IN THE SUPREME COURT OF FLORIDA

66297

ANICETO P. SANTIAGO,

Appellant,

-v-

CASE NO. AW-418

STATE OF FLORIDA,

Appellee.

_____/

ON APPEAL FROM THE DISTRICT
COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

APPELLANT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

Appellant was convicted by a jury of the offense of possession of, with intent to sell, Lysergic Acid Diethylamid (LSD). Despite the recommendation of the State Attorney, the trial judge chose to ignore the non-state prison recommendation of the sentencing guidelines and instead imposed a sentence of between six months and three years in state prison.

The trial court's reasons for departure from the guidelines were set out in a written order as: (1) The nature of the drug LSD and its damage to the citizens of the First Judicial Circuit; (2) The need to satisfy the "dispassionate enlightened conscience of the community" of Santa Rosa County; (3) The substantial deterrent effect on such conduct; and (4) The nature and perceived dangers to the community and the community interest in deterring the possession with intent to sell LSD in Santa Rosa County, an area he characterized as a predominantly rural, agricultural economy and culture, despite the stipulation of counsel that the Gulf Breeze area, where appellant was arrested, is an urban area.

The First District Court of Appeal affirmed the sentence imposed by the trial court. Appellant invoked the discretionary jurisdiction of the Supreme Court pursuant to Rule 9.030(a)(2)(iv) by timely filing a Notice.

ARGUMENT

The decision of the First District Court of Appeal in this case follows the line of reasoning it has established in its prior decisions of Manning v. State, 452 So.2d 136 (Fla. 1st DCA 1984) and Garcia v. State, 454 So.2d 713 (Fla. 1st DCA 1984). The rationale set out therein is essentially that the trial judges continue to have broad sentencing discretion, despite adoption of the sentencing guidelines and that Florida Rule of Criminal Procedure 3.701 (b)(6) "provides a general escape-hatch for trial judges to ignore or depart from the sentencing guidelines" as pointed out by Chief Judge Ervin in his concurring opinion in Manning.

The decision of the First District Court of Appeal in this case expressly and directly conflicts with the decisions of the Fifth District Court of Appeal in Fletcher v. State, 9 FLW 2149 (Fla. 5th DCA 1984) and the decisions of the Fourth District Court of Appeal in Mischler v. State, 9 FLW 2205 (Fla. 4th DCA 1984); Williams v. State, 9 FLW 2533 (Fla. 4th DCA 1984); and Callaghan v. State, 10 FLW 8 (Fla. 4th DCA 1985).

In Fletcher v. State, the Fifth District held that the trial Court's categorization of the Defendant as "a regular street prostitute" and consideration of the

threatened force in accomplishing the theft for which he was being sentenced, were an impermissible consideration of "factors relating to the instant offense."

In Mischler v. State, the Fourth District reversed a sentence of the trial court which departed from the guidelines because of its belief that white collar crime per se "deserves a harsher sanction", together with the defendant's lack of remorse and the sizeable funds embezzled by the defendant, a bookkeeper, by virtue of a fiduciary relationship with her employer.

The Mischler court determined that "the guidelines unequivocally state that no court should aggravate a defendant because of his or her social or economic status". Futhermore, it was pointed out that the phrase: "Reasons for deviating from the guidelines shall not include factors relating to . . . instant offense" must have meant something because the Supreme Court removed the words "instant offense" and substituted "factors relating to prior arrests without conviction" in the last amendment adopted May 8th, 1984. That court referred to Chief Judge Ervin's opinion in Manning, supra, which suggests that the "instant offense" language contained in Florida Rule of Criminal Procedure 3.701(d)(11), precludes the trial judge from taking other factors in account. The author of the Mischler opinion further relates that:

> In truth, the trial court and the district courts, as we do here, have taken other factors in the instant offense into account in nearly every reported case, almost all of which arose while the former guidelines were in vogue. Thus, if Judge Ervin be correct, we have built a mountain of incorrect law. It is hoped the Supreme Court will dispel our apprehensions.

The Mischler court went on to say that "the trouble with the guidelines is that they themselves need guidelines". After struggling with the definition of the term "clear and convincing reasons", not defined in the guidelines, the court reversed the sentence departing from the guidelines and certified the question to the Supreme Court.

The Fourth District was consistent with Mischler in deciding in Callaghan v. State, 10 FLW 8 (Fla. 4th DCA 1985), that:

> Rule 3.701 (d) (11) provides in pertinent part that the court should not deviate from the guidelines for reasons that include factors relating to the instant offense or prior arrests for which convictions have not been obtained. Furthermore, we hold that the court is not at liberty to aggravate a sentence by using elements which go to make up the crime for which the defendant is being sentenced.

In Williams v. State, 9 FLW 2533 (Fla. 4th DCA 1984) the Fourth District reversed a sentence outside the guidelines and remanded with directions that:

> The trial judge may not depart from the guidelines because a harsher sentence will act as a "deterrent to others". We agree that punishment should be a deterrent, but there is no cause to suppose that a sentence may be enhanced for this reason alone. If that were so, all punishments would automatically be aggravated, the very antithesis of what the guidelines were designed to accomplish.

As pointed out by Judge Ervin in Manning, "there is an identical legislative and judicial purpose behind the establishment of sentencing guidelines: The elimination of subjective variations in the sentencing process which had heretofore existed geographically--and indeed from judge to judge--throughout the state".

It is clear from a study of the cited Fourth District Court of Appeal cases and the opinion of Judge Ervin that an extreme divergence of opinion exists not only between the districts, but among the judges intra-district as to whether factors relating to the instant offense may be considered as a basis for departure from the sentencing guidelines.

It is Appellant's contention that the trial court and the First District Court of Appeal erred in considering factors relating to the instant offense, to-wit, the nature of the drug LSD, the conscience of the community and the deterrence of an enhanced sentence.

The Williams case, supra directly conflicts on the consideration of deterrence as a factor and Mischler and Callaghan directly conflict on the consideration of any elements of the instant offense, whether the threat of force, white collar crime or the nature of a drug.

Judge Letts, in the opinion in Davis v. State, 9 FLW 2221 (Fla. 4th DCA 1984) states:

> Appeals from Guideline departure, despite assurances to the contrary are now in full spate. As we see it, the flood cannot subside until the Supreme Court gives guidelines for the Guidelines.

The bench and bar of Florida, by taking appeals and certifying questions to the Supreme Court in countless cases are desperately seeking the guidance of the Supreme Court in untangling the morass of law, indeed the "mountain of bad law" that the District Courts of Appeal, acting separately and without concert or direction have created since enactment of the sentencing guidelines, especially concerning cases such as the instant case which occurred prior to October 1, 1983, or which occurred prior to the latest amendment to the guidelines.

CONCLUSION

There exists an express and direct conflict between the decision of this court and the decisions of the Fourth and Fifth Districts cited above. The conflict can only be reconciled by the Supreme Court of Florida and consequently, Appellant prays that the Court take jurisdiction hereof pursuant to Rule 9.030(2)(iv) of the Florida Rules of Appellate Procedure.

Respectfully submitted,

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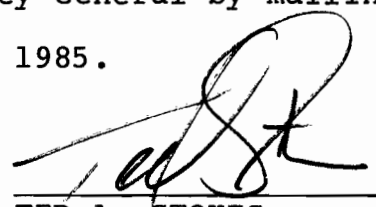
CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof was furnished to Gregory C. Smith, Assistant Attorney General by mailing the same this 11 day of January, 1985.



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