IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 67560

LUKE RICHARDSON,

Respondent.
_____/

BRIEF OF PETITIONER ON JURISDICTION

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and the appellee below in Richardson v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1712, and the petitioner here, will be referred to as "the State." Luke Richardson, the criminal defendant and appellant below, and the respondent here, will be referred to as "respondent."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, a conformed copy of the decision under review is attached to this brief as an appendix.

No references to the record on appeal will be necessary.

All emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional questions are related in the opinion of the First District in Richardson v. State, which the State adopts as its statement of the case and facts. It need be noted here only that the State's timely motion for rehearing was denied on August 12, and that the State on August 27 timely filed a notice to invoke this Court's discretionary jurisdiction over the decision below. Copies of the legal documents attendant the denial of rehearing and the State's notice to invoke filed in the First District are attached to this brief as part of the appendix.

STATEMENT OF JURISDICTION

The State seeks to invoke this Court's discretionary jurisdiction over the decision below, Richardson v. State, 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)(ii) and (iv) on grounds that this decision expressly construes Article I, Sections 9 and 10 of the Constitution of the United States, and expressly and directly conflicts with decisions of this Court, May v. Florida Parole and Probation Commission, 435 So.2d 834 (Fla. 1983), Mills v. State, 462 So.2d 1075 (Fla. 1985), and Preston v. State, 444 So.2d 939 (Fla. 1984), on the same question of law.

SUMMARY OF ARGUMENT

Richardson construes the ex post facto provisions of the Constitution of the United States to preclude employment of the sentencing guidelines as they exist subsequent to their procedural July 1, 1984 amendment upon defendants whose offenses were committed prior to that date. Such construction conflicts with this Court's decisions in May, Mills and Preston on the legal question of whether ameliorative procedural changes effected subsequent to the commission of a defendant's offense, which may increase the actual length of his incarceration in the discretion of an autonomous authority but do not increase the quantum of punishment to which he is legislatively exposed, are violative of these constitutional provisions. These significant constitutional constructions and conflicts demand that this Court review Richardson.

ISSUE I

THE FIRST DISTRICT'S DECISION EXPRESSLY CONSTRUES PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES IN A SIGNIFICANT MANNER DEMANDING THIS COURT'S REVIEW.

ARGUMENT

The First District, in deciding in Richardson v. State that employment of the sentencing guidelines as amended effective July 1, 1984 upon defendants whose offenses were committed prior to that date constitutes an impermissible ex post facto application of the law, explicitly construed Article I, Sections 9 and 10 of the Constitution of the United States, id., 10 F.L.W. 1712.[1] This express construction must certainly be said to "explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision" in a manner so significant as to demand this Court's review, Ogle v. Pepin, 273 So.2d 391,393 (Fla. 1973), quoting Armstrong v. City of Tampa, 106 So.2d 407,409 (Fla. 1958), especially considering the recent plethora of other district court decisions reaching the same explicit or implicit conclusion, see e.g. Miller v. State, ___So.2d___(Fla. 4th DCA 1985), 10 F.L.W. 989, on motion for rehearing denied, 10 F.L.W. 1662,

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[1] These provisions read, in pertinent part, as follows:

ARTICLE I...

SECTION 9...No...ex post facto Law shall be passed....
SECTION 10...No State shall...pass any...ex post facto Law....

review pending (Fla. 1985), Case No. 67,276; Mott v. State, ___ So.2d___(Fla. 5th DCA 1985), 10 F.L.W. 1338, review pending (Fla. 1985), Case No. 67,278; Moore v. State, ___So.2d___(Fla. 5th DCA 1985), 10 F.L.W. 1338, review pending (Fla. 1985), Case No. 67,281; Beggs v. State, ___So.2d___(Fla. 1st DCA 1985), 10 F.L.W. 1729, review pending (Fla. 1985), Case No._____. Review is further compelled by the fact Richardson and all of these decisions are at variance with the February 1 and July 12 pronouncements of the Sentencing Guidelines Commission chaired by Justice McDonald of this Court that revisions to the guidelines are intended to be "procedural in nature" (see Appendix) which, as will be explained shortly, would not render their "retrospective" application violative of the aforecited ex post facto prohibitions.

ISSUE II

THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THREE OF THIS COURT'S DECISIONS ON THE SAME QUESTION OF LAW.

ARGUMENT

In Richardson v. State, 10 F.L.W. 1712, the First District crucially held that "application of the guidelines [as amended effective July 1, 1984] would be ex post facto and unconstitutional... [because] [t]he amended guidelines expose [respondent] to a greater penalty than the [unamended] guidelines in effect on the [pre-July 1] date of his [sale of cocaine and escape] offenses." The Court reached this holding notwithstanding the fact that respondent was actually "exposed" to the exact same maximum penalties for sale of cocaine and escape, fifteen years of imprisonment each, see §§893.13(1)(a), 944.40, and 775.082(3)(c), Fla.Stat; and indeed was even "exposed" to these same maximum penalties through the exact same procedural mechanism, a Fla.R.Crim.P. 3.701(b)(6) departure from the sentences recommended under the guidelines. The mere fact that respondent could have been ordered to serve a somewhat greater percentage of these maximum possible sentence under the amended guidelines without the trial judge exercising his discretion to depart evidently led the First District to decide that their "retrospective" application was illegal under the ex post facto provisions.

