

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUL 26 1985

CLERK, SUPREME COURT

By [Signature]
Chief Deputy Clerk

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 THEODORE J. MOTT,)
)
 Respondent.)
 _____)

CASE NO. 67,278

RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

NANCYE R. CROUCH
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ATTORNEY FOR RESPONDENT

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RESPONDENT'S BRIEF ON JURISDICTION

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by Petitioner in his Brief on Jurisdiction.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal, in interpreting the ex post facto doctrine of the Federal Constitution as it applies to the application of the amended sentencing guidelines is in accord with the other District Courts of Appeal and thus, this Court need not exercise its discretionary jurisdiction to review that decision.

ARGUMENT

THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHERE IT DOES NOT CREATE DIRECT AND EXPRESS CONFLICT WITH THE DECISIONS OF OTHER DISTRICT COURTS OF APPEAL ON THE SAME QUESTION OF LAW.

Petitioner alleges that the Fifth District Court of Appeal in construing the ex post facto doctrine contained in Article I, Sections 9 and 10 of the United States Constitution has prohibited the application of sentencing guideline provisions in effect at the time of sentencing. The actual language in the opinion proscribes retroactive application of an enhanced penalty guideline and remands the case for sentencing in accordance with the guidelines in effect at the time of the offense.

Petitioner contends that this issue has been decided differently by other District Courts of Appeal and specifically alleges that the 1st DCA has held that sentencing guidelines in effect at the time of sentencing are those that should apply, citing cases in support thereof.

Respondent respectfully directs the attention of this Court to Richardson v. State, 10 FLW 1712 (Fla. 1st DCA, July 10, 1985) and Beggs v. State, 10 FLW 1729 (Fla. 1st DCA, July 16, 1985) which held that the sentencing guidelines in effect at the commission of the crime are to be applied. Richardson specifically distinguishes three of the four cases cited by Petitioner in support of their argu-

ment. Two of the cases involved offenses which took place prior to the effective date of the sentencing guidelines, but the defendant's chose to be sentenced pursuant to the guidelines. In those cases, it was necessary to apply the guidelines in effect at the time of sentencing since there were no guidelines in effect at the time of the offense. Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984). Another case cited by Petitioner, Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984) was distinguished because the defendant was sentenced prior to the effective date of the amendments to the guidelines and the Court stated that an amended rule cannot be applied retroactively. The final case cited by Petitioner in support of their position was also a retroactive application of an amendment to the guidelines, wherein the Court required the application of the guidelines in effect at the time of sentencing. Dubose v. State, 468 So.2d 517 (Fla. 1st DCA 1985).

In distinguishing the above cases, the Court in Richardson, supra, specifically stated, "None of these decisions are inconsistent with our holding here that a defendant, who commits a post guidelines offense, is entitled to be sentenced in accordance with the guidelines in effect on the date of his offense, if the guidelines amended subsequent to his offense have a disadvantageous effect on him." These decisions effectively eliminate any conflict between the respective District Courts of Appeal.

Petitioner further alleges that the application of the amended guidelines in this case was not a violation of the ex post facto doctrine because said application in no way increased the previous penalties for the offense. Respondent would submit that in fact, the amended guidelines did expose him to a greater penalty than the guidelines in effect on the date of his offenses and this, in accordance with Lee v. State, 294 So.2d 305 (Fla. 1974) is an ex post facto application and thus clearly unconstitutional.

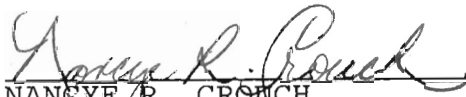
In that there is no conflict between the decisions of the respective District Courts of Appeal on the issue of proper application of the amended guidelines and the interpretation of the ex post facto doctrine as it relates to said application, Respondent respectfully asserts that this Court need not invoke it's jurisdiction to review the decision of the Fifth District Court of Appeal.

CONCLUSION

Based upon the foregoing cases, authorities, policies and facts, this Court should decline to exercise its discretionary jurisdiction in this matter.

Respectfully submitted,

JAMES B. GIBSON
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SEVENTH JUDICIAL CIRCUIT



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ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Jim Smith, Attorney General at 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014 and to Mr. Theodore J. Mott, Inmate No. A040510, Marion Correctional Facility, P.O. Box 158, Lowell, Florida 32663-0158 on this day of July 1985.



NANCYE R. CROUCH
ASSISTANT PUBLIC DEFENDER