IN THE SUPREME COURT OF FLORIDA

RANDALL E. RITCHIE, :

Petitioner, :

v. : CASE NO. 85,358

STATE OF FLORIDA, :

Respondent. :

_____/

PETITIONER'S BRIEF ON THE MERITS

NANCY A. DANIELS
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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court, and will be referred to as petitioner, or Randall Ritchie, in this brief. The decision of the lower court, which has been reported as Ritchie v. State, 20 Fla. L. Weekly D508 (Fla. 1st DCA, February 21, 1995), is attached as an appendix. The one volume record on appeal which consists of pages 1-162 will be referred to as "R." A one volume transcript will be referred to as "T."

II. STATEMENT OF THE CASE AND FACTS

Petitioner was charged by amended information with premeditated first degree murder with a firearm of Timothy R. Ritchie, his adoptive father (R-3). He was tried by jury before T. Michael Jones, Circuit Judge. The jury returned a verdict of guilty on the lesser included offense of second degree murder with a firearm (R-91).

Randall Ritchie was 16 years old when the offense occurred, July 5, 1993. He was sentenced as an adult to 20 years in the state prison, followed by ten years probation (R-142). On appeal, petitioner argued his sentence was invalid because the trial court did not enter a written order as to the suitability of adult sanctions.

The First District Court of Appeal affirmed Ritchie's sentence, holding that the trial court was not required to comply with the sentencing criteria of section 39.059(7)(c), Florida Statutes (1993), regarding the suitability of adult sanctions, because Ritchie was convicted of a lesser offense than was charged, but one which was punishable by a maximum sentence of life. The district court followed the Second District Court's interpretation of the applicable statute set out in Tomlinson v. State, 589 So. 2d 362 (Fla. 2d DCA), review denied, 599 So. 2d 1281 (Fla. 1992).

The Court expressed reservations about the Second District's interpretation of the statute. The court was particularly concerned that the statute was ambiguous as to when the language in

the second portion of the subsection applies. The First District certified the following question of great importance:

> WHETHER A CHILD, CHARGED WITH AN OFFENSE PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, BUT FOUND GUILTY OF A LESSER INCLUDED OFFENSE, PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE, MUST BE SENTENCED AS AN ADULT WITHOUT THE PROCEDURAL SAFEGUARDS AFFORDED BY SECTION 39.059(7)(c), FLORIDA STATUTES?

Ritchie, at 508.

Notice to invoke jurisdiction was timely filed and this petition follows.

SUMMARY OF ARGUMENT

The petitioner, Randall Ritchie, was sentenced and is serving 20 years in an adult prison without any consideration of the appropriateness of the adult sanction for his crime of second degree murder. He was not convicted of the charge the state brought by information, premeditated murder. His jury convicted him of a lesser included offense. The trial court, therefore, should have made reviewable written findings that Ritchie's sentence as an adult was suitable.

A strict reading of the applicable statute, construed liberally to benefit the petitioner, will provide him with protections as a juvenile while reasonably and adequately protecting society, as the legislature intended.

This Court should answer the First District Court of Appeal's question in the negative. A child, found guilty of a lesser included offense, punishable by a term of years not exceeding life, may be sentenced as an adult only if the trial court adheres to the procedural safeguards in section 39.059 (7) (c), Florida Statutes, (1993).

ARGUMENT

ISSUE: WHEN A CHILD IS SENTENCED AS AN ADULT ON A CONVICTION OF A LESSER INCLUDED OFFENSE, WHICH IS PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, THE TRIAL COURT MUST ADHERE TO THE PROCEDURAL SAFEGUARDS.

The certified question must be answered in the negative. Petitioner will argue in this brief that the statute as written should not be construed to deprive Ritchie of the protections afforded juveniles convicted of lesser included offenses than those charged. This Court's historical view that juvenile statutes must be strictly construed cannot be ignored.

The issue here concerns ambiguity in certain language of the statute governing when and how a juvenile can be sentenced as an adult. Section 39.022(5)(c)(3), Florida Statutes (1993) provides, in pertinent part, as follows:

> 3. If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. If the child is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he was indicted as a part of the criminal episode, the court may sentence as follows:
> a. Pursuant to the provisions of s.39.059;
> b. Pursuant to the provisions of chapter 958, notwithstanding any other provisions of that chapter to the contrary; or
> c. As an adult, pursuant to the provisions of s. 39.059(7)(c).

