

7-14-86

IN THE SUPREME COURT  
STATE OF FLORIDA

FILED  
SUPREME COURT

JUN 20 1986

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

STATE OF FLORIDA,  
Petitioner,

v.

CASE NO. 68,945

PHILLIP LEE MOULTRIE,  
Respondent.

\_\_\_\_\_ /

APPLICATION FOR DISCRETIONARY REVIEW OF THE  
DISTRICT COURT OF APPEAL, FIFTH DISTRICT OF  
FLORIDA

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

PAGE:

TABLE OF CITATIONS . . . . .	ii
STATEMENT OF THE CASE AND FACTS . . . . .	1-2
SUMMARY OF ARGUMENT . . . . .	3
POINT ON APPEAL <u>ARGUMENT:</u>	
WHETHER THE PRESENT DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH THOSE CASES HOLDING THAT IT IS NOT ERROR FOR A TRIAL JUDGE TO CONSIDER HABITUAL OFFENDER STATUS AS A REASON FOR DEPARTURE UNDER THE GUIDE- LINES . . . . .	4-5
CONCLUSION . . . . .	6
DECISION - FIFTH DISTRICT COURT OF APPEAL . . . . .	A
CERTIFICATE OF SERVICE . . . . .	7

TABLE OF CITATIONS

CASE:

PAGE:

<u>Ferguson v. State,</u> 480 So.2d 924 (Fla. 2d DCA 1986) . . . . .	4
<u>Fleming v. State,</u> 480 So.2d 715 (Fla. 2d DCA 1986) . . . . .	4
<u>Hendrix v. State,</u> 475 So.2d 1218 (Fla. 1985) . . . . .	4
<u>Payne v. State,</u> 480 So.2d 202 (Fla. 1st DCA 1985) . . . . .	5
<u>Shull v. State,</u> 481 So.2d 1294 (Fla. 1st DCA 1986) . . . . .	5
<u>State v. Jackson,</u> 478 So.2d 1054 (Fla. 1985) . . . . .	2
<u>Vicknair v. State,</u> 483 So.2d 896 (Fla. 5th DCA 1986) . . . . .	4

OTHER AUTHORITIES:

§ 775.084, Fla. Stat. (1985) . . . . .	1
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STATEMENT OF THE CASE AND FACTS

Petitioner, the State of Florida, seeks to have reviewed a decision of the District Court of Appeal, Fifth District, filed April 17, 1986. Petition for rehearing was denied on May 22, 1986.

The petitioner was the prosecution below and the appellee before the district court of appeal. The respondent, Phillip Lee Moultrie, was the original defendant in the trial forum and was the appellant before the district court of appeal. This was an appeal by the respondent from a final judgment and sentence entered by the Circuit Court in and for Orange County, Florida, in a criminal prosecution for grand theft, by virtue of which the respondent was sentenced as an habitual offender to ten years in prison with 92 days credit. The District Court of Appeal, Fifth District, affirmed the conviction, but vacated the sentence, and remanded the cause for resentencing.

In this brief the parties will be referred to by their names and by the positions they occupy before this court. The following symbol will be used for reference:

"A" for "Appendix" to petitioner's Brief.

This is a sentencing guidelines case. The departure sentence in this case is based on the adjudication of the defendant as an habitual felony offender under section 775.084, Florida Statutes. The Fifth District Court of Appeal found the adjudication of habitual felony offender status to be sufficient under the above statute, but that it was not based on reasons which, independent of the defendant's criminal record, justified a departure sentence.

The court, therefore, found the departure sentence to be indirectly and in substance, inconsistent with Hendrix v. State, 475 So.2d 1218 (Fla. 1985), which disapproves a departure sentence based on the defendant's criminal record, which has been factored into the recommended guidelines sentence. In addition, the court found that the reference "habitual offender" on the guidelines scoresheet was inadequate to comply with the dictates of State v. Jackson, 478 So.2d 1054 (Fla. 1985), which requires a written statement of reasons for departure.

### SUMMARY OF ARGUMENT

In the present case, the Fifth District Court of Appeal determined that habitual offender status based upon a prior criminal record, is not a valid reason for departing from the guidelines presumptive sentence. In contrast, the First and Second District Courts of Appeal find no error in considering habitual offender status as a reason for departure. Thus, the present decision sought to be reviewed is in express and direct conflict with the decisions of other district courts of appeal.

## ARGUMENT

THE PRESENT DECISION IS IN EXPRESS AND  
DIRECT CONFLICT WITH THOSE CASES HOLDING  
THAT IT IS NOT ERROR FOR A TRIAL JUDGE TO  
CONSIDER HABITUAL OFFENDER STATUS AS A  
REASON FOR DEPARTURE UNDER THE GUIDELINES.

The departure sentence in this case was based on the adjudication of the defendant as an habitual felony offender. The Fifth District Court of Appeal found that the adjudication of the defendant as an habitual felon was based upon reasons involving his criminal record. The court determined therefore, that since his habitual felon status was based on his criminal record and not other reasons, that the written reason for departure, "habitual offender" on the guidelines scoresheet is inconsistent with this court's decision in Hendrix v. State, 475 So.2d 1218 (Fla. 1985), which disapproves a departure sentence based on the defendant's criminal record, which has been factored into the recommended guidelines sentence.

The same point of law was involved in the case of Vicknair v. State, decided by the District Court of Appeal, Fifth District, on March 6, 1986, and reported in 483 So.2d 896 (Fla. 5th DCA 1986). In that case, the Fifth District Court of Appeal openly acknowledged that its decision was, in essence, in conflict with decisions of other districts. 483 So.2d at 897 n.5. The court cited Vicknair in the present decision.

In Ferguson v. State, 480 So.2d 924 (Fla. 2d DCA 1986), and Fleming v. State, 480 So.2d 715 (Fla. 2d DCA 1986), the Second District Court of Appeal determined that a literal adherence to Hendrix would functionally repeal the habitual felony offender

statute, a result not intended in the formulation of guidelines sentencing. Thus, the District Court of Appeal, Second District found no error in considering habitual offender status as a reason for departure, in contrast to the present decision of the Fifth District Court of Appeal. The First District Court of Appeal has, likewise, employed the same reasoning as the Second District Court of Appeal in Payne v. State, 480 So.2d 202 (Fla. 1st DCA 1985), and Shull v. State, 481 So.2d 1294 (Fla. 1st DCA 1986).


This court has exercised its discretionary jurisdiction and will entertain argument in Vicknair, Case No. 68,536; Ferguson, Case No. 68,146; and Payne, Case No. 68,180. This court should exercise its discretionary jurisdiction in the present case as well.

CONCLUSION

The decision of the District Court of Appeal, Fifth District, that the petitioner seeks to have reviewed is in direct and express conflict with decisions of the First and Second District Courts of Appeal. Because of the reasons and authorities set forth in this brief, it is submitted that the decision in the present case is erroneous and that the conflicting decisions are correct and should be approved by this court as the controlling law of this state. The petitioner, therefore, requests this court to extend its discretionary jurisdiction to this cause, and to enter its order quashing the decision and order hereby sought to be reviewed, approving the conflicting decisions of the First and Second District Courts of Appeal, as the correct decisions, and granting such other and further relief as shall seem right and proper to the court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing  
Petitioner's Brief on Jurisdiction has been furnished by mail  
to Michael O'Neill, Assistant Public Defender, 112 Orange Avenue,  
Suite A, Daytona Beach, Florida 32014, counsel for the respondent,  
this 19th day of June, 1986.

  
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