

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES PATRICK BARBERA, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 68,942

FILED  
JUL 9 1988  
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RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was Appellant below, and the prosecution in the trial court. Petitioner was the Appellee and the defendant in those lower courts. This case was tried in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. The direct appeal was heard in the Fourth District Court of Appeal of the State of Florida.

The following symbols will be used:

"A"	Appendix
"PB"	Petitioner's Brief on Jurisdiction

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts appearing on pages two (2) and three (3) of Petitioner's Brief on Jurisdiction.

POINT INVOLVED

WHETHER PETITIONER HAS SHOWN BASIS  
FOR INVOCATION OF THIS COURT'S DIS-  
CRETIONARY JURISDICTION?

SUMMARY OF ARGUMENT

Appellant has demonstrated no conflict between the decision of the Fourth District Court of Appeal sub judice, and the decisions of this Honorable Court, or any other District Court of this State.

ARGUMENT

PETITIONER HAS SHOWN NO BASIS  
FOR INVOCATION OF THIS COURT'S  
DISCRETIONARY JURISDICTION.

Petitioner asks this Court to exercise it's discretionary jurisdiction based upon the asserted conflict between the decision of the Fourth District Court of Appeal sub judice, and the decisions of this Court, and the Second District Court of Appeal (PB-6,7).

Respondent submits that the decision of the Fourth District Court in the instant case was entirely correct, as it was founded upon three decisions of this Honorable Court, which clearly show there was no valid reason to support a downward departure from the sentencing guidelines in this case (A-2).

Petitioner argues that the decision below conflicts with the holding of this Court in Ross v. State, 474 So.2d 1170 (Fla. 1985). Respondent does not contest the wisdom of the Ross decision, but respectfully submits that it is not dispositive here.

First, the Ross case involved the mitigating factors attendant to a consideration of imposition of the death penalty, and not the mitigating factors used in a downward departure from the sentencing guidelines. Respondent would submit that these two sentencing schemes are distinct, separate entities, as are the mitigating factors relevant to each of them, so that the logic of the Ross holding is not applicable here. Second, this Court in State v. Mischler, 11 F.L.W. 139 (Fla. April 3, 1983),

held that the fact that the defendant had embezzled money from her trusting employer was not a clear and convincing reason for departure. This Court reasoned that if such were the case, embezzlement would have to be penalized by a more severe sentence than other forms of larceny; something not contemplated by the legislature when the schedule of criminal penalties was devised.

In the instant case, the lower court clearly indicated that while voluntary intoxication may have been a valid defense at trial, to use it as a factor in mitigation would be contrary to the schedule of penalties established by the legislature (A-1).

The purpose of the sentencing guidelines would not be served if trial courts were to impose a downward departure sentence in every case in which it was proven that the defendant voluntarily became intoxicated before committing the offense for which he/she was being sentenced. Thus, the decision of the Court in Ross, supra, does not conflict with that of the Fourth District Court sub judice.

Nor does the decision below conflict with the opinion of the Second District Court of Appeal in State v. Twelves, 463 So.2d 493 (Fla. 2d DCA 1985).

In Twelves, the Second District Court held that the facts before the trial court in that case warranted mitigation. However, for one district court to hold that a trial court was within its discretion to mitigate a sentence, does not mean that a downward departure is warranted in every case where there is evidence of "psychosis." The facts before the trial court



sub judice were such that the Fourth District Court of Appeal ruled that the trial court had abused it's discretion by basing a downward departure solely upon the defendant's intoxication at the time of the crime (A-1). The Fourth District Court properly reviewed the trial court's exercise of discretion, and found an abuse See Twelves, supra; and Albritton v. State, 476 So.2d 158 (Fla. 1985). The fact that a factual similarity exists between Twelves and the instant case, does not in itself demonstrate a conflict. When a district court finds that an invalid reason for departure has been used by a trial court in imposing a sentence, an abuse of discretion is demonstrated and reversal is warranted See Albritton, supra, and Hendrix v. State, 475 So.2d 1218 (Fla. 1985).

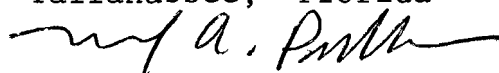
The Petitioner has not demonstrated express and direct conflict.

#### CONCLUSION

WHEREFORE based upon the foregoing arguments and the authorities cited therein, Respondent respectfully requests that this Honorable Court decline exercise of it's discretionary jurisdiction in the above styled cause.

Respectfully submitted,

JIM SMITH  
Attorney General  
Tallahassee, Florida

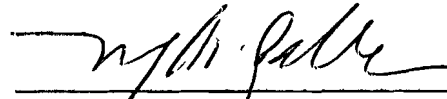


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on Jurisdiction has been furnished by courier to JEFFREY L. ANDERSON, ESQUIRE, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 8th day of July, 1986.



OF COUNSEL