There is no question that if a juvenile is indicted on a charge of first degree murder, the child must be tried as an

adult. And, if the child is convicted of first degree murder, the court must sentence the child as an adult. If the child is convicted of the lesser included charge of second degree murder, petitioner contends that the juvenile may be sentenced as an adult, but the trial court must comply with the procedural safeguards.

The statute is ambiguous. Is the child to be treated as an adult because the offense is punishable by life, as in the first clause, or must juvenile sanctions be considered because the child was convicted of a lesser included offense, as in the second clause?

The First District Court of Appeal expressed concern that the statute was unclear as to whether Ritchie should have been sentenced as an adult without the juvenile safeguards where he was convicted of a lesser included offense and not the indicted offense, the court stated:

> Ritchie was not found guilty of "the indictable offense" (first degree premeditated murder), but was found guilty of "a lesser included offense" (second degree murder). Given the strict construction generally accorded to penal statutes and the fact that the Second District did not expound on "the indictable offense" language cited above in Tomlinson, we find merit in Ritchie's contention that his sentence is controlled by the latter portion of the statute; therefore, the court was required to comply with section 39.059(7)(c) and make written findings to support the imposition of adult sanctions.

Ritchie, at 508.

In Tomlinson v. State, 589 So. 2d 362 (Fla. 2d DCA 1991),

review denied, 599 So. 2d 1281 (Fla. 1992) the court concluded that the child, convicted of second degree murder, a crime punishable by life imprisonment, was correctly sentenced as an adult without any consideration of the special protections afforded juveniles. That juvenile's sentencing was in accordance with the statute in effect at the time, which did not require the juvenile protections.

The court in Tomlinson, relied on this Court's statement in Duke v. State, 541 So. 2d 1170 (Fla. 1989): "no person may be sentenced as a youthful offender who has been found guilty of a capital or life felony." In that case, the child had to be sentenced as an adult without any juvenile protections. (The 1981 verson of the statute did not require the written findings.)

The Second District recently reviewed Tomlinson, in Kazakoff v. State, 642 So. 2d 596 (Fla. 2d DCA 1994). However, that case dealt with whether a juvenile transferred into the adult system by information and transfer order, should be entitled to the "juvenile sentencing benefits". The court held that the juvenile had to be resentenced with the proper written findings.

Tomlinson was also recently discussed in Washington v. State, 642 So. 2d 61 (Fla. 3d DCA 1994), where that court strictly construed the statute to mean that all children transferred into the adult system by "direct filed information" were to be afforded the procedural protections.

This Court should construe the applicable statute in favor of Randall Ritchie and answer the First District's question in

the negative. It is well accepted that penal statutes, must be strictly construed in favor of the accused. This Court outlined the rules of construction in Watson v. Stone, 4 So. 2d 700 (Fla. 1941), The Court stated:

> Rules for the construction of statutes are recognized by this Court. Penal laws should be strictly construed and those in favor of the accused should receive a liberal construction . . . In the construction of penal statutes, if there is any doubt as to its meaning, the Court should resolve the doubt in favor of the citizen. . . Any doubt or ambiguity in the provisions of criminal statutes are to be construed in favor of the citizen, life, and liberty. . . . Statutes prescribing punishment and penalties should not be extended further than their terms reasonably justify. . . If doubt exists as to the construction of a penal statute, it is the duty of the court to resolve such doubt in favor of the citizen and against the State. (Citations omitted.)

This Court recently stated in Perkins v. State, 576 So. 2d 1310 (Fla. 1991): "words and meanings beyond the literal language may not be entertained nor may vagueness become a reason for broadening a penal statute", when the statute is not sufficiently definite. Also see, Jones v. State, 356 So. 2d 4 (Fla. 4th DCA 1977)(ambiguous statutes must be "strictly construed, and when the language is susceptible of differing construction it must be construed most favorably to the accused"); Arthur v. State, 391 So.2d 338 (Fla. 4th DCA 1980)("criminal statutes are to be strictly construed and where a statute is susceptible of differing constructions, the construction most favorable to the accused should be adopted"); Amaker v. State, 492 So. 2d 419 (Fla. 1st DCA) review denied 497 So. 2d 1218 (Fla. 1986)("Penal

statutes are to be strictly construed in favor of person against whom penalty could be imposed").

