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SID J. WHITE

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CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 v.)
)
 DONALD EUGENE HURST,)
)
 Respondent.)
 _____)

Case Number 67453

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF CASE AND FACTS

The issues, herein, arose from respondent pleading guilty to two counts of burglary to a dwelling and one count of grand theft, second degree. All the offenses (as well as the pleas), occurred prior to July 1, 1984, i.e., before the effective date that the committee note of Florida Rule of Criminal Procedure 3.701(d)(12), was adapted by the Florida Legislature. The sentences, however, were imposed subsequent to July 1, 1984. The sentence for each offense was three and one-half (3 1/2) years incarceration, concurrent. Additionally, the two burglary sentences included ten (10) years probation, concurrent. The probation terms were to follow the three and one-half (3 1/2) years incarceration (App. 1).

The Fifth District Court of Appeal held that such a sentence violated the original committee note of rule 3.701(d)(12), because, "...the incarcerative portion imposed (should) not be less than the minimum of the guideline range, and the total sanction imposed should not exceed the maximum guideline range." (App. 2). The reviewing court explained that the sentence would be lawful had the amended committee note to rule 3.701(d)(12), been in effect, but since that was not the case, the sentence was a violation of Article I, Section 9 of the United States Constitution, and Article I, Section 10 of the Florida Constitution, pertaining to the ex post facto doctrine (App. 2).

QUESTION PRESENTED

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE DISTRICT COURT OF APPEAL WHICH EXPRESSLY CONSTRUES A PROVISION OF THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION, AND ADDITIONALLY, CREATES DIRECT AND EXPRESS CONFLICT WITH A DECISION OF THE SUPREME COURT OF FLORIDA.

ARGUMENT

The Fifth District Court of Appeal has construed the ex post facto doctrine contained in Article I, Section 9 of the United States Constitution and Article I, Section 10 of the Florida Constitution so as to prohibit the application of sentencing guideline provisions in effect at the time of sentencing. As such, this court should exercise its discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(ii).

Petitioner submits that this court should exercise its discretionary jurisdiction, because the opinion in the case at bar (App. 1-3), directly and expressly conflicts with this court's holding in Mills v. State, 462 So.2d 1075, 1081 (Fla. 1985). In Mills, the defendant committed the offense when a trial court had the discretion to retain jurisdiction for one-third of the sentence pursuant to section 947.16(3), Florida Statutes (1981). The statute in question was subsequently amended by chapter 82-171, section 9, Laws of Florida, which increased the maximum retention period from one-third to one-half. This

amendment was in effect at the time of Mills' sentencing. This court held: "Therefore, the legal consequences of retained jurisdiction had already attached under the existing statute. The quantum of punishment has not increased. The increase in the period of retention alone does not constitute an ex post facto law in this case because Mills was convicted and sentenced after the effective date of the statute increasing the retention." Id., at 1080.

Conflict exists between Mills, and the case at bar, because Hurst stood subject to a guidelines sentence which existed at the time of the crime. Under either set of guidelines, the trial court had the discretion to depart and sentence respondent to the maximum term. As such, the opinion in the case at bar, conflicts with Mills, supra, because, "the quantum of punishment has not increased." Id., at 1080. See also, Dobbert v. Florida, 432 U.S. 282, 292-293, 97 S.Ct. 2290, 2298-2299, 53 L.Ed.2d 344 (1977), and Paschal v. Wainwright, 738 F.2d 1173, 1176, n. 4 (11th Cir. 1984). As such, petitioner submits that this court could exercise its discretionary jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

Since the decision of the Fifth District Court of Appeal has construed a provision of the United States Constitution and the Florida Constitution, and since there exists a direct and express conflict between that decision and the holding of Mills, supra, pertaining to the interpretation of those constitutional

provisions, the court should exercise its jurisdiction and review the decision of the Fifth District Court of Appeal.¹

¹

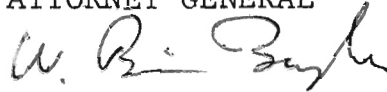
Petitioner notes that the State of Florida recently filed a notice to invoke discretionary jurisdiction and a brief on jurisdiction in Moore v. State, 10 F.L.W.1338 (Fla. 5th DCA May 30, 1985), and Mott v. State, 10 F.L.W. 1338 (Fla. 5th DCA May 30, 1985), which is seeking this court's review based on similar issues and grounds.

CONCLUSION

Based on the above and foregoing, the court should exercise its jurisdiction favorably and review the decision of the Fifth District Court of Appeal.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

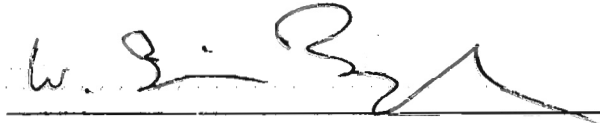


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing brief on Jurisdiction has been furnished, by mail, to Kenneth Witts, Certified Legal Intern for Donald Eugene Hurst, this 6th day of August 1985.



W. BRIAN BAYLY
COUNSEL FOR PETITIONER