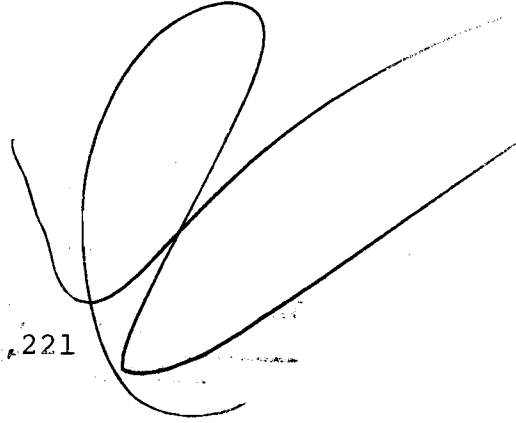


IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
)
 vs.)
)
 ROGER DALE GORDON,)
)
 Respondent.)
 _____)

CASE NO. 71,221



RESPONDENT'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

DANIEL J. SCHAFER
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
 Petitioner,)
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vs.)
)
STATE OF FLORIDA,)
)
 Respondent.)
_____)

CASE NO. 71,221

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts set forth in Petitioner's Brief on Jurisdiction.

SUMMARY OF ARGUMENT

The decision sub judice is correct. Where an accused's recommended sentence is 12-30 months or Community Control, a trial court may not impose both sanctions without giving clear and convincing reasons for departure. To the extent that Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986) suggests otherwise, it has been implicitly overruled in State v. Mestas, 507 So.2d 587 (Fla. 1987).

This court has refused to review the issue raised here in State v. Hankey, Fla. Sup. Ct. case number 70,548, review denied September 18, 1987.

ARGUMENT

WHETHER THE OPINION OF THE DISTRICT
COURT OF APPEAL, FIFTH DISTRICT,
IN GORDON V. STATE, 12 FLW 2086
(Fla. 5th DCA Aug. 27, 1987),
DIRECTLY AND EXPRESSLY CONFLICTS WITH
FRANCIS V. STATE, 487 So.2d 348 (Fla.
2d DCA 1986), ON THE SAME
QUESTION OF LAW?

Respondent does not dispute that Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986) contains language which appears to be in direct conflict with the holding of the Fifth District sub judice. However, Respondent asserts that such conflicting language is insufficient to establish true conflict whereby this Court may or should exercise its discretionary jurisdiction.

In Francis, supra, the defendant violated his probation and had a recommended guideline range of any non-state prison sanction. The trial court sentenced him to two years imprisonment followed by two years community control and gave reasons for departure which were challenged on appeal. The Second District Court of Appeal affirmed holding that since sentencing followed revocation of probation, the trial court was permitted to increase the punishment one cell without stating any reasons for departure. The Court then observed that the guidelines provide that a trial court may impose a split sentence of incarceration followed by a period of probation up to the maximum authorized by law. The Court then concluded that since community control essentially functions as a more restrictive form of probation, a trial court may impose a split sentence of incarceration followed

by a period of community control up to the maximum authorized by law. In State v. Mestas, 507 So.2d 587 (Fla. 1987) this Court recently held that community control may not properly be imposed when the guidelines call for any nonstate prison sanction without stating clear and convincing reasons for departure. As this Court noted, community control is not equivalent to probation but is a harsh and more severe alternative to probation. Thus it appears that this Court's decision in State v. Mestas, supra, has implicitly overruled Francis, supra. Consequently, no conflict exists. Cf. State v. Williams, 195 So.2d 202 (Fla. 1967) [Petition for review will be denied where one of the allegedly conflicting decisions is quashed].

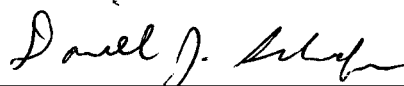
This Court heard the same arguments from the state and defense on the question of jurisdiction in State v. Hankey, Fla. Sup. Ct. case number 70,548, and denied review on September 18, 1987.

CONCLUSION

Based on the foregoing reasons and authorities, Respondent respectfully requests this Honorable Court to decline to exercise its discretionary jurisdiction.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Ave., Daytona Beach, FL 32014 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Roger Dale Gordon 627 Clearn Ct., Winter Springs, FL 32708 on this 27th day of October, 1987.



DANIEL J. SCHAFER
ASSISTANT PUBLIC DEFENDER