

IN THE SUPREME COURT OF FLORIDA

FILED  
SUPERIOR COURT

FEB 28 1984

CREED MARTIN VANOVER, :  
 :  
 Petitioner, :  
 :  
 vs. :  
 :  
 STATE OF FLORIDA, :  
 :  
 Respondent. :  
 :  
 \_\_\_\_\_ :

CLERK, SUPREME COURT

By 68254  
Court Deputy Clerk

Appeal No. 84-2193  
Case No. \_\_\_\_\_

PETITIONER'S BRIEF ON JURISDICTION

JAMES MARION MOORMAN  
PUBLIC DEFENDER  
TENTH JUDICIAL CIRCUIT

Allyn Giambalvo  
Assistant Public Defender  
Criminal Courts Complex  
5100 - 144th Avenue North  
Clearwater, Florida 33520

ATTORNEYS FOR APPELLANT

TOPICAL INDEX

|                                 | <u>PAGE</u> |
|---------------------------------|-------------|
| STATEMENT OF THE CASE AND FACTS | 1-2         |
| SUMMARY OF ARGUMENT             | 3           |
| ARGUMENT                        | 4-6         |
| CONCLUSION                      | 7           |
| CERTIFICATE OF SERVICE          | 7           |
| APPENDIX                        |             |

CITATION OF AUTHORITIES

|  | <u>PAGE</u> |
|--|-------------|
| <u>Davis v. State</u> , (1st DCA October 9, 1985)<br>[10 F.L.W. 2311]  | 3,6         |
| <u>Francis v. State</u> , 475 So.2d 1367 (2d DCA 1985)                 | 5           |
| <u>Marshall v. State</u> , 468 So.2d 255 (2d DCA 1985)                 | 5           |
| <u>Ross v. State</u> , (1st DCA November 14, 1985)<br>[10 F.L.W. 2540] | 3,5         |
| <u>Sloan v. State</u> , 472 So.2d 488 (2d DCA 1985)                    | 5           |
| <br><u>OTHER AUTHORITIES</u>   |             |
| F.R.Cr.P. 3.701(d)(9.)   | 4           |
| F.R.App.P. 9.0303(2)(A)(iv)  | 2           |



Court of Appeal also held that it could use the trial judge's reasons, could be "fleshed out" by reference to remarks made at the sentencing hearing. The Second District Court of Appeal affirmed Petitioner's conviction and sentence and denied Petitioner's Motion Motion for Rehearing. Petitioner now requests this Court to accept jurisdiction pursuant to F.R.App.P. 9.030(2)(A)(iv).

SUMMARY OF ARGUMENT

The opinion of the Second District Court of Appeal holding that the severity of victim injury can be used as a grounds for departure, and that the trial court's oral pronouncements may be used to "flesh out" its written reasons, expressly and directly conflicts with Ross v. State, (1st DCA November 14, 1985)[10 F.L.W. 2540] and Davis v. State, (1st DCA October 9, 1985)[10 F.L.W. 2311].

## ARGUMENT

Petitioner was sentenced to ten years imprisonment, a significant departure from the guideline recommendation of three years.<sup>1</sup> The trial court's reasons for departure were as follows:

- 1.) The offense of shooting Kim Carevic was done without any moral or legal justification.
- 2.) The defendant intended to murder Kim Carevic and it was only by a stroke of luck that Kim Carevic avoided being murdered.
- 3.) The manner of shooting of Kim Carevic, being at close range and at the body of the victim created a great risk of serious bodily harm and or death to the victim.
- 4.) This was a particularly aggravated set of circumstances which sets this case far and above the average aggravated battery.

Petitioner contends that none of the aforementioned reasons justify a departure, especially so significant a departure, from the guideline recommended sentence.

First, Reasons #1 and #4 are improper because Petitioner did justify his actions on the grounds of self defense and his apprehension that the so called "victims" were about to take his money and beat him up. The jury apparently did not totally discount Petitioner's testimony, as both the trial court and District Court did, because they saw fit to acquit Petitioner of one of the charges.

---

1. The actual recommendation was community control/twelve to thirty months, however, as the three-year minimum mandatory provisions for use of a firearm were applicable they took precedence. F.R.Cr.P. 3.701(d)(9.)

Secondly, Reasons #2 and #3 attempt to justify departure on the basis of what could have occurred, not what actually happened. The trial court makes mention that Petitioner intended to murder the victim and would have done so, but for the intervention of fate. This is improper justification for departure because it in essence penalized Petitioner for a higher crime which he was never charged with or convicted of. This is clearly prohibited by F.R.Cr.P. 3.701(d), and is contrary to Sloan v. State, 472 So.2d 488 (2d DCA 1985) and Marshall v. State, 468 So.2d 255 (2d DCA 1985). The Second District Court of appeal totally ignored these facts in its opinion and instead focused on the severity of the victim's injury although the victim injury had been factored into the recommended sentence.

The Second District Court of Appeal's opinion expressly and directly conflicts with the holdings in Ross v. State, (1st DCA November 14, 1985)[10 F.L.W. 2540]. The First District in Ross held that where the nature and extent of the victim's injury was an element of the statute under which the defendant was convicted and therefore already factored into the scoresheet, it did not constitute a valid reason for departure. The same holding was made in another Second District case, Francis v. State, 475 So.2d 1367 (2d DCA 1985) where the court specifically stated that for a conviction of aggravated battery the trial court could not use



the extent or severity of the attack on the victim as grounds to depart because it was already factored in.

The Second District Court of Appeal also used the trial court's oral pronouncements to "flesh out" the admitted paucity of factual support for the trial court's written reasons. This practice is in express and direct conflict with the holding in Davis v. State, (1st DCA October 9, 1985)[10 F.L.W. 2311] which states that any justification for departure not in writing, although compelling, may not be considered.

As none of the trial court's enumerated reasons presented clear and convincing reasons for departure, and the Second District Court of Appeal's opinion totally ignored this fact as well as expressly and directly conflicting with its own earlier opinion and that of the First District Court of Appeal in Ross and Davis, supra, this Court should grant the Petition for Discretionary Review.

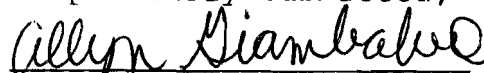
CONCLUSION

In light of the foregoing reasons, arguments and authorities, Petitioner has demonstrated that conflict does exist so as to invoke discretionary review of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William I. Munsey, Jr., Assistant Attorney General, Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Creed Martin Vanover, 357 Bayview Drive, St. Petersburg, FL 33704, February 5, 1986.

Respectfully submitted,



Allyn Giambalvo  
Assistant Public Defender