IN THE

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

EZEKIEL PETERSON,

Respondent.

CASE NO. 85,583

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the appellant in the Fourth District Court of Appeal and the defendant in the trial court. Petitioner was the appellee and prosecution in the lower courts. In this brief the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will denote respondent's appendix, which is a conformed copy of the opinion below.

STATEMENT OF THE CASE AND FACTS

Respondent pled no contest to one count of delivery of cocaine and one count of possession of cocaine. (A 1). At the sentencing hearing, held on April 21, 1994, the trial court relied upon a sentencing guideline scoresheet which included two felony convictions[1], under prior record, that were on appeal at the time sentence was imposed.[2] (A 2-3). The district court reversed the sentence "because the trial court erred by sentencing appellant based upon a guideline scoresheet which included convictions not yet final at the time of sentencing." (A 1). Addressing respondent's argument that the guideline scoresheet incorrectly included points for convictions which were on appeal, the Fourth District determined that "[t]he focus of the issue on appeal is whether convictions which are on appeal are final for purposes of scoring prior convictions." (A 2). Based upon the decision of this Court in Joyner v. State, 30 So. 2d 304 (Fla. 1947) superseded on other grounds as recognized in State v. Barnes, 595 So. 2d 22 (Fla. 1992), the district court concluded that they were not. (A 4-5).

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[1] One each for delivery and possession of cocaine.

[2] The convictions were affirmed on October 26, 1994.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal in Peterson v. State, 20 Fla. L. Weekly D589 (Fla. 4th DCA Mar. 8, 1995), relied upon by petitioner to invoke the conflict jurisdiction of this Court, does not "expressly and directly" conflict with the decision of the Third District in Ward v. State, 568 So. 2d 452 (Fla. 3rd DCA 1990) or the Second District in Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982). In addition, petitioner's contention that jurisdiction lies because the decision in Peterson "expressly affects" a class of constitutional or state officers is without merit. Accordingly, discretionary review should be denied.

ARGUMENT

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT WHERE THE DECISION OF THE DISTRICT COURT IN PETERSON v. STATE NEITHER EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL NOR EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

Petitioner seeks review of the decision reached by the Fourth District Court of Appeal in Peterson v. State, 20 Fla. L. Weekly D589 (Fla. 4th DCA Mar. 8th 1995) based upon two grounds. First, review is sought pursuant to the "express and direct" conflict provision of Article V, Section 3(b)(3) of the Florida Constitution. Second, petitioner asserts that the decision "expressly affects" a class of constitutional or state officers and, as a result, Article V, Section 3(b)(3) confers jurisdiction upon this Court on that ground as well. Respondent disagrees.

"Conflict" jurisdiction may be invoked when the decision of a district court announces a rule of law which conflicts with a rule of law previously announced by the Supreme Court or by another district court or the district court applies a rule of law to produce a different result in a case which involves facts substantially the same as those found in a decision of this Court or another district court. See Mancini v. State, 312 So. 2d 732, 733 (Fla. 1975). The test for accepting review under this provision is "not whether we [the Supreme Court] would necessarily have arrived at a conclusion different from that reached by the District Court. The constitutional standard is whether the decision of the District Court on its face collides with a prior decision of this Court, or another District Court, on the same point of law so as to create an inconsistency or conflict among precedents." Kincaid v. World Insurance Co., 157 So. 2d 517, 518 (Fla. 1963). The conflict must be of such magnitude "that if the later decision and the earlier decision were rendered by the same court the former would have the effect of overruling the latter." Kyle v. Kyle, 139 So. 2d 885, 887 (Fla. 1962). However, "[i]f the two cases are distinguishable in controlling factual elements or if the points of law settled by the

two cases are not the same, than no conflict can arise." Id. at 887.

