SUPREME COURT OF FLORIDA

MARJORIE O. DAVIS,

Petitioner,

vs.

CASE NO. 69,019

STATE OF FLORIDA,

Respondent.

_____/

PETITION FOR REVIEW FROM
FIRST DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF RESPONDENT

JIM SMITH
ATTORNEY GENERAL

MARK MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

SUPREME COURT OF FLORIDA

MARJORIE O. DAVIS,

Petitioner,

vs. CASE NO. 69,019

STATE OF FLORIDA,

Respondent.

_____/

JURISDICTIONAL BRIEF OF RESPONDENT

SUMMARY OF ARGUMENT

This Honorable Court should not accept the case at bar for discretionary review inasmuch as the decision of the District Court is not in express and direct conflict with any decision of this Court or another District Court.

STATEMENT OF THE CASE AND FACTS

Marjorie Davis was indicted for the premeditated murder of her husband (R 2,3).

Mrs. Davis, after some planning and reflection, fired five shots into her sleeping husband and then sat outside while he slowly bled to death. While waiting, she wiped off the gun (R 265).

The shots awoke the Davis' child, who watched his father stagger about and slowly die (R 533).

Pursuant to plea negotiations, Davis withdrew her "insanity" defense and pled guilty to second degree murder (R 271). The State reserved the right to ask for a sentence in excess of the guidelines (R 271). The defendant acknowledged this (R 276).

Mrs. Davis' sentencing hearing disclosed:

> (1) Davis killed her husband because she could not bear to confront him with her financial problems.
>
> (2) Dr. Veronen, Davis' own expert, testified that Davis' crime was not a "one time reaction" to anything but rather was a crime capable of repetition by this defendant (R 605).
>
> (3) Dr. Veronen, again, Davis' own expert, stated that Ms. Davis was <u>not</u> an abused or battered spouse (R 533,605).

Ms. Davis was sentenced to a term of 40 years, which exceeded the guidelines recommendation of only (12) to (17) years.

On appeal, the First District rejected one of the four grounds for deprture (Defendant was same and not an abused spouse) but affirmed the other three remaining grounds, to wit:

> (1) Cold blooded nature of the offense.
>
> (2) Abuse of trust of a familial relationship.
>
> (3) Presence of Victim's son in the house.

ARGUMENT

DISCRETIONARY REVIEW SHOULD NOT BE GRANTED.

The decision of the First District Court of Appeal does not conflict, expressly or directly, with **State v. Mischler**, 488 So.2d 523 (Fla. 1986) or **Scurry v. State**, 11 F.L.W. 254 (Fla. 1986).

While **Mischler** and **Scurry** rejected similar findings, they did not state that the reasons given could never support departure **Scurry**, for example, said:

> "Reason one, even if we were to find it clear and convincing, is not proved. There is insufficient evidence in the record" **Scurry**, **supra**.

The case at bar, as well as **Scurry** and **Mischler**, turned on its facts, not a legal determination. Thus, there was no express or direct conflict between the decision at bar and those cited.

Where Ms. Davis detects "conflict" is in the results, not the judgments, of the courts. Mere conflicts of "results" rather than "decisions" cannot provide a basis for review, **Nielson v. Sarasota**, 117 So.2d 731 (Fla. 1960).

In **Florida Power and Light Co. vs. Bell**, 113 So.2d 697 (Fla. 1959) "express and direct conflict" was defined as:

> (1) Adoption of conflicting rules of law by two or more courts.
>
> (2) application of an existing rule of law to identical facts, with different conclusions.

The facts at bar are not identical to those in **Mischler** or **Scurry**. Unlike **Scurry**, for example, the victim's son stood and watched his father bleed to death. (The mental trauma from this gory experience may not be readily apparent). The same can be said for **Chandler** (the rape was "witnessed" by an infant) and **Carter** [1] (general economic loss).

What the petitioner really desires is simple resentencing by this Court after reweighing the evidence, which of course would violate **Tibbs v. State**, 397 So.2d 1120 (Fla. 1981) affd. 457 U.S. 31 (1982). For that reason, she alleges that a "per se" reversible error rule was created by **Mischler** which, of course, is incorrect. **Albritton v. State**, 476 So.2d 158 (Fla. 1985).

Absent express and direct conflict, review should not be granted merely to reweigh the distinctive evidence at bar and resentence the petitioner de novo.

---

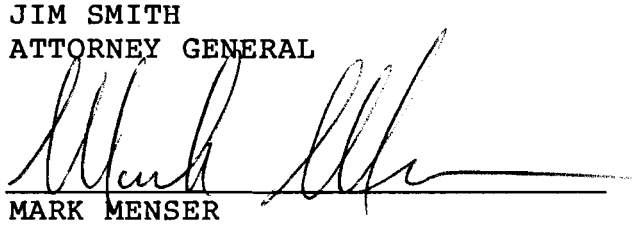
[1] **Chandler v. State**, 11 F.L.W. 1443 (Fla. 2d DCA 1986), **Carter v. State**, 11 F.L.W. 895 (Fla. 4th DCA 1986).

CONCLUSION

The petitioner has failed to establish any basis for (conflict) review of the decision of the District Court.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



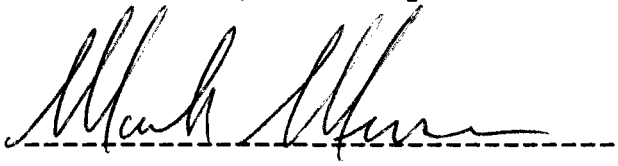
MARK MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Offices of Robert Stuart Willis, 503 East Monroe Street, Jacksonville, Florida, 32202 by U.S. Mail this 24th day of July, 1986.



MARK MENSER
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT