IN THE SUPREME COURT OF FLORIDA

THOMAS RAPHAEL FASENMYER,

Petitioner,

-vs-

CASE NO. 63,382

STATE OF FLORIDA,

Respondent.

_____/

# RESPONDENT'S BRIEF ON JURISDICTION

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# RESPONDENT'S BRIEF ON JURISDICTION

## PRELIMINARY STATEMENT

Thomas Raphael Fasenmyer was the defendant in the Circuit Court in and for Duval County, Florida, and the appellant in the District Court of Appeal, First District. The State of Florida was the prosecution and the appellee, respectively. The parties will be referred to as they appear before this Court.

## STATEMENT OF THE CASE AND FACTS

Petitioner has been tried three times for the offenses which he now stands convicted. See Fasenmyer v. State, 305 So.2d 99 (Fla. 1st DCA 1974); Fasenmyer v. State, 383 So.2d 706 (Fla. 1st DCA 1980); Fasenmyer v. State, 413 So.2d 33 (Fla. 1st DCA 1981); Fasenmyer v. State, 425 So.2d 151 (Fla. 1st DCA 1983).

Petitioner was originally convicted of breaking and entering while armed, grand theft, and using a firearm during the commission of a felony. At the conclusion of his second trial, Petitioner received a collective total of 50 years in prison--(1) 50 years on the breaking and entering while armed conviction; (2) 5 years on the grand theft conviction (to run concurrent to the breaking and entering while armed conviction); and (3) Petitioner received no sentence on the using of a firearm during the commission of a felony conviction because that offense merged with the breaking and entering while armed conviction.

However, on his third direct appeal to the First District, that court reduced Petitioner's breaking and entering while armed conviction to the offense of entering without breaking. The First District also remanded the case for resentencing since a 50-year sentence was impermissible for

entering without breaking. When Petitioner was resentenced, the trial court sought to achieve his original 50-year sentencing objective by changing the sentences from concurrent to consecutive and by imposing for the first time a sentence for count three (use of a firearm during the commission of a felony) because that conviction no longer merged with the breaking and entering while armed conviction. Petitioner received a five-year sentence on the entering without breaking conviction, a five-year consecutive sentence on the grand theft conviction, and a fifteen year consecutive sentence on the use of a firearm during the commission of a felony conviction. Fasenmyer v. State, supra, at 425 So.2d 152.

Petitioner then appealed to the First District and alleged that he had been illegally sentenced. After relief was denied in the First District, Petitioner sought certiorari in this Court.

## ISSUE PRESENTED

THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE PETITIONER HAS FAILED TO DEMONSTRATE CONFLICT BETWEEN HIS CASE AND AN OPINION OF THIS COURT OR ANY OTHER DISTRICT COURT OF APPEAL.

## A R G U M E N T

Petitioner's attempt to demonstrate conflict with his case and federal cases or previous opinions of the First District must fail because it is well settled that certiorari conflict jurisdiction in this Court will lie only if conflict is demonstrated with an opinion of this Court or another district court of appeal. See Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

Petitioner's claim that his case conflicts with this Court's opinion in Troupe v. Rowe, 283 So.2d 857 (Fla. 1973), is incorrect. In Troupe, this Court found that once a defendant had been sentenced, a judge could not after rehearing, once a second assistant state attorney had argued before her, impose an increased sentence. Petitioner's case is completely different--it was Petitioner who attacked his breaking and entering while armed conviction, and it was Petitioner who successfully obtained a reduction in that conviction from the offense of breaking and entering while armed to the offense of entering without breaking. It was

Petitioner who caused his use of a firearm during the commission of a felony conviction no longer to merge with the breaking and entering while armed conviction by reducing that conviction to entering without breaking. Moreover, contrary to Petitioner's assertion, after his second trial, he was never sentenced on the use of a firearm during the commission of a felony conviction. Also, Troupe v. Rowe, supra, was decided on double jeopardy grounds. Id. at 283 So.2d 860. After North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), it is clear that the "once concurrent--always concurrent" doctrine does not violate double jeopardy and that unless vindictiveness on the part of the State is involved, a greater or consecutive sentence is not prohibited. Therefore, Troupe v. Rowe, supra, has absolutely nothing to do with the facts and circumstances of Petitioner's case, and there is no express and direct conflict.

The only state case upon which Petitioner has relied to establish his alleged conflict is Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982). However, that case was relied upon by the State during the last appeal and is of absolutely no assistance to Petitioner. In Herring, the court did say that an unattacked legal sentence could not be touched on resentencing--apparently Petitioner has forgotten that he never received a sentence on the use of a firearm during the commission

of a felony conviction, and he has also apparently overlooked the fact that North Carolina v. Pearce, supra, specifically permits a trial court on resentencing to alter concurrent sentences to consecutive sentences as long as due process is not involved. There has been no allegation of a due process violation in this case.

## CONCLUSION

Petitioner has totally failed to demonstrate conflict between his case and the applicable state cases relied upon in his brief. Accordingly, this Court is without jurisdiction, and certiorari should be DENIED.

Respectfully submitted:

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to QUENTIN T. TILL, P.A., 255 Liberty St., Jacksonville, FL 32202, Counsel for Petitioner, by U. S. Mail this 4th day of April, 1983.

Lawrence A. Kaden

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Assistant Attorney General

OF COUNSEL.