Thus postured, this decision effectively conflicts with the decisions of this Court in May v. Florida Parole and Probation Commission, Mills v. State, and Preston v. State on the legal question of whether ameliorative procedural changes effected

subsequent to the commission of a defendant's offense which may increase the actual length of his incarceration in the discretion of an autonomous authority, but do not increase the quantum of possible punishment to which he is legislatively exposed, are violative of constitutional protections against ex post facto application of the law. In May, this Court held that procedural changes in the rules governing a prisoner's presumptive parole release date effected subsequent to the commission of the offense for which he was jailed, which had the effect of postponing his actual date of release in the discretion of the Florida Parole and Probation Commission but did not increase the quantum of punishment to which he was legislatively exposed, were consonant with the ex post facto provisions.[2] In Mills v. State, this Court held that procedural changes in the law governing retention of jurisdiction over a

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[2] May was cited with approval in Paschal v. Wainwright, 738 F.2d 1173,1178 (11th Cir. 1984). It is interesting to note that the Eleventh Circuit, in Paschal, 738 F.2d 1173,1181, footnote 12, obliquely criticized the Third Circuit's decision in United States ex.rel. Forman v. McCall, 709 F.2d 852 (3rd Cir. 1983), upon which the First District relied to decide the instant case. The Eleventh Circuit's disdain for McCall was made explicit in its subsequent decision in Dufresne v. Baer, 744 F.2d 1543,1549, footnote 19 (11th Cir. 1984), wherein the court further held that amendments to federal parole guidelines (perhaps like amendments to the sentencing guidelines?) do not constitute criminal laws for purposes of ex post facto analysis.

It is also interesting to note that the First District, in Randolph v. State, 458 So.2d 64,65 (Fla. 1st DCA 1984), rejected a State argument similar to that tendered below by finding Paschal "distinguishable" without stating why.

prisoner's proposed release on parole effected subsequent to the commission of the offense for which he was convicted and sentenced, which could have the effect of postponing his actual date of release in the discretion of the trial judge but did not increase the quantum of punishment to which he was legislatively exposed, were also consistent with the ex post facto provisions. See also Preston v. State, wherein this Court held that ex post facto concepts were not affronted by a trial judge's finding as an aggravating factor in a capital case that the defendant committed murder in a cold, calculated and premeditated manner without pretense of moral or legal justification, even though the legislation authorizing such a finding in aggravation was not passed until after the defendant's crime was committed. See also Justus v. State, 438 So.2d 358 (Fla. 1983), cert. denied, ___U.S.___, 79 L.Ed.2d 726 (1984); Combs v. State, 403 So.2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982), and Smith v. State, 424 So.2d 726 (Fla. 1982), cert. denied, ___U.S.___, 77 L.Ed.2d 1379 (1983).

Respondent will doubtless argue that the First District's decision is consistent with this Court's decision in Lee v. State, 294 So.2d 305 (Fla. 1974), receded from on other grounds, Lee v. State, 340 So.2d 474 (Fla. 1976), that a defendant who committed first degree murder prior to the enactment of a statutory provision that those sentenced to life imprisonment for this offense could not be paroled for at least 25 years thereafter could not be required to serve this mandatory minimum sentence under the ex post facto provisions. Lee, however, is distinguishable from the decision below and this Court's decisions in May, Mills and Preston as involving mandatory increases in legislatively-

authorized punishment, cf also Weaver v. Graham, 450 U.S. 24 (1981), rather than discretionary changes in the manner in which a constant legislatively-authorized punishment may be imposed and/or served. Compare Dobbert v. Florida, 432 U.S. 282 (1977), rejecting the argument that a capital defendant whose crimes were committed when no statutory provision for a trial judge to override a jury recommendation of mercy existed could be sentenced to death in such an eventuality under the statutory scheme in place at the time the defendant was sentenced; see also Vaught v. State, 410 So.2d 147 (Fla. 1982).

CONCLUSION

WHEREFORE petitioner, the State of Florida, respectfully moves this Honorable Court to GRANT constitutional and conflict certiorari to review the decision below and then, following briefing on the merits, to REVERSE the decision of the First District with directions that the sentence imposed by the trial court be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of Petitioner on Jurisdiction has been forwarded to Mr. Carl S. McGinnes, Assistant Public Defender, P.O. Box 671, Tallahassee, Florida 32302 on this 27th day of August, 1985.

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