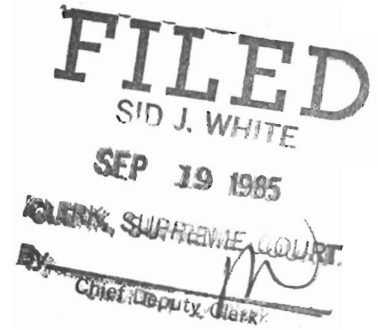


IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
JAMES DOUGHERTY,
Respondent.

CASE NO. 67,582



ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF RESPONDENT ON JURISDICTION

MICHAEL E. ALLEN
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :
Petitioner, :
v. : CASE NO. 67,582
JAMES DOUGHERTY, :
Respondent. :
_____ :

BRIEF OF RESPONDENT ON JURISDICTION

I PRELIMINARY STATEMENT

Respondent was the appellant in the district court and the defendant in the trial court. The parties will be referred to as they appear before this Court. No reference to the record will be necessary. Reference to petitioner's brief on jurisdiction will be by "PB" followed by the appropriate page number in parentheses. Respondent has filed a separate motion to strike a portion of petitioner's appendix and brief. Attached hereto as an appendix is the decision of the lower tribunal.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

III SUMMARY OF ARGUMENT

Respondent will argue in this brief that this Court has no jurisdiction to review this decision. This is because there is no conflict among the appellate courts of this state on the question of which version of the guidelines rule applies when the rule is amended after the date of the crime.

IV ARGUMENT

ISSUE PRESENTED

THIS COURT HAS NO JURISDICTION TO ACCEPT REVIEW SINCE ALL DISTRICT COURTS OF APPEAL HAVE HELD THAT THE DATE OF THE CRIME CONTROLS SENTENCING WHEN THE GUIDELINES ARE REVISED AFTER THE DATE OF THE CRIME.

Petitioner claims conflict with other sentencing cases in which an ex post facto claim was rejected (PB at 5-7). There is no conflict because these cases were not cited in the District Court's opinion in the instant case, and because they do not deal with the retroactive application of changes in the sentencing guidelines and thus deal with a different question of law.

As to the holding that the change in the guidelines should not be applied retroactively, petitioner's claim of conflict with Lee v. State, 294 So.2d 305 (Fla. 1974) must fail. Lee held that when the legislature amended its statute in 1972 to require a 25 year minimum mandatory as part of a life sentence for a capital crime, that amendment could not be applied retroactively to one whose crime was committed prior to the effective date of the amendment:

To expose this petitioner to a greater penalty than that which originally could be imposed at the time of the commission of the instant offense would be an ex post facto application and hence clearly unconstitutional.

Id. at 307. The non-death penalty for first degree murder was life before and after the amendment. But the additional penalty of 25 years without parole constituted an increase in the quantum of punishment, even though the maximum penalty remained the same.

There is no conflict with Lee, because when the legislature ratified the change in the guidelines rule, effective July 1, 1984, the quantum of punishment for one in respondent's position increased from non-state prison to 30 months - 3½ years even though the maximum penalty of 5 years remained the same.

The district courts of appeal are unanimous in holding that an adverse change in the guidelines rule cannot be applied retroactively. Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984); Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984); Tackett v. State, 458 So.2d 368 (Fla. 2d DCA 1984); Bell v. State, 459 So.2d 478 (Fla. 5th DCA 1984); Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984); Burke v. State, 460 So.2d 1022 (Fla. 2d DCA 1984); O'Malley v. State, 462 So.2d 868 (Fla. 4th DCA 1985); Frazier v. State, 463 So.2d 458 (Fla. 2d DCA 1985); Bibby v. State, 465 So.2d 670 (Fla. 4th DCA 1985); Garner v. State, 465 So.2d 671 (Fla. 4th DCA 1985); Joyce v. State, 466 So.2d 433 (Fla. 5th DCA 1985);

Stoute v. State, 467 So.2d 1096 (Fla. 4th DCA 1985); Fletcher v. State, 468 So.2d 428 (Fla. 4th DCA 1985); Oldfield v. State, 468 So.2d 446 (Fla. 1st DCA 1985); Taft v. State, 468 So.2d 472 (Fla. 4th DCA 1985); DuBose v. State, 468 So.2d 517 (Fla. 1st DCA 1985); Miller v. State, 468 So.2d 1018 (Fla. 4th DCA 1985); E.W. v. State, 469 So.2d 914 (Fla. 1st DCA 1985); Mott v. State, 469 So.2d 946 (Fla. 5th DCA 1985); Pisarski v. State, 471 So.2d 679 (Fla. 3d DCA 1985); Sueiro v. State, 471 So.2d 1317 (Fla. 3d DCA 1985); and Dewberry v. State, No. BC-430 (Fla. 1st DCA July 2, 1985).

Petitioner seeks to bootstrap a claim of conflict with the minutes of the sentencing guidelines commission meeting held on July 12, 1985 (PB at 5, note 1). Respondent has filed a separate motion to strike these minutes from petitioner's appendix and to strike footnote 1 from page 5 of petitioner's brief. Regardless of the outcome of that motion, petitioner cannot base conflict jurisdiction before this Court on anything other than prior decisions from this Court or the other district courts of appeal on the same question of law. Fla.R.App.P. 9.030(a)(2)(A)(iv) and Article 3 §3(b)(3), Florida Constitution.

Thus, because there is no proper basis for conflict jurisdiction, this Court must refuse to entertain this case.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, respondent requests this Court to deny discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Assistant Attorney General Patricia Connors, The Capitol, Tallahassee, Florida, 32302, this 19 day of September, 1985.



P. DOUGLAS BRINKMEYER
Assistant Public Defender