d 732 (Fla. 1975). As this court has stated and reaffirmed, "[i]t is conflict of *decisions*, not conflicts of *opinions* or *reasons* that supplies jurisdiction for review by certiorari."[1] Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970); approved, Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980); see generally Ansin v. Thurston, 101 So.2d 808 (Fla. 1958); Withlachochee River Elec. Co. v. Tampa Elec. Co., 158 So.2d 136 (Fla. 1963), cert. denied, 377 U.S. 952 (1964), and England and Williams, Florida Appellate Reform One Year Later, 9 F.S.U. L. Rev. 221 (1981). Although the courts in State v. McPhadder and State v. Steinbrecher reached different conclusions concerning the same point of law, they did not do so in factual contexts of sufficient similarity to permit any inference that the result in each case would have been different had the deciding court employed the reasoning of its sister court. Indeed, insofar as both district courts reversed trial court orders

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[1] Emphasis in original.

suppressing portions of incriminating tape recordings, albeit on unrelated grounds, the more logical inference is that these results would have been the same. Compare State v. Eicher, 431 So.2d 1009 (Fla. 3rd DCA 1983); see Combs v. State, 436 So.2d 93 (Fla. 1983).

The State would suggest, with no disrespect intended, that petitioner is not pursuring this litigation for the sake of resolving the academic point of whether the order at issue should have been received by the First District via direct appeal or petition for writ of certiorari. Petitioner hopes that the perceived conflict among the district courts as to this academic point will cause this court to invoke its discretionary jurisdiction, upon which eventuality, citing to Fla.R.App.P. 9.040(a), he will undoubtedly seek a second review of the propriety of the trial court's order.[2] This court has in the past refused to countenance this type of creative "bootstrapping." See Berezovsky v. State, 350 So.2d 80, 81 (Fla. 1977), in which the court resolved a conflict in decisions but saw "no reason to provide a full second review of the evidence as urged by that petitioner; Sobel v. State, 437 So.2d

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2 Petitioner admitted as much when he moved the First District to stay its mandate pending review by stating that "the Supreme Court may find...the evidence which was ruled admissible by [the First District]...should have been stricken as the trial judge ruled."

144 (Fla. 1983), in which the court also resolved a conflict in decisions but declined to litigate the alleged ineffectiveness of trial counsel; and Barket v. State, 356 So.2d 263, 264 (Fla. 1978), cert. denied, 439 U.S. 848 (1978), in which the court resolved a certified question and "decline[d] to entertain other issues raised . . . by petitioner but resolved by the district court." The State therefore serves notice to both petitioner and this court that, absent a specific order to the contrary, it will regard any grant of certiorari in this case as being for the limited purpose of resolving whether orders of the type at issue here are reviewable via direct appeal or petition for writ of certiorari.

CONCLUSION

WHEREFORE, the State of Florida submits that petitioner's application for review in this case must be DENIED.

Respectfully submitted,

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee has been forwarded to Mr. Michael J. Minerva, Assistant Public Defender, Second Judicial Circuit , Post Office Box 671, Tallahassee, FL 32302, via U.S. Mail, this 23rd day of August 1984.

John W. Tiedemann
John W. Tiedemann
Assistant Attorney General