FILED
SID J. WHITE
AUG 31 1992
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT
STATE OF FLORIDA

DONALD RESHA,

Petitioner,

vs.

KATIE TUCKER,

Respondent.
_____/

CASE NO.: 80,228

On Petition to Review
a Decision of the First
District Court of Appeal

RESPONDENT'S BRIEF ON JURISDICTION

McCONNAUGHHAY, ROLAND, MAIDA,
CHERR, & McCRANIE, P.A.

BRIAN S. DUFFY
Florida Bar Number: 180007
Post Office Drawer 229
Tallahassee, Florida 32302
(904) 222-8121
Fax Number: (904)222-4359
Attorneys for respondent

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STATEMENT OF THE CASE AND FACTS

The decision of the First District Court of Appeal charts the progress of the case and recounts the facts essential to its holding. Petitioner's statement of the "facts" travels far beyond the face of the district court's decision, without citation to the record.

SUMMARY OF ARGUMENT

Petitioner seeks discretionary review of a decision of the First District Court of Appeal pursuant to Article V, section 3(b)(3), Florida Constitution.

A former Revenue Director does not constitute a "class" of state officers.

Trial court judges do not constitute a class of constitutional officers whenever a decision is issued that they must follow as stare decisis.

Application of constitutional provisions to facts before the court does not amount to an express construction of those constitutional provisions.

No case has been cited which expressly and directly conflicts with the decision of the First District.

Discretionary review is not warranted; the petition should be denied.

ARGUMENT

I. The District Court's Decision Did Not Expressly Affect a Class of Constitutional or State Officers

A. As to "Sealed Criminal Records Involving Official Misconduct."

Petitioner argues that the district court's decision expressly affects a class of constitutional or state officers with sealed criminal records involving official misconduct, warranting an exercise of discretionary jurisdiction under Article V, section 3, Florida Constitution. Resha v. Tucker, 600 So.2d 16 (Fla. 1st DCA 1992). The argument is inventive, but unsupportable.

First, assuming that a former executive director of the Department of Revenue is a "state officer", the decision did not affect a "class" of such state officers. Larson v. Harrison, 142 So.2d 727 (Fla. 1962) (holding that a decision affecting a single cabinet member did not affect a class of constitutional officers); Florida State Board of Health v. Lewis, 149 So.2d 41 (Fla. 1963) (explaining Larson).

Second, the decision below did not in some special way "affect" the interests of future Revenue Directors. Spradley v. State, 293 So.2d 697, 701 (Fla. 1974), is instructive:

> A decision which "affects a class of constitutional or state officers" must be one which does more than simply modify or construe or add to the case law which comprises much of the substantive and procedural law of this state. Such cases naturally affect all classes of constitutional or state officers, in that the members of these classes are bound by the law the same as any other citizen. To vest this Court with certiorari jurisdiction,

> a decision must directly and, in some way, exclusively affect the duties, powers, validity, formation, termination or regulation of a particular class of constitutional or state officers.

(emphasis by the Court).

Third, the decision below did not "expressly" affect a class of constitutional or state officers by its passing reference to the fact that respondent was once the Revenue Director. The decision below did not turn on that fact, even by implication. And, as observed in Padovano, Florida Appellate Practice, § 2.9, n. 8:

> [T]he insertion of the term "expressly" in Art. V § 3(b)(3) Fla. Const. (1980) makes it clear that the court does not have jurisdiction to review decisions which inherently or impliedly affect a class.

See, also, School Board of Pinellas County v. District Court of Appeal, 467 So.2d 985, 986 (Fla. 1985) (holding that "expressly" in the context of this jurisdictional clause "means within the written district court opinion").

B. As to "the Authority of Circuit Judges to Unseal Criminal Files."

Petitioner argues that the district court limited the authority of the class of circuit judges by overturning the sealing order of the circuit judge in this case. Circuit judges are indeed constitutional officers, Richardson v. State, 246 So.2d 771, 773 (Fla. 1971), but the decision below did not expressly affect the class of circuit judges. If petitioner were correct, the Supreme Court would have "jurisdiction to review nearly all cases, both civil and criminal, because nearly all decisions which review the

actions or rulings of trial judges impose upon other trial judges a requirement to follow the law as stated therein in similar situations." Spradley v. State, 293 So.2d 697, 701 (Fla. 1974).

11. The District Court's Decision Did Not Expressly Construe Provisions of the State Constitution.

A. The Decision Did Not Expressly Construe Article I, Section 21.

The district court decision did not expressly construe a provision of the state or federal constitution. Art. V, § 3(b)(3), Fla. Const. The district court applied the "access to courts" provision and concluded with little elaboration that petitioner's contention was "without authority or evidentiary support." An application of a constitutional provision to a set of facts does not amount to an express construction of that constitutional provision, especially for jurisdictional purposes. Armstrong v. City of Tampa, 106 So.2d 407, 409 (Fla. 1958), distinguishing "construe" from "apply" through its observation that the lower court must have undertaken "to explain, define or otherwise eliminate existing doubts arising from the language or terms of the constitutional provision" in order for there to be jurisdiction. *See*, also, Miami Herald Publishing Co. v. Brautigam, 121 So.2d 431, 432 (Fla. 1960) (declining to accept jurisdiction in a libel action even though consideration of constitutional provisions is inherent in such cases); Rojas v. State, 288 So.2d 234, 237 (Fla. 1974) (emphatically stating the point).

B. The Decision Did Not Expressly Construe Article I, Section 16(b).

Again, the district court's decision applied, but did not construe, the victim's rights provision on the basis of the facts presented.