Petitioner appears to argue that the decision rendered in Peterson is in conflict with Ward v. State, 568 So. 2d 452 (Fla. 3rd DCA 1990) and Barber v. State, 413 So. 2d 482 (Fla. 2d DCA 1982).[4] In Ward the appellant contended that his guideline scoresheet was improperly calculated because it included, under prior record, "offenses for which appellant was placed on probation without having been adjudicated guilty." Ward, 568 So. 2d at 454. The Third District ruled that the offenses were properly included. Id. Peterson did not concern the propriety of scoring a prior offense the adjudication of which was withheld, rather, it addressed the inclusion in a guideline scoresheet of a conviction, under prior record, that was on appeal at the time of sentencing, regardless of the status of adjudication. "[T]he points of law settled by the two cases are not the same." Kyle, 139 So. 2d at 887. Therefore, no conflict exists. The same can be said of Barber. There, the Second District faced the question "whether a jury verdict of guilty without an adjudication of guilt constitutes a conviction for purposes of impeachment." Barber, 413 So. 2d at 482. The defendant in Barber suffered an adverse jury verdict in one case which was used by the State, before he was adjudicated guilty by the sentencing court, to impeach him in a second case. The district court determined that the jury verdict of guilty without an adjudication of guilt constituted a conviction which could be used to impeach the defendant.[5] Id. 413 So. 2d at 484. Peterson did not define the term

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[4] Petitioner also cites Ascensio v. State, 497 So. 2d 640 (Fla. 1986) as supporting the existence of "conflict" jurisdiction. There, the district court applied a rule of law announced by this Court to a factual situation which, if the facts were as the district court understood them to be, would have been proper. However, because the facts were not as the district court understood them to be application of the rule of law was improper and created conflict. Review was granted to resolve the conflict created by the misapplication of law. The case at bar does not involve the misapplication of a rule of law due to a misunderstanding of the facts. Neither does it involve a misapplication of law by relying on a decision which involves a situation materially at variance with the one under review. See Gibson v. Avis Rent-a-Car Systems, Inc., 386 So. 2d 520 (Fla. 1980). Therefore, Ascensio is inapposite.

[5] In dicta the court noted that it is permissible to rely upon a conviction, which is under appeal, to impeach a witness. Barber, 413 So. 2d at 484. Section 90.610, Florida Statutes (1993) allows the use of a conviction on appeal for impeachment purposes. That statute also allows the defendant an opportunity to explain to the jury that the conviction is under appeal.

"conviction" for purposes of impeachment, rather, it defined that term in the context of sentencing enhancement. Again, the two cases settle different points of law. Accordingly, there is no conflict.

Petitioner contends that review should be granted based upon two cases, Ward and Barber, in which there is no discussion concerning the definition of the term "conviction" for sentencing enhancement purposes. Strangely enough, petitioner fails to cite to the decision of this Court in Joyner v. State, 30 So. 2d 304 (Fla. 1947), superseded on other grounds as recognized in State v. Barnes, 595 So. 2d 22 (Fla. 1992) wherein it was stated:

> It appears to be very well settled that before a prior conviction may be relied upon to enhance the punishment in a subsequent case such prior conviction must be final. If an appeal has been taken from a judgment of guilty in the trial court that conviction does not become final until the judgment of the lower court has been affirmed by the appellate court.

Id. at 305.

It is true that Joyner dealt with the term conviction, vis-a-vis, a habitual offender type statute while the case at bar deals with that term as it applies to prior record under the sentencing guidelines. However, both situations involve sentencing and the enhancement of a sentence based upon a prior conviction which is under appeal at the time of sentencing. Accordingly, the holding in Joyner is much more closely related to the issue at bar than are the holdings of either case cited by petitioner.

The decision of the Fourth District Court of Appeal neither announced a rule of law in conflict with a rule of law previously announced by the Supreme Court or another district court nor applied a rule of law to produce a different result in a case which involved facts substantially the same as those found in a decision of this Court or another district court. Mancini, 312 So. 2d at 733. To the contrary, the decision reached in Peterson is consistent with the rule of law announced in Joyner. Accordingly, this Court should not grant review based upon its "conflict" jurisdiction.

In order for review to be granted based upon a decision that expressly affects a class of

constitutional or state officers the decision "must expressly affect the class." P. Padovano, Florida Appellate Procedure § 2.9 (1988). "Thus, a decision which inherently affects a class of constitutional or state officers without expressing an intention to do so, is not subject to review by the Supreme Court." Id. A review of cases where jurisdiction was accepted helps to illustrate what is meant by expressly affecting the class.

