

IN THE SUPREME COURT OF FLORIDA

67,607

JOSEPH WILLIAM COLBERT, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 :  
 \_\_\_\_\_ :

**FILED**

SID J. WHITE

Case No. 4985

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk *pl*

DISCRETIONARY REVIEW OF DECISION OF  
THE DISTRICT COURT OF APPEAL  
SECOND DISTRICT OF FLORIDA

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

PAUL C. HELM  
ASSISTANT PUBLIC DEFENDER  
CHIEF, APPELLATE DIVISION

Hall of Justice Building  
455 North Broadway  
Bartow, FL 33830-3798  
(813) 533-1184; 0931

ATTORNEYS FOR PETITIONER

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## STATEMENT OF THE CASE AND FACTS

The State filed eight separate informations in the Circuit Court for Polk County charging Petitioner, JOSEPH WILLIAM COLBERT, with two armed robberies and six robberies which occurred between November 17, 1983 and January 4, 1984. (R17 - 24, 30 - 37)

On June 19, 1984, Petitioner appeared with counsel before the Honorable Edward F. Threadgill, Jr., Circuit Judge, and entered unnegotiated pleas of nolo contendere to the two armed robbery charges and guilty to the six robbery charges. (R41 - 61) The State's factual basis for the pleas established that Petitioner personally possessed a firearm during one of the armed robberies (R49, 60), but a co-defendant possessed the firearm during the other armed robbery. (R44 - 49, 58)

On July 11, 1984, the court adjudicated Petitioner guilty of all eight offenses and sentenced him to concurrent terms of ten years imprisonment with credit for time served. (R64, 75 - 77, 80 - 112, Appendix 9 - 41) The court imposed a three year mandatory minimum term for the armed robbery in which Petitioner possessed the firearm. (R75, 82) The guidelines recommended a sentence of six years, with a sentencing range of five and a half to seven years. The court's reason for departure was "Multiple Robberies not scored because Guideline Sheet scores none after 4." (R84, Appendix 13)

On appeal to the District Court of Appeal, Second District, Petitioner argued that the trial court's reason for departure was not clear and convincing, relying upon the decision of the District Court of Appeal, First District in Young v. State,

455 So.2d 551 (Fla. 1st DCA 1984). On August 9, 1985, the Second District affirmed Petitioner's sentences on authority of Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984). The Second District expressly acknowledged that Russell was in conflict with Young. (Appendix 1)

Petitioner filed a timely notice invoking this Court's discretionary jurisdiction.

### SUMMARY OF ARGUMENT

The trial court departed from the sentencing guidelines recommendation in sentencing Petitioner solely because Petitioner had additional offenses at conviction in excess of four. The decision of the District Court of Appeal, Second District that this was a clear and convincing reason for departure expressly and directly conflicts with the decision of the District Court of Appeal, First District in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984). This Court should grant review of the decision on Petitioner's appeal to uphold the legislative purpose of establishing a uniform sentencing policy under the guidelines and Petitioner's right to equal protection of the law.

## ARGUMENT

THIS COURT HAS JURISDICTION BECAUSE THE DECISION ON PETITIONER'S APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, IN YOUNG v. STATE, 455 So.2d 551 (Fla. 1st DCA 1984).

The sentencing guidelines, Fla.R.Crim.P. 3.701 and 3.988(c), recommended that Petitioner be sentenced to a term of six years imprisonment, with a sentencing range of five and a half to seven years. (R84, Appendix 13) The trial court departed from the guidelines and sentenced Petitioner to concurrent terms of ten years imprisonment. (R80 - 112, Appendix 9 - 41) The trial court's sole reason for departure from the guidelines recommendation was "Multiple Robberies not scored because Guidelines Sheet scores none after 4." (R84, Appendix 13)

On appeal to the District Court of Appeal, Second District, Petitioner argued that the trial court's reason for departure from the guidelines recommendation was not clear and convincing as required by Florida Rules of Criminal Procedure 3.701(b)(6) and (b)(11). Petitioner relied upon the decision of the District Court of Appeal, First District, in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984). In Young, the First District ruled,

The opinion of the trial court that the guidelines form does not account for additional felonies beyond four is both inaccurate and an impermissible and unconvincing reason for departure. The form contemplates more than four felonies and clearly states "4<sup>+</sup>".

Id., at 552 (Appendix 3).

The Second District affirmed the trial court's reason for departure on authority of Russell v. State, 458 So.2d 422 (Fla. 2d DCA 1984). (Appendix 1) In Russell, the Second District had affirmed a departure from the guidelines because the defendant had additional offenses at conviction in excess of four and prior convictions in excess of four which could not be scored on the guidelines scoresheet. The Second District ruled,

Of course, defendant's additional convictions and prior record cannot be considered as factors in calculating the applicable sentencing range. But that does not mean that these factors cannot be considered by the court as reasons for departing from the guidelines.

Id., at 423 (Appendix 7).

In deciding Petitioner's appeal on authority of Russell, the Second District expressly stated that Russell is in conflict with Young. (Appendix 1) This Court has jurisdiction to review the Second District's decision on Petitioner's appeal because it expressly and directly conflicts with the decision of the First District in Young v. State. Art. V, §3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(2)(A)(iv).

This Court should exercise its discretion to review the decision on Petitioner's appeal in order to maintain uniformity in the application of the sentencing guidelines throughout the state. The Legislature's express purpose in establishing the Sentencing Commission to develop the sentencing guidelines was "to develop, implement, and revise a uniform sentencing policy in cooperation with the Supreme Court." §921.001(1), Fla. Stat. (1983). There can be no uniform sentencing policy under the guidelines if the



District Courts are permitted to establish conflicting decisional rules for application of the guidelines.

This Court should also exercise its discretion to review the decision of Petitioner's appeal in order to guarantee Petitioner's constitutional right to equal protection of the law. Petitioner cannot be subjected to a different rule of law because he was sentenced within the Second District's jurisdiction rather than the First District's jurisdiction. The Fourteenth Amendment to the United States Constitution provides that "No State shall...deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 2 of the Florida Constitution provides, "All natural persons are equal before the law...." "And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged." Reynolds v. Sims, 377 U.S. 533, 565 (1964). "To withstand an equal protection attack, a statute must treat all persons within a class the same...." Haber v. State, 396 So.2d 707, 708 (Fla. 1981). The Second District cannot treat Petitioner differently than he would be treated by the First District without violating his constitutional right to equal protection of the law.

This Court should grant review of the Second District's decision on Petitioner's appeal because it expressly and directly conflicts with the First District's decision in Young v. State. To fail to grant review would allow the Second District to destroy the legislative purpose of establishing a uniform sentencing

policy under the guidelines and to deprive Petitioner of his right to equal protection of law.

CONCLUSION

Petitioner respectfully requests this Honorable Court to grant review of the District Court of Appeal, Second District's decision on Petitioner's appeal because that decision expressly and directly conflicts with the decision of the District Court of Appeal, First District in Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984).

Respectfully submitted,

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT



PAUL C. HELM  
Assistant Public Defender

Hall of Justice Building  
455 North Broadway  
Bartow, FL 33830-3798  
(813) 533-1184; 0931

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 28<sup>th</sup> day of August, 1985.

  
PAUL C. HELM

PCH:rkm