

**FILED**

SID J. WHITE

AUG 26 1985

CLERK, SUPREME COURT

By *[Signature]*  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
 )  
 ) Petitioner, )  
 )  
 ) vs. )  
 )  
 ) BEN ARNETT, )  
 )  
 ) Respondent. )  
 )  
 )

CASE NO. 67,478

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
STATEMENT OF CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
THE DECISION BELOW DOES NOT CONFLICT WITH OTHER APPELLATE COURT DECISIONS. [RESTATED]	4
CONCLUSION	7
CERTIFICATE OF SERVICE	7

AUTHORITIES CITED

	<u>PAGE</u>
<u>Jackson v. State</u> , 454 So.2d 691 (Fla. 1st DCA 1984)	4
<u>Jenkins v. State</u> , 385 So.2d 1356 (Fla. 1980)	5
<u>Lee v. State</u> , 294 So.2d 305 (Fla. 1974)	5,6
<u>Mancini v. State</u> , 312 So.2d 732 (Fla. 1975)	5
<u>Moore v. State</u> , 470 So.2d 947 (Fla. 5th DCA 1985)	5,6
<u>Randolph v. State</u> , 458 So.2d 64 (Fla. 1st DCA 1984)	4
<u>Richardson v. State</u> , 10 F.L.W. 1712 (Fla. 1st DCA July 10, 1985)	5,6
<u>Saunders v. State</u> , 9 F.L.W. 2378 (Fla. 1st DCA November 14, 1984)	4
<u>State v. Pizarro</u> , 383 So.2d 762 (Fla. 4th DCA 1980)	5

OTHER AUTHORITIES CITED

<u>Florida Constitution</u> (1968 amended)	
Article V, Section 3 (b)(3)	5
Article X, Section 9	5

PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and for Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. The parties will be referred to as they appear before this Honorable Court.

STATEMENT OF CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts but adds that his presumptive sentence under the guidelines in effect at the time his crime was committed was any non-state prison sanction, or, at most, (if aggravated to the next higher cell) 12-30 months in prison.

SUMMARY OF ARGUMENT

Petitioner's cited cases do not demonstrate conflict, since they did not address the issue decided by the Fourth District Court of Appeal below. To the contrary, both the First and Fifth District Courts of Appeal have reached the same conclusion as the Fourth District Court of Appeal in their two recent decisions in which this issue was raised.

## ARGUMENT

THE DECISION BELOW DOES NOT CONFLICT WITH OTHER  
APPELLATE COURT DECISIONS. [RESTATED]

Petitioner, the State of Florida, apparently seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, Section 3(b)(3), Florida Constitution (1968 amended), which vests this Court with the power to review a district court decision which expressly or directly conflicts with a decision of another district court or of this Court on the same question of law. In its initial brief on jurisdiction, petitioner has failed to show any such conflict with respect to the decision below.

In its brief, petitioner relies on three cases: Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984), Saunders v. State, 9 F.L.W. 2378 (Fla. 1st DCA November 14, 1984), and Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984). In each of those cases, the trial court erred by using amendments to the guidelines which were not yet in effect at the time of sentencing. None of those cases involve the question resolved by the lower court at bar, namely: where the guidelines are amended between the date of the crime and the date of sentencing, and the amendment serves to increase the recommended punishment of the defendant, which guidelines apply? Randolph, Saunders, and Jackson do not even address the point, much less conflict with the lower court decision on the point. In fact, the First and Fifth District Courts of Appeal have joined the Fourth district Court of Appeal in deciding that the amendments in effect at the time of the offense are the ones which apply. Richardson v.

State, 10 F.L.W. 1712 (Fla 1st DCA July 10, 1985); Moore v. State, 470 So.2d 947 (Fla. 5th DCA 1985). Hence, there is no basis for this Court to exercise its jurisdiction in this cause on the basis of any alleged conflict with these cases.

Petitioner in its second point appears to be arguing the merits of the issue, an improper function of a jurisdictional brief requiring that this point be stricken.

In any event, Petitioner's reliance on Lee v. State, 294 So.2d 305 (Fla. 1974) is misplaced. In order for conflict of decision to be direct and express, Article V, Section 3 (b)(3), Florida Constitution (1980), the different courts must have reached a different result on the same or virtually identical facts, so that the later case has the effect of overruling the former case. Mancini v. State, 312 So.2d 732 (Fla. 1975); See Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

In Lee, this Court addressed an ex post facto argument directed against the capital punishment statute. Whether or not the same rationale applies to a change in the sentencing guidelines which results in a higher presumptive sentence is an entirely different legal issue which depends upon the operation of the specific statute and rule in effect. This is demonstrated in State v. Pizarro, 383 So.2d 762 (Fla. 4th DCA 1980), where the appellate court addressed an ex post facto argument relating to the Youthful Offender Act and held:

Florida law provides that the punishment in effect at the time of the crime controls the penalty at sentencing. In fact, retroactive application of an amended or repealed statute affecting prosecution or punishment is unconstitutional. Article X, Section 9, Florida



Constitution. Only procedural or remedial statutory changes may be applied to pending cases. Since the Youthful Offender Act alters the prescribed punishment for those persons meeting its requirements, it cannot apply to offenses committed prior to its effective date.

Consequently, Lee v. State, supra, states a rule applicable to that particular case, but Petitioner has entirely failed to show that the same rule is relevant to the context of the sentencing guidelines.

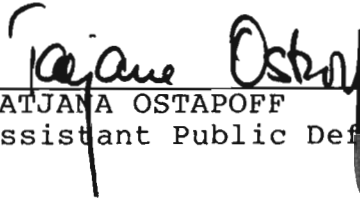
Petitioner has, in sum, suffered a complete lack of success in establishing a direct and express conflict sufficient to vest this Court with discretionary jurisdiction. Moreover, Petitioner has not shown any grounds for this Court to exercise its discretion and grant jurisdiction in this cause. To the contrary, the other district courts of appeal which have faced the issue involved in the present case have joined the Fourth District Court of Appeal in its conclusion. Richardson v. State, supra; Moore v. State, supra. Therefore, this Court should deny jurisdiction in the present case.

CONCLUSION

This is not a proper case for discretionary review by this Court.

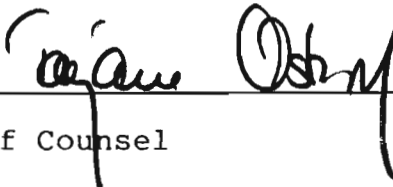
Respectfully submitted,

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\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to SARAH B. MAYER, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 22<sup>nd</sup> day of August, 1985.

  
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Of Counsel