

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
AUTHORITIES CITED	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND OF THE FACTS	2
SUMMARY OF ARGUMENT	3
ARGUMENT	
THE DECISION BELOW DOES NOT CONFLICT WITH THE APPELLATE COURT DECISIONS [RESTATED]	4
CONCLUSION	7
CERTIFICATE OF SERVICE	7

PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts. In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent agrees with the statements contained in petitioner's initial brief on jurisdiction.

SUMMARY OF ARGUMENT

The lower court decision conflicts with no other appellate court decision.

ARGUMENT

THE DECISION BELOW DOES NOT CONFLICT WITH OTHER
APPELLATE COURT DECISIONS. [RESTATED]

Petitioner, the State of Florida, seeks to invoke the discretionary jurisdiction of this Court pursuant to Article V, Section 3(b)(3), Florida Constitution (1968 amended), which vests this Court with the power to review a district court decision which expressly or directly conflicts with a decision of another district court or of this Court on the same question of law. In its initial brief on jurisdiction, petitioner has failed to show any such conflict with respect to the decision below.

In its brief, petitioner relies on four cases: Randolph v. State, 458 So.2d 64 (Fla. 1st DCA 1984), Saunders v. State, 459 So.2d 1119 (Fla. 1st DCA 1984), Jackson v. State, 454 So.2d 691 (Fla. 1st DCA 1984) and Dubose v. State, 10 FLW 1181 (Fla. 1st DCA May 13, 1985). In each of those cases, the trial court erred by using amendments to the guidelines which were not yet in effect at the time of sentencing. None of those cases involve the question resolved by the lower court at bar, namely: where the guidelines are amended between the date of the crime and the date of sentencing, and the amendment serves to increase the recommended punishment of the defendant, which guidelines apply? Randolph, Saunders, Dubose and Jackson do not even address the point, much less conflict with the lower court decision on the point. Hence, there is no basis for this Court to exercise its jurisdiction in this cause on the basis of any alleged conflict with those cases.

Petitioner in its second point seems to argue the merits of the issue, an improper function of a jurisdictional brief requiring that this point be stricken. Petitioner's argument is based on its attempt to read between the lines of the lower court decision. Petitioner's characterization of appellant's argument in the lower court is irrelevant and somewhat misleading, insofar as petitioner states: "In his appeal to the Fourth District, the Respondent argued that application of the amended guidelines to his sentence was a prohibited ex post facto application." The ex post facto argument was not the only argument which appellant raised in the lower court, as is reflected by the lower court's reliance on Arnold v. State, 429 So.2d 819 (Fla. 2nd DCA 1983), which is not an ex post facto clause case.

In any event, Petitioner's reliance on Lee v. State, 294 So.2d 305 (Fla. 1974) is misplaced. In order for a conflict of decision to be direct and express under Article V, Section 3(b)(3), Florida Constitution (1980), the different courts must have reached different results on the same or virtually identical facts, so that the later case has the effect of overruling the former case. Mancini v. State, 312 So.2d 732 (Fla. 1975); see Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

In Lee, this Court addressed an ex post facto argument directed against the capital punishment statute. Whether or not the same rationale applies to a change in the sentencing guidelines which results in a higher presumptive sentence is an entirely different legal issue which depends upon the operation

of the specific statute and rule in effect. This is demonstrated in State v. Pizairo, 383 So.2d 762 (Fla. 4th DCA 1980), where the appellate court addressed a similar argument relating to the Youthful Offender Act and held:

Florida law provides that the punishment in effect at the time of the crime controls the penalty at sentencing. In fact, retroactive application of an amended or repealed statute affecting prosecution or punishment is unconstitutional. Article X, Section 9, Florida Constitution. Only procedural or remedial statutory changes may be applied to pending cases. Since the Youthful Offender Act alters the prescribed punishment for those persons meeting its requirements, it cannot apply to offenses committed prior to its effective date.

Consequently, Lee, supra, states a rule applicable to that particular case, but Petitioner has entirely failed to show that the same rule is relevant in the context of the sentencing guidelines. Petitioner has, in sum, suffered a complete lack of success in establishing a direct and express conflict sufficient to vest this Court with discretionary jurisdiction. Moreover, petitioner has not shown any grounds for this Court to exercise its discretion and grant jurisdiction in this cause. To the contrary, the only other district court of appeal which has expressed itself on the issue involved in the present case has joined the Fourth District Court of Appeal in its conclusion, albeit on slightly different grounds. Mott v. State, 10 FLW 1338 (Fla. 5th DCA May 30, 1985).

CONCLUSION

This is not an appropriate case for the exercise of this Court's discretionary jurisdiction.

Respectfully Submitted,

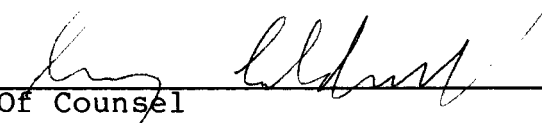
RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150



GARY CALDWELL
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida, 33401 this 11th day of July, 1985.



Of Counsel