In Section 775.021(1), Florida Statutes (1987), the legislature codified the rule of strict construction:

> The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to the accused.

Here, this Court should follow the rule of statutory construction, as stated in Hollingsworth v. State, 632 So. 2d 176 (Fla. 5th DCA 1994):

> Where the state seeks to impose a criminal statutory penalty against a criminal defendant and the statute is ambiguous and susceptible of two interpretations, one to the detriment of the defendant and one to the benefit of the defendant, the court is required to use the interpretation that is to the benefit of the defendant.

Hollingsworth at 177.

Under the statute at issue here, there is no question but that, if a juvenile is indicted on a charge of first degree murder, he or she must be tried as an adult. And, if the child is convicted of first degree murder, he or she must be sentenced as an adult. If the child is convicted of the lesser included charge of second degree murder, a juvenile in this situation may be sentenced as an adult only if the trial court complies with the procedural safeguards.

If the statute is susceptible to any other interpretation, it should be construed to the benefit of the child, Randall Evan Ritchie. Children are to be treated favorably by the state, as

the legislature intended.

The juvenile criminal justice system was created by the legislature. Article I, section 15(b), of the Florida Constitution, provides that the legislature may authorize the prosecution and sentencing of juveniles differently than adults. Greater protections have been given to juveniles; the legislature has "imposed a firm layer of protection". M.F. v. State, 583 So. 2d 1383 (Fla. 1991).

That portion of the statute requiring consideration of specific criteria at sentencing was enacted to ensure that children in adult criminal proceedings are treated differently than adults. Those protections must apply to Ritchie unless it is clear and definite that the legislature did not intend for them to apply to him. Section 39.059(7)(c) sets forth the criteria to be considered before imposing sanctions:

> 1. The seriousness of the offense to the community and whether the community would best be protected by juvenile, youthful offender, or adult sanctions.
> 2. Whether the offense was committed in an aggressive, violent, premeditated, or willful manner.
> 3. Whether the offense was against persons or against property, with greater weight being given to offenses against persons, especially if personal injury resulted.
> 4. The sophistication and maturity of the offender.
> 5. The record and previous history of the offender, including:
> a. Previous contacts with the Department of Corrections, the Department of Juvenile Justice, the Department of Health and Rehabilitative Services, other law enforcement agencies, and the courts.
> b. Prior periods of probation or community control.

c. Prior adjudications that the offender committed a delinquent act or violation of law as a child.
d. Prior commitments to the Department of Juvenile Justice, the Department of Health and Rehabilitative Services, or other facilities or institutions.
6. The prospects for adequate protection of the public and the likelihood of deterrence and reasonable rehabilitation of the offender if assigned to services and facilities of the Department of Juvenile Justice.
7. Whether the Department of Juvenile Justice has appropriate programs, facilities, and services immediately available.
8. Whether youthful offender or adult sanctions would provide more appropriate punishment and deterrence to further violations of law than the imposition of juvenile sanctions.

This Court, in State v. Cain, 381 So. 2d 1361 (Fla. 1980), held constitutional the statute allowing state attorneys to file direct informations against juveniles. The Court noted: "[E]ven when a juvenile is convicted in adult court he is still given special treatment as a juvenile." This Court has also recognized that adult programs may not be adequate to meet the needs of children and has noted that the legislature, in creating the juvenile justice system "has recognized that sentencing children as adults is generally not appropriate and should be avoided in most cases." Troutman v. State, 630 So. 2d 528 (Fla. 1993).

Furthermore, the appropriateness of the trial court's sentence could be adequately reviewed if written findings outlining the reasons for imposing adult sanctions were a part of the record. This right of sentence review is another "layer of protection" granted to juveniles by the legislature. State v. Rhoden, 448 So. 2d 1013, (Fla. 1984).

Randall Ritchie was sentenced to serve 20 years in an adult prison. He was sixteen years old when he committed the second degree murder. The jury found that the murder was not premeditated, he was found not guilty of the offense for which he was charged. The trial court should have considered the statutory criteria before determining if adult sanctions were appropriate for him.

