ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO: 88,145

KISON EVANS,

Respondent
_____/

On Notice to Invoke Discretionary
Jurisdiction to Review a Decision of the
Fifth District Court of Appeal

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent pled nolo contendere to one count of armed robbery, in violation of §812.13 (2) (a), a first degree felony punishable by life. Respondent was originally placed on probation. Thereafter, he was apprehended while trying to purchase cocaine. On October 28, 1992, after finding he violated his probation, the trial court sentenced him to seventeen years in the Department of Corrections followed by life probation. This sentence was amended to seventeen years followed by five years probation.

Respondent submitted a Motion for Post Conviction Relief to the Circuit Court of the Fifth Judicial Circuit in and for Lake County on July 9, 1995. On August 9, 1995, the Circuit Court issued an order denying the motion, nunc pro tunc to August 7, 1995. On August 21, 1995, Respondent filed a motion for rehearing. On September 7, 1995, this motion was also denied. This was received by Respondent on October 18, 1995. On October 24, 1995, the Respondent submitted his Notice of Appeal.

The Fifth District ordered a response to this Notice on January 16, 1996. Subsequent to the State's response, the Fifth District found that the original sentence was illegal. Although it did note that §39.059(7)(d) was amended, it stated that since

the amendment did not take effect until October 1, 1994, it would **not** apply to Respondent because he had already committed the offense,

On April 1, 1996, the State filed a Motion for Rehearing On April 22, 1996, it was denied. The instant petition follows.

SUMMARY OF THE ARGUMENT

This court has jurisdiction pursuant to Article V, § 3(b)(3) to review cases which expressly and directly conflict with opinions of this Court or other district courts of appeal on the same question of law. This court must exercise its jurisdiction and accept the State's case for review because the Fifth District's opinion expressly and directly conflicts with the First District's decision on the issue. This case presents an important issue as to whether the amendment to §39.059(7)(d) was procedural in nature and should be applied retroactively.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THE FIRST DISTRICT'S DECISION ON WHETHER THE CHANGE TO FLORIDA STATUTE 39.059(7)(d) WAS PROCEDURAL IN NATURE.

As to the issue of whether the amendment to §39.059(7)(d) was procedural in nature, the Fifth District's opinion conflicts with the opinion of the First District Court. This Court should therefore accept jurisdiction.

In its opinion, the Fifth District misconstrued the law and the record when it found that the amendment to §39.059(7)(d) did not apply to Respondent merely because it did not take effect until after he had committed the offense. It found that because the amendment did not take effect until October I, 1994, and because this change was well after Respondent's 1992 sentencing date, that the amendment did not apply to him.

The First District addressed the question of whether §39.059(7)(d) was a procedural amendment to be properly applied retroactively. It held that the amendment to §39.059(7)(d) was a procedural change. Thomas v. State, 662 So. 2d 1334 (Fla. 1st DCA 1995). Specifically, it found: '[al lthough the amendment to section 39.059(7)(d) will affect the depth of review of adult

sanctions imposed under that statute, its application did not change appellant's punishment in any way, thus it does not violate the prohibition against retroactive laws." Thomas at 1336. Given that §39.059(7)(d) was applied retroactively in Thomas, it should also be applied retroactively in the instant case.

In Reaves v. State, 485 So. 2d 829 (Fla. 1986), this court explained:

> Conflict between decisions must be direct, i.e., it must appear within the four corners of the majority decision. Neither a dissenting opinion nor the record itself can be used to establish jurisdiction.

Further, this Court has held that inherent or so-called "implied" conflict may not serve as a basis for this Court's jurisdiction. Jones v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986). This court is in direct conflict with the First District in that it held that the amendment to §39.059(7)(d) was not retroactive.

This case presents an important question as to whether the amendment to §39.059(7)(d) was procedural in nature and whether it should be applied retroactively. It is additionally clear that the Fifth District Court's opinion is in express and direct conflict with the holding of the First District Court of Appeal.

Thus, review should be granted so as to clarify this issue for all courts,

Conclusion

Based upon the foregoing argument and authority, petitioner respectfully requests this honorable court to grant the State's petition for review and order briefing on the merits.

Respectfully submitted
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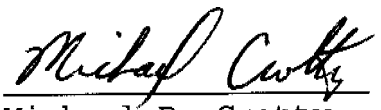
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing answer brief has been furnished by U.S. Mail to Kison Evans, Marion Correctional Institution, P. 0. Box 158-(861), Lowell, FL, 32663, this 3rd day of June, 1996.



Michael D. Crotty
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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v. CASE NO: _____

KISON EVANS,

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APPENDIX TO
PETITIONE ' RIEF ON JURISDICTION

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95-3303

other

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 1996

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

KISON EVANS,

Appellant,

v.

CASE NO. 95-3303

STATE OF FLORIDA,

Appellee.

Opinion filed March 15, 1996

3.850 Appeal from the Circuit Court for Lake County, Jerry T. Lockett, Judge.

Kison Evans, Lowell, Pro se.

Robert A. Butterworth, Attorney General, Tallahassee, and Michael D. Crotty, Assistant Attorney General, Daytona Beach, for Appellee.

HARRIS, J.

Evans appeals the summary denial of his motion for post conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure. We find that one of the grounds for post-conviction relief is legally sufficient.

Evans, who was a minor at the time he committed his criminal offense, was sentenced as an adult. At the time he was sentenced, a juvenile could only receive adult sanctions if specific findings mandated by statute were reduced to writing. See section 39.059(7)(d), Fla. Stat. (1993). Evans alleged that the court failed to enter written findings

as to the suitability of adult sanctions before imposing sentence. Our court previously held that this allegation is legally sufficient and precludes summary denial of a Rule 3.850 motion. See *Ramos v.* State, 660 So. 2d 817 (Fla. 5th DCA 1995); Wood v. *State, 655* So. 2d 1155 (Fla. 5th DCA 1995). See *a/so Davis v.* State, 661 So. 2d 1261 (Fla. 4th DCA 1995). If there is a complete absence of written findings, there is no authority for sentencing a juvenile as an adult and the resulting sentence is illegal.

The state correctly notes that the legislature recently amended section 39.059(7), Florida Statutes (1994), and a court is no longer required to set forth specific findings or enumerate statutory criteria as a basis for its decision to impose adult sanctions on a juvenile. *See* Ch. 94-209, section 51, Laws of Fla. However, this amendment did not take effect until October 1, 1994, long after Evans committed his offense as a juvenile and was sentenced as an adult.' This amendment, then, would not apply to Evans. *Cf. Hangen* v. State, 651 So. 2d 706 (Fla. 5th DCA 1995); *Shaw v. State,* 645 So. 2d 68 (Fla. 4th DCA 1994).

An illegal sentence may be raised at any time. As the trial judge did not conclusively refute this claim of illegal sentence, the order denying post conviction relief is reversed, and the case remanded for the court to conduct a hearing or attach documents showing that written findings were entered or that Evans knowingly waived his statutory right to written findings. If the proper sentencing procedure was not followed, the court on resentencing could reimpose adult sanctions after making the necessary written findings.

'Evanswasplacedonprobationin1991andwassentencedtoincarcerationfollowinga revocation of probation in 1992.

See Troutman v. State, 630 So. 2d *528* (Fla. 1993); *Hannah v. state, 644 So.* 2d 141 (Fla. 2d DCA 1994).

REVERSED AND REMANDED.

SHARP, W., and ANTOON, JJ., concur.