

IN THE SUPREME COURT OF FLORIDA

**FILED**

SID J. WHITE

JAN 3 1985

CLERK, SUPREME COURT

CASE NO. 66,320 By \_\_\_\_\_ Chief Deputy Clerk

THOMAS RAYMOND HANKEY, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CITATIONS

CASES CITED:

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Mischler v. State

Case No. 84-151 (Fla. 4th DCA 10/17/84)  
[9 FLW 2205]

1,5

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CASE NO. 66,320

PETITIONER'S BRIEF ON JURISDICTION

SUMMARY OF ARGUMENT

This Honorable Court has jurisdiction to review a decision of the Fifth District Court of Appeal which is in direct conflict with the decision of the Fourth District in Mischler v. State, Case No. 84-151 (Fla. 4th DCA October 17, 1984) [9 FLW 2205].

Petitioner, THOMAS HANKEY, was the Appellant in the court below. The State of Florida was the Appellee.

The following symbols will be used:

"R" Record on Appeal in Circuit Court Case  
No. 83-576 CFJ

"X" Record on Appeal in Circuit Court  
Case No. 83-515 CFM

STATEMENT OF THE CASE AND FACTS

On June 7, 1983, Petitioner entered the Putnam County business establishment, then the residence of his employer, without permission, and took property including cash and firearms.

By an information filed in Case No. 83-576 CF-J, Petitioner was subsequently charged with burglary of a structure belonging to Emil Boik, and grand theft second degree. (R3) By a separate information filed in Case No. 83-515 CF-M, the State charged him with burglarizing Emil Boik's residence and with grand theft second degree. (X3)

On November 3, 1983, Petitioner entered into a negotiated plea agreement covering both cases. (R14;X14) Pursuant to the agreement he pleaded guilty to the burglary counts in exchange for the State's decision to nolle prosequi both grand theft second degree counts. (R14;X14)

At the January 17, 1984 sentencing hearing before Circuit Judge Robert R. Perry, Petitioner elected to be sentenced under the guidelines set forth in Florida Rule of Criminal Procedure 3.701. (R15;X15) Despite the fact that Petitioner's point total called for a recommended sentence of "any non-state prison sanction", the trial court pronounced judgment and sentenced Petitioner to consecutive five (5) year terms of imprisonment. (R16021,41-42;X16-21) The sentencing court explained its radical departure from the presumptive

guideline sentence by terming the burglaries "an abuse of trust" which had resulted in "considerable economic injury" to Emil Boik.

Petitioner filed timely notice of appeal in February of 1984. (R29;X25) On April 26, 1984, the Fifth District consolidated Case Nos. 83-576 and 83-515.

On April 30, 1984, Petitioner/Appellant filed an initial brief contending that the trial court had erred in departing at all from the sentencing guidelines. Alternatively, it was contended that it was an abuse of discretion for the court to "jump" six (6) guideline categories. On October 18, 1984, the Fifth District rendered an opinion affirming Petitioner's sentence. In particular, the Fifth District found the trial court's articulated reason that the crime imposed severe economic and emotional hardship to the victim to constitute a clear and convincing reason for departure. Additionally, the Fifth District determined it was not an abuse of discretion for the trial judge to "leap" six (6) guideline categories so long as the sentences remained within the limits imposed by statute for the crime(s).

On October 30, 1984, Petitioner filed a motion entitled motion for rehearing, to certify conflict, or to certify questions. The primary purpose of said motion was to call the Fifth District's attention to Mischler v. State, Case No. 84-141 (Fla. 4th DCA October 17, 1984) [9 FLW 2205] wherein the Fourth District rejected the rationale which underlies the opinion in the case sub judice.

Petitioner's motion for rehearing, etc., was denied November 20, 1984.

On December 19, 1984, Petitioner filed a timely notice of his intention to seek the discretionary jurisdiction of this Court.

ISSUE

IT IS SUGGESTED THAT THIS HONORABLE COURT HAS JURISDICTION TO REVIEW A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL WHICH IS IN DIRECT CONFLICT WITH THE DECISION OF THE FOURTH DISTRICT IN MISCHLER V. STATE, CASE NO. 84-151 (Fla. 4th DCA October 17, 1984) [9 FLW 2205].

Petitioner submits that the decision of the Fifth District in the instant case is in direct conflict with the decision of the Fourth District in Mischler v. State, supra.

In the case sub judice, the trial court sentenced Petitioner outside the guidelines upon finding that Petitioner's unauthorized entries into his employer's residence and business were an "abuse of trust" which resulted in emotional and economic trauma on the victim. On appeal, the Fifth District upheld the departure upon finding the victim's "emotional trauma" to be a clear and convincing reason. The Fifth District also upheld the trial court's sentencing "leap" of six (6) guideline categories.

The facts in Mischler, supra, show that the defendant was a bookkeeper who embezzled a considerable sum of money from a small business. The trial court departed from the guidelines since the theft involved a large sum of money (\$14,000 to \$15,000), in relation to the wealth of the nearly-bankrupted victim, and because the bookkeeper violated a relationship of "special trust and confidence".



On appeal, the Fourth District concluded that those factors could not support a departure unless committed in an unusually repugnant way.

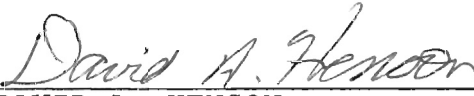
Like the defendant in Mischler, Id., the Petitioner was an employee who enriched himself at the expense of his employer (\$6,000 to \$10,000). And, like the defendant in Mischler, Id., there was nothing that unusual about the way Petitioner carried out the burglaries. By its very definition a burglary is an invasion. And, burglaries are often perpetrated by those who know their target, socially or otherwise. In other words, a departure in this case would serve as authority to depart whenever the burglarized victim and burglar know each other. The only "evidence" in this case that the victim suffered grave emotional trauma is the blanket assertion of the trial court to that effect. And, to the extent that the emotional hurt is derived from either the extent of the financial loss, or the employer/employee relationship, those factors should not support a departure under the rationale of Mischler, supra.

CONCLUSION

BASED ON the argument and authority cited herein,  
Petitioner requests this Honorable Court exercise its dis-  
cretionary jurisdiction in this cause.

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 delivered by mail to: The Honorable  
Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona  
Beach, FL 32014 and Mr. Thomas Hankey, Inmate No. 092561-042,  
P. O. Box 278, E. Palatka, FL 32031 on this 2nd day of  
January, 1985.

  
\_\_\_\_\_  
DAVID A. HENSON  
ASSISTANT PUBLIC DEFENDER