A literal and strict interpretation of the statute would effectuate the legislative purpose of providing special protection to juveniles when being sentenced as adults. The decision to place children in the same system with hardened criminals cannot be taken lightly. This Court should answer the First District's question in the negative, a fair and reasonable result for Randall Ritchie.

CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court answer the certified question in the negative and hold that the statute requires the trial court to adhere to the procedural safeguards when a child is being sentenced as an adult on a conviction of a lesser included offense, and remand this case accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Douglas Gurnic, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, on this 2nd day of May, 1995.

SAUNDRA G. SWIFT

IN THE SUPREME COURT OF FLORIDA

RANDALL E. RITCHIE,

Appellant,

v. CASE NO. 85,358

STATE OF FLORIDA,

Appellee.
_____/

APPENDIX TO PETITIONER'S BRIEF ON THE MERITS

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IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

RANDALL EVAN RITCHIE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 94-1866

Opinion filed February 21, 1995.

An appeal from the Circuit Court for Escambia County. Michael Jones, Judge.

Spiro T. Kypreos, Pensacola, for Appellant.

Robert A. Butterworth, Attorney General, Douglas Gurnic, Assistant Attorney General, Office of the Attorney General, Tallahassee, for Appellee.

ERVIN, J.

Appellant, Randall Evan Ritchie, contends that his sentence for second degree murder is invalid, because the trial court failed to comply with the statutory requirements provided in section 39.059(7)(c), Florida Statutes (1993), for sentencing him as an adult. We hold that because appellant was convicted of a lesser offense to that charged, which is punishable by a maximum sentence

of life imprisonment, the trial court was not required to comply with the sentencing criteria of section 39.059(7)(c), pertaining to the child's suitability for the imposition of adult sanctions, and, therefore, we affirm Ritchie's sentence.

Ritchie was charged by amended information with the premeditated first degree murder of his adoptive father, which occurred on July 5, 1993, when Ritchie was 16 years old. He was thereafter tried as an adult, and the jury found him guilty of the lesser included offense of second degree murder with a firearm. Ritchie was sentenced as an adult to 20 years in prison, with a mandatory minimum of three years for use of a firearm, followed by ten years of probation. The court entered no oral findings or written order concerning the imposition of adult sanctions.

Section 39.022(5)(c), Florida Statutes (1993), was in effect at the time of the offense in this case. That statute provides, in pertinent part, as follows:

> 3. If the child is found to have committed the offense punishable by death or by life imprisonment, the child shall be sentenced as an adult. If the child is not found to have committed the indictable offense but is found to have committed a lesser included offense or any other offense for which he was indicted as a part of the criminal episode, the court may sentence as follows:
>
> a. Pursuant to the provisions of s. 39.059;
>
> b. Pursuant to the provisions of chapter 958 [as a youthful offender], notwithstanding any other provisions of that chapter to the contrary; or
>
> c. As an adult, pursuant to the provisions of s. 39.059(7)(c).

The determination of the issue on appeal turns on the proper interpretation of the language of subsection (5)(c)(3): whether appellant's sentence falls under the first portion of the above subsection, *i.e.*, he was convicted of an offense punishable by death or life imprisonment, for which he "shall be sentenced as an adult," or whether his sentence is controlled by the remaining portion thereof, that is, he was found not to have committed the indictable offense, but rather a lesser included offense thereof, for which he may be sentenced "[a]s an adult, pursuant to the provisions of s. 39.059(7)(c)."

Ritchie contends that his sentence for second degree murder is governed by the latter part of the statute as he was convicted of a lesser included offense; therefore, under the clearly stated language of the statute, the trial court was required to sentence him in accordance with the provisions of section 39.059(7)(c), Florida Statutes (1993), mandating that the court make written findings regarding the specific statutory criteria and give reasons for the imposition of adult sanctions.

The state, on the other hand, argues that Ritchie's sentence is governed by the first part of section 39.022(5)(c)(3), and even though he was not convicted of the indictable offense (first degree premeditated murder), he nevertheless was convicted of an offense punishable by life imprisonment (second degree murder) and

therefore was properly sentenced as an adult without the necessity of any written findings for the imposition of adult sanctions.