III. The District Court's Decision Did Not Expressly and Directly Conflict With a Decision of Another District Court of Appeal or of the Supreme Court on the Same Question of Law.

A. As to the "Burden of Proof."

The district court's decision distinguished Barron v. Florida Freedom Newspapers, 531 So.2d 113 (Fla. 1988), on its facts. There was no conflict, express or direct, between Barron and the decision below, as the district court itself concluded. The district court concluded that petitioner bore the burden of proof, which he failed to carry "under any test." 600 So.2d at 18.

The decision below is consistent with Barron, which recognized that "closure of . . . records should occur only when necessary (a) to comply with established public policy set forth in . . . statutes, rules , . . ." 531 So.2d at 118. Section 943.058, Florida Statutes (1991), implemented by Rule 3.692, Florida Rules of Criminal Procedure, established the public policy warranting closure of the criminal records of respondent.' And consistent with Barron, noting that the party seeking closure bears the burden through the appellate review process, respondent carried her burden

'Respondent was not adjudicated guilty of the misdemeanor to which she had pled nolo contendere.

of proof at the time and in the proceedings when the records were closed.

Petitioner has not cited any Florida appellate decision which holds that after a party has carried her burden and persuaded the court to seal her criminal records, she must carry that burden again and again every time any stranger demands to see the records and that the stranger need only show up and ask to see the records.[2] While that may be what petitioner would like the law to be, since he has no hope of prevailing on this record otherwise, that is not the law.

There is no conflict within the four corners of the challenged decision and any other decision relied upon by petitioner. Hardee v. State, 534 So.2d 706, 708 (Fla. 1988) (citing White Constr. Co. v. Dupont, 455 So.2d 1026 (Fla. 1984)). There can be no conflict with another decision of the First District. State v. Walker, 593 So.2d 1049 (Fla. 1992).

Petitioner correctly notes that this Court has accepted Russell v. Times Publishing Co., 592 So.2d 808 (Fla. 5th DCA 1992), for review as Case No. 79,496. The Fifth District stated on the face of its decision that Mr. Russell "had obtained three orders sealing court files relating to arrests in Orange County." 592 So.2d at 808-09 (emphasis supplied). A prima facie violation of the records sealing statute (§ 943.058(2)(c)) on the face of the

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[2] Straying beyond the face of the district court's decision, we observe that petitioner did not even bother to show up, appearing through counsel who demanded to see the records with no evidentiary proffer whatsoever.

Fifth District's opinion presented virtually unlimited grounds for the Court to exercise jurisdiction. But the First District's decision under attack here made no reference to that portion of the Russell opinion because the earlier sealing proceedings here were expressly found by the First District as not having been tainted with fraud or perjury. Moreover, the First District did not cite Russell as controlling authority in a per curiam affirmance. Jollie v. State, 405 So.2d 418 (Fla. 1981). The accepting of review in Russell is of interest, but of no moment, to jurisdiction here.

B. As to the "Special Status of Public Officials."

Not only is there no conflict with Gonzalez v. State, 565 So.2d 410 (Fla. 3rd DCA 1990), that decision supports the original closure order here by recognizing the discretion expressly accorded to the trial judge by the record sealing statute (§ 943.058) when he initially decides to expunge the criminal records.

C. As to the "Passage-of-Time Criterion."

The district court's decision could not have expressly and directly rejected the "passage-of-time criterion" when there is no mention at all of any such consideration in the opinion.

Conclusion

The district court's decision does not expressly affect a "class" of state officers - Revenue Directors, The district court's decision does not expressly affect a class of

constitutional officers - trial judges duty bound to follow the law. The district court's decision does not expressly construe provisions of the state constitution by applying its provisions to the facts at hand. The district court's decision does not expressly and directly conflict with decisions of any other district court or of the supreme court on the same, or any, question of law.

Jurisdiction does not lie under Article V, section 3(b)(3), Florida Constitution, to review the decision of the First District Court of Appeal finding that petitioner made no showing under *any* test that would warrant the unsealing of previously and properly sealed criminal records.

Respectfully submitted,

MCCONNAUGHHAY, ROLAND, MAIDA, CHERR, & McCRANIE, P.A.

BRIAN S. DUFFY
Florida Bar Number: 180007
Post Office Drawer 229
Tallahassee, Florida 32302
(904) 222-8121
Fax Number: (904)222-4359
Attorneys for respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the Respondent's Brief on Jurisdiction has been furnished by U.S. Mail this 31st day of August, 1992, to:

RICHARD JOHNSON
Spriggs & Johnson
324 W. College Ave
Tallahassee, FL 32301

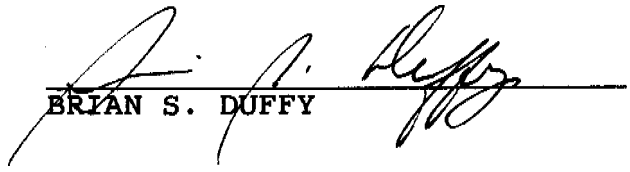
WILLIAM A. FRIEDLANDER
Attorney at Law
Lake Jackson Office Park
3045 Tower Court
Tallahassee, FL 32303

JAMES P. JUDKINS
1102 N. Gadsden
Tallahassee, FL 32303

NEILL G. WADE
State Attorney's Office
Leon County Courthouse
Tallahassee, FL 32301

MICHAEL RAMAGE
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302

HON. N. SANDERS SAULS
Circuit Judge
Leon County Courthouse
Tallahassee, FL 32301



BRIAN S. DUFFY