

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 16 1985
CLERK, SUPREME COURT.
By _____
Chief Deputy Clerk

THOMAS HANKEY,
Petitioner,
vs.
STATE OF FLORIDA,
Respondent.

CASE NO. 66,320

RESPONDENT'S BRIEF ON JURISDICTION

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TOPICAL INDEX

	<u>PAGE</u>
AUTHORITIES CITED -----	-i
STATEMENT OF THE CASE AND FACTS -----	1
SUMMARY OF ARGUMENT -----	2
ARGUMENT ;	
WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL, IN THE INSTANT CASE, IS IN CONVLICT WITH <u>MISCHLER V. STATE</u> , 9 F.L.W. 2205 (4th DCA, October 17, 1984), SO AS TO WARRANT CONFLICT JURISDICTION IN THE FLORIDA SUPREME COURT. -----	3,4
CONCLUSION -----	5
CERTIFICATE OF SERVICE -----	5

AUTHORITIES CITED

<u>CASES</u>	<u>PAGE</u>
<u>Jenkins v. State,</u> 385 So.2d 1356, (Fla. 1980) -----	3
<u>Mancini v. State,</u> 312 So.2d 732, (Fla. 1975) -----	3
<u>Mischler v. State,</u> 9 F.L.W. 2205 (Fla. 4th DCA, October 17, 1984)----	1,3
<u>Nielson v. City of Sarasota,</u> 117 So.2d 731 (Fla. 1960) -----	3
 <u>OTHER AUTHORITIES</u>	
Article X, § 3(b)(3) Fla. Const. -----	3

STATEMENT OF CASE AND FACTS

Respondent accepts the statement of case and facts of petitioner, but would note that the "clear and convincing reason for departure" accepted by the appellate court was the trial court's finding that "the emotional trauma to the victim was as severe as if inflicted with 'fists or sticks or guns or knives'."

SUMMARY OF ARGUMENT

No conflict is demonstrated between the instant case and Mischler v. State, 9 F.L.W. 2205 (Fla. 4th DCA, October 17, 1984), because the reason for departure affirmed in the instant case ("emotional trauma to the victim") was not disapproved in Mischler.

ARGUMENT

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL, IN THE INSTANT CASE, IS IN CONFLICT WITH MISCHLER V. STATE, 9 F.L.W. 2205 (4th DCA, October 17, 1984), SO AS TO WARRANT CONFLICT JURISDICTION IN THE FLORIDA SUPREME COURT.

Conflict jurisdiction pursuant to Article X, Section 3(b)(3) of the Florida Constitution cannot be invoked merely because of disagreement with a factual determination in the lower court. Mancini v. State, 312 So.2d 732 (Fla. 1975). Rather, there must be express and direct conflict as to the legal significance of those facts. Jenkins v. State, 385 So.2d 1356 (Fla. 1980); Nielsen v. City of Sarasota, 117 So.3d 731 (Fla. 1960). The opinion of the Fifth District Court of Appeal gives the following reason for affirming the guidelines departure:

There was no error in departing from the suggested guideline sentence, because of the articulated reason that the crime imposed a severe and long lasting economic and emotional hardship on the victim. The trial court found that the emotional trauma to the victim was as severe as if inflicted with "Fists or sticks or guns or knives" and we find this to be a clear and convincing reason for departure.

Thus, the reason for departure found acceptable in the instant case is emotional trauma to the victim, as found by the trial court. Mischler v. State, 9 F.L.W. 2205 (4th DCA, October 17, 1984), does not dispute the validity of emotional trauma as a reason for departure. In fact, Mischler specifically reserves "the question of how we would react to a more harrowing tale."

The trial judge in Mischler made no finding of emotional trauma, as did the trial judge here. Thus, this case and Mischler are not dealing with the same set of ultimate facts, and no conflict exists between them.

CONCLUSION

No conflict has been demonstrated to warrant certiorari jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished, by delivery, to David A. Henson, Assistant Public Defender for Petitioner (1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014), this 14th day of January, 1985.

Ellen D. Phillips

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