IN THE SUPREME COURT OF FLORIDA

MARVIN RAYMOND BALLARD, Petitioner,	)	
v.	)	CASE NO. 68,967
STATE OF FLORIDA, Respondent.	)	

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the defendant, and Respondent the prosecution, in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant, and Respondent the Appellee in the District Court of Appeal of the State of Florida, Fourth District. In this brief, the parties will be referred to as they appear before this Honorable Court, except that Respondent may also be referred to as the State.

The following symbols will be used:

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

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts presented by Petitioner and found on page 1 of Petitioner's Brief on Jurisdiction.

POINT INVOLVED

WHETHER EXPRESS, DIRECT CONFLICT HAS BEEN SHOWN, AND PETITIONER SEEKS TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION BASED UPON GROUNDS THIS COURT HAS PREVIOUSLY RULED INADEQUATE FOR INVOCATION OF SAID JURISDICTION?

SUMMARY OF ARGUMENT

The decision of the district court sub judice is not in conflict with the other district courts of this state regarding valid reasons for departure from the sentencing guidelines.

Petitioner previously sought to invoke the discretionary jurisdiction of this Court, in order to challenge the propriety of the district court's decision to relinquish jurisdiction to the trial court in order that a written order of departure could be drafted. This Court declined exercise of it's jurisdiction, and thereby precluded Petioner from raising the same issue now.

ARGUMENT

NO EXPRESS, DIRECT CONFLICT HAS BEEN SHOWN, AND PETITIONER SEEKS TO INVOKE THIS COURT'S DISCRETIONARY JURISDICTION BASED UPON GROUNDS THIS COURT HAS PREVIOUSLY RULED INADEQUATE FOR INVOCATION OF SAID JURISDICTION.

Petitioner argues that a departure from the sentencing guidelines approved by the district court sub judice and based upon the defendant's unamenability to rehabilitation, and escalating pattern of increasingly serious offenses, represents a direct and express conflict with the decisions of other district courts of this state (PB-3).

In essence, what Petitioner asserts is that the decision of the Fourth District Court in the instant case, conflicts with this Court's decision in Hendrix v. State, 475 So.2d 1218 (Fla. 1985);(PB-3). Petitioner cites the decisions of the First and Third District Courts of this State, and asserts that those two courts correctly interpreted this Court's decision in Hendrix, while the Fourth District Court, in the instant case, entered a ruling contrary to the Hendrix holding. Petitioners argument must fail.

Because this Court's decision in Hendrix represents the controlling decision in this State regarding valid reasons for departure, any decisions from district courts which comport with the tenets of Hendrix will not constitute the express and direct conflict necessary for invocation of this Court's discretionary jurisdiction See Jenkins v. State, 385 So.2d 1356,

1359 (Fla. 1980). As the Fourth District noted in it's opinion below, it did not believe the trial court had violated the Hendrix prohibition of "double consideration" of the defendant's prior offenses (A-1). Thus, unless the decision of the district court sub judice is facially in contradiction to this Court's decision in Hendrix, supra, no basis now exists for the exercise of this Court's discretionary jurisdiction.

In Eutsey v. State, 383 So.2d 219 (Fla. 1980), this Court held that the classification of a defendant as an habitual offender was a valid basis for imposition of a departure sentence. The habitual offender classification, by it's nature, calls for a consideration of the pattern of a defendant's prior convictions, and of the defendant's unlikely prospects for rehabilitation by probation authorities. Yet, this Court has not announced that the Eutsey decision is no longer applicable in light of the Hendrix decision. Therefore, by approving the trial court's decision in the instant case, the Fourth District Court did nothing more than to follow the holdings of Hendrix and Eutsey, supra, which would allow departures based upon findings separate and distinct from a mere totaling of points assigned to particular prior convictions (A-1). This Court has recently held that unamenability to rehabilitation is a valid reason for departure See Adams v. State, ___So.2d___, 11 F.L.W. 291,292 (Fla. June 26, 1986). Even the First District Court of Appeals has recognized that departure may be based upon a consideration of the defendant's cumulative criminal record See Williams v.

State, 11 F.L.W.1429 (Fla. 1st DCA June 25, 1986). Conflict must appear on the face of the decision sought to be reviewed, and should not be speculative, or based upon reasons for a decision stated in the body of an opinion or in the dissent See Jenkins, supra. The cases Petitioner cites [Battles v. State, 11 F.L.W. 323 (Fla. 3d DCA February 4, 1986); and Smith v. State, 479 So.2d 804 (Fla. 1st DCA 1985)]; do not specifically hold that the defendant's inability to achieve rehabilitation through probation, or the continuing pattern of increasingly serious offenses, are invalid reasons for departure. Therefore, the aforesaid decisions are not expressly and directly in conflict with the decision complained of, and cannot serve as a basis for exercise of this Court's discretionary jurisdiction See Jenkins, supra. Petitioner next argues that the decision now complained of conflicts with the decision of this Court in State v. Oden, 478 So.2d 51 (Fla. 1985). This argument is substantively unfounded, and procedurally improper.

The substance of Petitioner's argument is that the Fourth District Court erroneously relinquished jurisdiction to the trial court in order to allow the promulgation of a written order of departure. This Court has held that similar procedures are entirely proper See State v. Jackson, 478 So.2d 1054, 1056 n.2 (Fla. 1985); pertaining to Fla.R.Civ.P. 1.530(f), and relinquishment of jurisdiction in order to carry out the intended purpose of said rule. Moreover, when Petitioner previously sought discretionary review of this issue, and this Court declined

to accept jurisdiction (PB-4), this Court can be presumed to have been aware of it's decision in Oden, supra. Therefore, it is clear that the proper time to seek review of this issue was upon issuance of the order of the Fourth District Court of Appeal which relinquished jurisdiction, and that Petitioner cannot invoke the "conflict" jurisdiction of this Court based upon the instant order of the Fourth District, based only upon Petitioner's omission of case law in it's brief seeking review of a previous order of the Fourth District. The instant petition is improper because it is clearly prohibited as it is an attempt to invoke this Court's discretionary jurisdiction so as to pursue a second appeal of the district court's decision to relinquish jurisdiction to the trial court sub judice See Sanchez v. Wimpey, 409 So.2d 20 (Fla. 1982). Such relinquishment is not directly in conflict with this Courts holding in Oden, supra. See Jackson, supra, 478 So.2d at 1056n.2 Moreover, Petitioner improperly seeks review of this issue for a second time, when the order sought to be reviewed is not before this Court.

The instant Petition should be denied.

CONCLUSION

The decision of the district court is not expressly and directly in conflict with the decisions of this Court, or the other district courts, and the instant Petition in part seeks improper remedy. This Honorable Court should therefore decline to accept jurisdiction in this case.

Respectfully submitted,

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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, MARGARET GOOD, ESQUIRE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401, this 15th day of July, 1986.

OF COUNSEL