

IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT BLACKSHEAR,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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CLETS  
By *M*  
CASE NO. 71,440

RESPONDENT'S BRIEF ON JURISDICTION

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

EDWARD C. HILL, JR.  
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the Appellant in the lower tribunal. Respondent was the prosecution in the trial court and the Appellee in this lower tribunal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts of the Petitioner.

SUMMARY OF ARGUMENT

Respondent will argue that jurisdiction should not be accepted by the Florida Supreme Court because express and direct does not exist as:

1) The facts of this case are different from those cited as in direct conflict.

2) The decision of the trial court was to remand for resentencing, therefore, decisional conflict does not exist.

3) As no sentence exists to challenge, this Court would be giving merely an advisory opinion.

## ARGUMENT

This Court should decline jurisdiction because of the posture of this case.

The District Court of Appeal in this case reversed the sentence imposed by the trial court and remanded for resentencing. What the Petitioner is trying to do is to have this Court rule on sentences which no longer exist. In effect, the Petitioner is asking for an advisory opinion. As there is no constitutional authority for such an advisory opinion, this Court should not give one under the guise of conflict certiorari.

Sarasota Fruitville Orange District v. Certain Lands, 80 So.2d 335 (Fla. 1955) and Sabio v. Russell, 472 So.2d 869 (Fla. 3rd DCA 1985).

The trial court should review the previous sentence imposed, the Opinion of this Court, the rulings of the District Court of Appeal, the Guidelines, argument of counsel, and impose a new sentence. It may be persuaded to remain within the guideline range, obviating the need for further judicial proceedings, particularly as all parties agreed previously that Peace v. North Carolina, 395 U.S. 711, 23 L.Ed.2d 656 (1969), did not apply. If not, counsel will certainly appeal and bring into focus in the district court the issues which are currently speculative. The Petitioner will not be prejudiced by orderly review as his guideline range is twelve to seventeen years.

Further, the Court should decline jurisdiction because the Article 5 § 3 of the Florida Constitution requires express and direct conflict of decisions. There can be no such conflict of decisions where the cases cited by the Petitioner require reversal and the District Court, in fact, reversed. What Petitioner cites as conflict of decision is merely conflict of opinion and not suitable to invoke the jurisdiction of this Court. Nieman v. Nieman, 312 So.2d 733 (Fla. 1975).

As to direct and express conflict, the Petitioner alleges that the case sub judice is in direct and express conflict with Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984). There is no such conflict. Fasenmyer, supra, involved a resentencing after the imposition of a legal sentence. The case sub judice involves a resentencing after the imposition of an illegal sentence. Further, Fasenmyer involved an attempt to impose a sentence on remand on a count upon which no sentence was initially imposed by the trial court. Again no such facts exist in this case and when the facts are different there is no express and direct conflict and jurisdiction should be declined. Department of Revenue v. Johnston, 442 So.2d 950 (Fla. 1983).

This concept is also applicable to Beech v. State, cited as direct and expressly conflicting with the case sub judice. Beech involved a split sentence of probation and incarceration. The case before this Court does not. Therefore, under Department of Rerveue, supra, jurisdiction should be declined.

The appropriate case for comparison is Cruz v. State, 458 So.2d 826 (Fla. 3rd DCA 1984) where the court found that the correction of the original illegal sentencing was within the original sentencing scheme of the judge and no punishment for appealing the original conviction existed. See also Fogle v. State, 479 So.2d 826 (Fla. 2nd DCA 1985).

Therefore, as the Petitioner has not shown express and direct conflict on this point, jurisdiction should be declined.

Petitioner's final point is that the opinion this case directly conflicts with, Vantassell v. State, 512 So.2d 181 (Fla. 1987). Again, this Court should decline jurisdiction as Vantassell, supra, involved a departure for reasons which involved the defendants actions in relation to the victim of the offense for which he was being sentenced. The three reasons in Vantassell: excessive force in the assault, the ongoing nature of the abuse with the victim, and flagrant disregard for the victim's welfare, are inherent in the crime or are calculated in the guidelines.

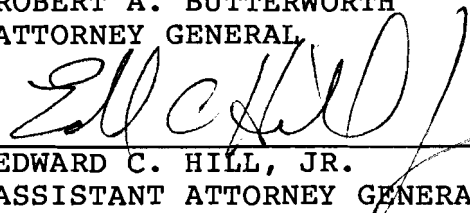
The two-part reason sub judice is not any of those cited in Vantassell. It was the violent nature of the defendant's actions as exemplified by his actions and the timing of these violent acts, reasons not inherent in the guidelines. Timing has been approved by this Court as a ground for departure in Williams v. State, 504 So.2d 392 (Fla. 1987). The Petitioner has failed to show direct and express conflict with regard to this issue also.

CONCLUSION

As the Petitioner has failed to show express and direct conflict between decisions of this Court and the case sub judice, jurisdiction should be declined.

Respectfully Submitted,

ROBERT A. BUTTERWORTH  
ATTORNEY GENERAL

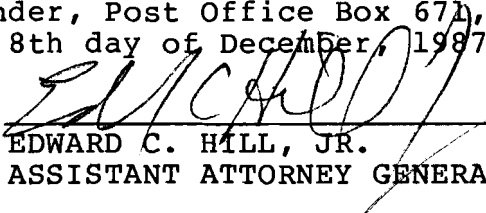
  
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TALLAHASSEE, FL 32399-1050  
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U. S. Mail to P. Douglas Brinkmeyer, Assistant Public Defender, Post Office Box 671, Tallahassee, Florida, 32302, this 8th day of December, 1987.

  
EDWARD C. HILL, JR.  
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS  
THE CAPITOL  
TALLAHASSEE, FL 32399-1050  
(904) 488-0600

COUNSEL FOR RESPONDENT