In Hamilton v. State, 427 So. 2d 1137 (Fla. 5th DCA 1983) approved, 448 So. 2d 1007 (Fla. 1984) the district court interpreted Florida Rule of Criminal Procedure 3.216(a) to preclude trial judges from exercising discretion to deny requests for the appointment of confidential mental health experts if the three requisite criteria of the rule were met. Id. at 1138. The district court noted that its decision affected a class of state officers.[5] Id. In Brinker v. Ludlow, 379 So. 2d 999 (Fla. 3rd DCA 1980) approved, 403 So. 2d 969 (Fla. 1981) the Third District, reviewing the peremptory issuance of a writ of mandamus, construed Section 57.081, Florida Statutes (1977), so as not to require the Clerk of the Circuit Court to record a cost judgment for a person holding a certificate of insolvency without prepayment of the prescribed fee. This Court accepted jurisdiction on the ground that "the district court's decision expressly affects all court clerks, a class of constitutional officers, ..." Ludlow v. Brinker, 403 So. 2d 969, 970 (Fla. 1981). In State v. Jenny, 424 So. 2d 142 (Fla. 4th DCA 1983) rev'd, 447 So. 2d 1351 (Fla. 1984) this Court accepted jurisdiction over a case in which the Fourth District ruled that the immunity statute, Section 914.04, Florida Statutes (1979), was not self-executing. That opinion permitted the state attorney to prosecute an individual based upon testimony given to the grand jury under subpoena, unless the witness asserted his right to remain silent and was, thereafter, compelled to testify. Jenny, 424 So. 2d at 142. Finally, in Richardson v. State, 246 So. 2d 771, 773 (Fla. 1971), cited by petitioner, this Court accepted

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[5] The court also certified a question of great public importance. In accepting jurisdiction, this Court noted the certified question but failed to mention whether jurisdiction was accepted because the decision affected a class of state officers. State v. Hamilton, 448 So. 2d 1007, 1008 (Fla. 1984).

accepted jurisdiction over a decision of the Second District which reviewed the failure of the State to comply with the rules of discovery and the extent of the trial court's discretion to deny a motion for mistrial based upon that failure. In granting jurisdiction this Court stated:

> The decision below in the ultimate affects all prosecuting attorneys insofar as it interprets their duties in connection with compliance with Rules of Criminal Procedure promulgated by this Court, and all trial judges when called upon to interpret the effects of non-compliance by such prosecuting attorneys. Its pronouncement presents to this Court the duty to determine if the District Court of Appeal has properly interpreted the respective duties, powers and obligations of such officers under such Rules, and particularly Rule 1.220.

Id. 246 So. 2d at 773.

In each of the aforementioned cases the district court interpreted the duties, powers, or obligations of a constitutional or state officer as set forth by rule or statute. The interpretation rendered by the courts in those cases expressly affected the manner in which the officer performed his or her duty. Additionally, the court intended to render a decision affecting the class of constitutional or state officers. In contrast to those decisions are decisions which "inherently affect[] a class of constitutional or state officers without expressing an intention to do so, ..." P. Padovano, at § 2.9. All written opinions affect, in one way, shape, or form, the manner in which prosecutors or judges handle future cases. Petitioner's logic would result in all written opinions being reviewable by this Court. Surely, that is not what was intended by this provision of the Constitution.

In the case at bar the district court did not render a decision which interpreted the duties, powers, or obligations of either the state attorney or the trial judge. It may be that the decision rendered will have some affect on how state attorneys and judges handle future cases. That, however, is not sufficient to confer jurisdiction upon this Court. Accordingly, petitioner's reliance upon this ground is misplaced and should be rejected.

CONCLUSION

Because the decision of the district court neither expressly and directly conflicts with one of this Court or another district court nor expressly affects a class of constitutional or state officers, this Court should deny the Petition for Discretionary Review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to EDWARD L. GILES, Assistant Attorney General, 1655 Palm Beach Lakes Blvd, Third Street, West Palm Beach, Florida 33401 by courier this 1st day of MAY, 1995.

Attorney for Ezekiel Peterson