

IN THE SUPREME COURT OF FLORIDA

WILLIAM E. TEAL,

Petitioner,

v.

CASE NO. SC04-102

STATE OF FLORIDA,

Respondent.

_____ /

SUPPLEMENTAL MERITS BRIEF OF RESPONDENT

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TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
 THE COURT SHOULD DECLINE TO EXERCISE JURIS- DICTION IN THE INSTANT CASE SINCE THE RECENT DECISION IN RICHARDSON SETTLED THE ISSUE AND THERE IS NO LONGER A DIRECT AND EXPRESS CONFLICT. 	
CONCLUSION	8
CERTIFICATE OF SERVICE	9
CERTIFICATE OF COMPLIANCE	9

TABLE OF CITATIONS

	<u>PAGE NO.</u>
<i>McCall v. State</i> , 2005 Fla. LEXIS 2667, Case No. SC04-136 (Fla., Dec. 23, 2005)	2, 4
<i>McCall v. State</i> , 862 So. 2d 807 (Fla. 2d DCA 2003)	3
<i>Richardson v. State</i> , 884 So. 2d 950 (Fla. 4 th DCA 2004)	3
<i>State v. Richardson</i> , 915 So. 2d 86, 30 Fla. L. Weekly S616, 2005 Fla. LEXIS 1775 (Fla. 2005)	4, 5, 6

OTHER AUTHORITIES

Section 775.084 (5), Florida Statutes (1995)	3
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STATEMENT OF THE CASE AND FACTS

On December 12, 2005 the Court entered its order stating that it continues to postpone its decision on jurisdiction, but, sua sponte, ordered supplemental briefing limited solely to the impact, if any, of the Court's recent decision in *State v. Richardson*, 915 So. 2d 86 (Fla. 2005)¹. The petitioner's supplemental initial brief was served January 16, 2006. On January 20, 2006 the Court accepted the petitioner's brief as timely filed.

¹30 Fla. L. Weekly S616 (Fla. 2005), 2005 Fla. LEXIS 1775.

SUMMARY OF THE ARGUMENT

The Court should decline to exercise jurisdiction in the instant case. The Court's recent decision in *State v. Richardson, infra*, has resolved the question whether the sanction of probation is a "sentence" for purposes of the habitual offender statute. The definition of sentence approved in *Richardson* also encompasses the sanction of community control in the instant case. In *McCall v. State, infra*, the Court recently issued an order vacating its stay order, declining to exercise jurisdiction, and denying discretionary review. The Court should also decline to exercise jurisdiction in the instant case. There is no longer conflict between the district courts of appeal.

ARGUMENT

THE COURT SHOULD DECLINE TO EXERCISE JURISDICTION IN THE INSTANT CASE SINCE THE RECENT DECISION IN *RICHARDSON* SETTLED THE ISSUE AND THERE IS NO LONGER A DIRECT AND EXPRESS CONFLICT.

The instant case addresses the sequential conviction requirement of section 775.084 (5), Florida Statutes (1995), specifically, whether a sentence of probation or community control, a subsequent revocation and reimposition of community control, and the imposing of a prison sentence for the violation of probation or community control at the same time as the offense being habitualized satisfies the sequential sentencing requirement.

In *McCall v. State*, 862 So. 2d 807 (Fla. 2d DCA 2003) the defendant had asserted that his probationary sanction in case no. 91-2765 was not in reality a sentence. He claimed that he was first sentenced in conjunction with new offenses in case nos. 91-3206 and 91-3236 such that his habitual offender sentence for burglary and resisting arrest without violence violated the separate sentencing requirement of the habitual offender statute. The Second District disagreed: ~~A~~We find that a sentence, as referred to in section 775.084, includes the sanction of probation.® The court certified conflict with the Fourth District's opinion in *Richardson v. State*, 884 So. 2d 950

(Fla. 4th DCA 2004) (granting rehearing to address state's argument and to certify conflict with *McCall*). 862 So. 2d at 807.

In the instant case, the petitioner had argued below that it was improper to use his 1992 conviction for robbery as a predicate offense for habitualization since he was placed on community control which he contended was not a sentence. Teal claimed he was first sentenced in the robbery case on the same day as the habitualized offenses and the robbery offense did not meet the sequential sentencing requirement of the habitual offender statute. The Second District disagreed, finding the analysis applied in *McCall* applied to Teal's sanction of community control such that his 1992 conviction and placement on community control in case no. 91-20507 could properly serve as a predicate for habitualization. As in *McCall*, the Second District certified conflict with *Richardson*.

On December 23, 2005 the Court, in *McCall v. State*, 2005 Fla. LEXIS 2667, Case No. SC04-136 (Fla., Dec. 23, 2005), vacated its stay order of September 13, 2004, declined to exercise jurisdiction, and denied the petition for discretionary review, citing the recent decision in *State v. Richardson*, 915 So. 2d 86 (Fla. 2005). In *Richardson*, the Court quashed the Fourth District's decision and approved the Second

District's decision in *McCall*:

We agree with the Second District in *McCall* that a sentence, as referred to in section 775.084, includes the sanction of probation. 862 So. 2d at 808. This is consistent with the philosophy as stated in *Barnes* that an individual who has been convicted of one offense and who with knowledge of that conviction subsequently commits another offense has rejected his or her opportunity to reform and is subject to being sentenced as a habitual offender.

Florida Rule of Criminal Procedure 3.700(a) defines a sentence as the pronouncement by the court of the penalty imposed on a defendant for the offense of which the defendant has been adjudged guilty. This rule definition encompasses probation. We find that the rule provides the definition of a sentence to be used under section 775.084(5).

Richardson, 915 So. 2d at _____. Logically, the definition of sentence as defined by rule 3.700(a) would also include the sanction of community control in the instant case.

The state submits that, in light of *Richardson*, there is no longer a direct and express conflict between the Second District's *Teal* decision and the Fourth District's *Richardson* decision. The Court should decline to exercise jurisdiction and deny discretionary review. The petitioner attempts to distinguish the facts of *Richardson* from those of the instant case, but the distinction makes no difference. In *Richardson*, the predicate offenses were sentenced on the same date, i.e.,

the violation of probation and new law violation. In *Teal*, the defendant did not claim he was sentenced on the same date as the prior predicate offense, kidnapping.

He claimed he was first sentenced on the prior robbery case with the cases for which he was habitualized. The question in each case, however, is identical and that is whether a sanction of probation or community control qualifies as a **Asentence@** for purposes of the habitual offender statute. This Court has settled the issue in *Richardson*. This Court, as well as the district courts, are now unanimous. *Richardson*, 915 So. 2d at 86, ___ n.2.

The Court should decline to exercise jurisdiction in the absence of conflict.

CONCLUSION

The Honorable Court should decline to exercise jurisdiction in the instant case in the absence of conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Heather Mary Ann Gray, Heather M. Gray, P.A., P.O. Box 2668, Riverview, Florida 33568-2668 on this ____ day of January, 2006.

CERTIFICATE OF COMPLIANCE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

OF COUNSEL FOR RESPONDENT