The state relies on Tomlinson v. State, 589 So. 2d 362 (Fla. 2d DCA 1991), review denied, 599 So. 2d 1281 (Fla. 1992), which involved a similar fact pattern wherein the defendant was indicted for first degree murder, but found guilty of the lesser included offense of second degree murder. That defendant was sentenced as an adult and complained on appeal that the court failed to comply with the procedural safeguards for imposing adult sanctions. The Second District rejected that argument, concluding from its examination of the statute that the legislature intended for all children convicted of offenses punishable by death or life imprisonment to be sentenced as adults without entitlement to the special provisions of chapter 39. Id. at 363 (citing Duke v. State, 541 So. 2d 1170 (Fla. 1989)).

Although Ritchie attempts to distinguish Tomlinson, because it dealt with the 1989 version of section 39.022(5)(c)(3), which did not reference section 39.059(7)(c),[1] a close reading of Tomlinson indicates that the defendant was sentenced pursuant to the first sentence of section 39.022(5)(c)(3), not the remainder, which refers to the court's "discretionary sentencing power." Thus,

[1]Prior to 1991, section 39.02(5)(c)(3)(c) provided the court could sentence the child "[a]s an adult," but in 1991 the statute was renumbered and amended to add the reference to section 39.059(7)(c), *i.e.*, "[a]s an adult, pursuant to the provisions of s. 39.059(7)(c)." See generally Tomlinson; § 39.02(5)(c)(3)(c) & 39.022(5)(c)(3)(c), Fla. Stat. (1989 & 1991).

Tomlinson is directly on point and supports affirmance. Moreover, we note that the result in Tomlinson is consistent with the following statement in Duke v. State, 541 So. 2d 1170, 1171 (Fla. 1989), observing that "[c]hildren of any age who are convicted of offenses punishable by death or life imprisonment *shall* be sentenced as adults. They shall not be sentenced as youthful offenders and are not subject to the provisions of section 39.111 [now 39.059(7)(c)]." (Emphasis in original.)

Although we elect to follow Tomlinson and affirm Ritchie's sentence, we have some doubt as to whether Tomlinson appropriately interpreted section 39.022(5)(c)(3). Specifically, we are concerned about certain language in the latter portion of section 39.022(5)(c)(3), namely, that the child was not found to have committed "the indictable offense but [was] found to have committed a lesser included offense." (Emphasis added.) Ritchie was not found guilty of "the indictable offense" (first degree premeditated murder), but was found guilty of "a lesser included offense" (second degree murder). Given the strict construction generally accorded to penal statutes and the fact that the Second District did not expound on "the indictable offense" language cited above in Tomlinson, we find merit in Ritchie's contention that his sentence is controlled by the latter portion of the statute; therefore, the court was required to comply with section 39.059(7)(c) and make written findings to support the imposition of adult sanctions.

Because we have difficulty in concluding that this penal statute is free from ambiguity, we certify the following question to the supreme court as one of great public importance:

> WHETHER A CHILD, CHARGED WITH AN OFFENSE PUNISHABLE BY DEATH OR LIFE IMPRISONMENT, BUT FOUND GUILTY OF A LESSER INCLUDED OFFENSE, PUNISHABLE BY A TERM OF YEARS NOT EXCEEDING LIFE, MUST BE SENTENCED AS AN ADULT WITHOUT THE PROCEDURAL SAFEGUARDS AFFORDED BY SECTION 39.059(7)(c), FLORIDA STATUTES?

AFFIRMED.

MINER, J. CONCURS. WOLF, J., SPECIALLY CONCURS WITH OPINION.

WOLF, J., specially concurring.

While I agree that the statute is not a model of clarity, the result we reach is the only logical way to interpret the statute. If we were to accept the arguments submitted by appellant, a person originally indicted for a more severe offense (first-degree murder) and later found guilty of a lesser-included offense (second-degree murder with a firearm), would be entitled to greater protection from being sentenced as an adult than a person who was originally indicted for and found guilty of second-degree murder with a firearm. The only difference in the two situations is that the grand jury would have found the first person to be more culpable. It does not make good common sense to provide the more culpable person with greater procedural protections prior to adult sentencing.