IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 67,560

LUKE RICHARDSON,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
ASSISTANT PUBLIC DEFENDER
POST OFFICE BOX 671
TALLAHASSEE, FLORIDA 32302
(904) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	:	
Petitioner,	:	
v.	:	CASE NO. 67,560
LUKE RICHARDSON,	:	
Respondent.	:	
	:	

BRIEF OF RESPONDENT ON JURISDICTION

I PRELIMINARY STATEMENT

LUKE RICHARDSON was the defendant in the trial court, appellant before the District Court of Appeal, First District, and will be referred to as "respondent," "defendant," or by his proper name. Reference to petitioner's brief on jurisdiction will be by use of the symbol "PB" followed by the appropriate page number in parentheses. Reference to the appendix, containing a copy of the opinion issued below, will be by use of the symbol "A" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as related by petitioner (PB-2).

III SUMMARY OF ARGUMENT

As more fully developed in the argument section, infra, the district court's decision merely applied, and did not construe, the expost facto clause of the Federal Constitution. Moreover, the cases cited by petitioner as conflicting with the decision below in reality do not conflict, because they are factually and legally distinguishable from the case at bar. It is therefore respondent's position that this Court is without jurisdiction.

IV ARGUMENT

ISSUE PRESENTED

THE DECISION ISSUED BY THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN RESPONDENT'S CASE DID NOT "CONSTRUE" A PROVISION OF THE FEDERAL CONSTITUTION, NOR DOES THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICT ON THE SAME QUESTION OF LAW WITH MAY V. FLORIDA PAROLE AND PROBATION COMMISSION, 435 So.2d 834 (Fla. 1983); PRESTON V. STATE, 444 So.2d 939 (Fla. 1984); OR, MILLS V. STATE, 462 So.2d 1075 (Fla. 1985).

Petitioner advances two arguments in support of its proposition that this Court has jurisdiction. Petitioner first argues that this Court has jurisdiction pursuant to that portion of Article V, Section 3(b)(3), Florida Constitution, conferring jurisdiction where a "...decision of a district court of appeal...expressly construes a provision of the...federal constitution...." Secondly, petitioner seeks jurisdiction pursuant to that part of Article V, Section 3(b)(3), conferring jurisdiction where a "...decision of a district court of appeal...expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law." Respondent contends, for the reasons to follow, that both of petitioner's jurisdictional arguments are without merit.

This Court's decisions with respect to its jurisdiction resulting where a lower court construes the state or federal constitution, draw a distinction between decisions

merely applying a constitutional provision, in which event this Court is without jurisdiction, and decisions expressly construing a constitutional provision, in which event this Court has jurisdiction. See Dykman v. State, 294 So. 2d 633 (Fla. 1974) and Rojas v. State, 288 So.2d 234 (Fla. 1973).

Although the author of the opinion under review here saw fit to reference the federal constitutional provision prohibiting ex post facto laws, Article I, Sections 9 and 10, United States Constitution (A-3), it is nevertheless submitted that what the decision actually did was to merely apply well established ex post facto principles. More particularly, all the district court did was apply ex post facto principles as stated by this Court in Lee v. State, 294 So.2d 305 (Fla. 1974), and 11 year old decision, to the sentencing guidelines. Thus, the result below is nothing new, having been foreshadowed, if not legally predictable, by cases such as Lee. Accordingly, this Court is without jurisdiction on the ground that the decision below construed, as opposed to applied, the federal constitution.

Petitioner's second jurisdictional claim is that the decision below expressly and directly conflicts on the same issue of law with May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983); Preston v. State, 444 So.2d 939 (Fla. 1984); and, Mills v. State, 462 So.2d 1075

In the instant case, the district court's opinion makes it abundantly clear that the guidelines, as amended, called for a more stringent sentence than that applicable at the time appellant's offenses were committed. Because one of the key features of the guidelines is the abolishment of parole, it is obvious that, in the instant case, and unlike the situation in May, it was shown that the retrospectively applied rule disadvantaged respondent. In this manner, May is distinguishable and cannot form a predicate for this Court's jurisdiction.

In Preston v. State, supra, this Court held that application of the aggravating circumstance and the death penalty statute that the homicide was committed in a cold, calculated, and premeditated manner to an offense that occurred prior to its effective date did not violate ex post facto principles. It is clear that Preston has absolutely nothing to do with either the practical minimum or maximum sentence for first degree murder, this Court noting in its opinion that the new aggravating circumstance did not change the substance of the sentencing law to the detriment of capital offenders. Again, the instant case is distinguishable because, since application of the amended guidelines dramatically affected the length of respondent's sentence, the retroactive change of the sentencing law here did operate to respondent's detriment.

In Mills v. State, supra, it was held that a statute providing for retention of jurisdiction up to one-half of a sentence could be retrospectively applied to a crime occurring when the law provided for retention of up to one-third of a sentence, because the defendant stood subject to retention at the time of the offense, the legal consequences of retained jurisdiction had already attached, and the quantum of punishment had not increased.

Because the guidelines abolished parole, and also the need to retain jurisdiction, it is apparent that as a practical matter the quantum of punishment applicable to respondent had changed, because of the change in the sentencing guidelines. Mills, therefore, is distinguishable.

V CONCLUSION

For the foregoing reasons respondent contends he has established that this Court is without jurisdiction. Accordingly, respondent requests this Court to issue an order ruling that it is without jurisdiction.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

CARL S. McGINNES
Assistant Public Defender
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Mr. John Tiedemann, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Petitioner; and, a copy has been mailed to respondent, Mr. Luke Richardson, #389086, Post Office Box 158, Lowell, Florida, 32663, this 16th day of September, 1985.

Carl S. McGinnes

CARL S. McGINNES