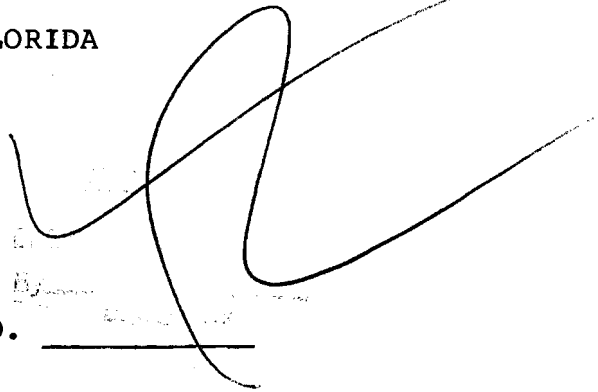


9-13

IN THE SUPREME COURT OF FLORIDA

CHRISTIAN DANIEL MASSARD,)
)
 Petitioner,)
)
 v.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)



CASE NO. _____

PETITIONER'S BRIEF ON JURISDICTION

69,173

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PRELIMINARY STATEMENT

Petitioner was the Appellant and the defendant, and Respondent was the Appellee and the prosecution in the Criminal Division of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. In the brief, the parties will be referred to as they appear before this Honorable Court of Appeal.

The following symbols will be used:

"A" Appendix

STATEMENT OF THE CASE AND FACTS

In the trial court, Petitioner was convicted of two counts of attempted first-degree murder and two counts of robbery (A1). Petitioner was sentenced to two consecutive forty (40) year sentences and two concurrent forty (40) year sentences. Petitioner appealed his convictions and sentences.

Petitioner's convictions for attempted first-degree murder were enhanced from first-degree felonies to life felonies on the basis that a weapon or firearm was used (A1). The information had charged that the two offenses were each committed with a "blunt instrument" (A1). The verdict for each charge read: "Guilty of Attempted First Degree Murder as charged" (A1). On appeal, the district court held that the jury had made a specific finding that the offenses were committed with the use of a weapon (A2).

The trial court gave several reasons for departing from the sentencing guidelines.¹ The district court held that "Appellant was an habitual felony offender" and "That the crimes were committed in a cold and calculated manner leaving permanent disabling injuries" were valid reasons for departure (A3,4). The district court also held that a defendant's clear and present danger to society was equivalent to finding that a sentence would not be sufficiently long to accomplish reasonable rehabilitation and could be an acceptable reason for departure (A3). The district court also held that deterrence to others was not a

¹ These reasons were never placed in writing. However, the trial court did give three reasons for departure at sentencing (A6-7).

valid reason for departure (A4). The court then concluded that the state had carried its burden of showing beyond a reasonable doubt that the absence of the invalid reasons would not have affected the departure sentence (A4).

On July 16, 1986, the Fourth District issued its decision in the form of an amended opinion (A1-4). Petitioner thereafter filed the instant cause in this Court.

SUMMARY OF THE ARGUMENT

In the instant case, the information charged that Petitioner had committed attempted first degree murder with a "blunt instrument". The jury returned a verdict of "Guilty...as charged." The district court held that this was a sufficient finding by the jury that Petitioner had used a weapon in this commission of the offense as to justify enhancement of the felony from a first-degree felony to a life felony. Such a holding conflicts with State v. Overfelt, 457 So.2d 1385 (Fla. 1984); Streeter v. State, 416 So.2d 1203 (Fla.3d DCA 1982); and Clemon v. State, 473 So.2d 271 (Fla.3d DCA 1985).

By holding that the trial court may depart from the sentencing guidelines because a defendant is an "habitual felony offender", the district court's decision, as the district acknowledges, conflicts with Vicknair v. State, 483 So.2d 896 (Fla.5th DCA 1986).

By holding that a trial court may depart because a defendant is a danger to society, the district court's decision conflicts with Heston v. State, 11 FLW 1344 (Fla.2d DCA June 13, 1986); Martinez-Diaz v. State, 484 So.2d 633 (Fla.2d DCA 1986); Sabb v.

State, 479 So.2d 845 (Fla.1st DCA 1985); Brooks v. State, 456 So.2d 1305 (Fla.1st DCA 1984); and Burch v. State, 462 So.2d 548 (Fla.1st DCA 1985).

By holding that the trial court may depart from the sentencing guidelines because the attempted first-degree murders and robberies were committed in a cold and calculated manner leaving disabling injuries, the district court's decision conflicts with Carney v. State, 458 So.2d 13 (Fla.1st DCA 1984) and State v. Mischler, 488 So.2d 523 (Fla. 1986).

This Court should review the decision of the district court in the exercise of its certiorari jurisdiction to resolve these conflicts.

ARGUMENT

POINT INVOLVED

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF OTHER DISTRICT COURTS OF APPEAL AND WITH DECISIONS OF THIS COURT.

Petitioner invokes this Court's "conflict" jurisdiction under Article V, §3(b)(3), Florida Constitution (1980), and Fla.R.App.P. 9.030(a)(2)(iv). Said rule provides that review may be sought of "decisions of district courts of appeal that: (iv) expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law."

At bar, the decision of the district court expressly and directly conflicts with other decisions on the same question of law in several instances.

First, the district court held that Petitioner's conviction could be reclassified pursuant to §775.087(1)(a), Fla. Stat. (1983), for the use of a weapon where the information charged that the offense was committed "with a blunt instrument" and where the jury returned a verdict of: "Guilty of Attempted First Degree Murder, as charged." (A1). Permitting enhancement under these circumstances creates conflict with the decisions in State v. Overfelt, 457 So.2d 1385 (Fla. 1984); Streeter v. State, 416 So.2d 1203 (Fla.3d DCA 1982); and Clemon v. State, 473 So.2d 271 (Fla.3d DCA 1985). In Overfelt this Court stated:

The district court held, and we agree, "that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for a use of a firearm, the jury must make a finding him guilty of a crime which involves a firearm or by answering a specific

question of a special verdict form so indicating".... To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function....

457 So.2d at 1387.

Thus, Overfelt holds that §775.087 may not be utilized unless there is a specific jury finding that a weapon or firearm was used in the commission of the offense. In the present case the jury verdict did not make the specific requisite finding that a weapon, as opposed to a blunt instrument, was used in the commission of the offense. Consequently the decision in this case conflicts with this Court's decision in Overfelt.

In Streeter v. State, 416 So.2d 1203 (Fla.3d DCA 1982), the Third District Court of Appeal held that as a predicate to reclassification under §775.087 the jury must decide beyond a reasonable doubt that the defendant used a firearm or weapon during the commission of a felony. In addition, the same court in Clemon v. State, 473 So.2d 271 (Fla.3d DCA 1985), disapproved the enhancement of a sentence for the use of a deadly weapon where neither the information nor verdict explicitly referred to the use of a deadly weapon, even though the information read that the defendant committed a robbery while carrying a weapon specifying a knife, and the defendant was found guilty as charged. Consequently, both Streeter and Clemon conflict with the instant decision where reclassification was upheld even though there was no specific jury finding, or what can be labeled

a specific finding by combined analysis of the information and jury verdict, that Petitioner used a weapon in the commission of the offense.

The district court also held that Petitioner "was an habitual felony offender" was a proper reason for departure from the guidelines (A3). In its decision the district court acknowledged that there was conflicting authority on the validity of this reason for departure. The district court cited decisions from the First and Second Districts to show that the reason for departure was valid but then the court said "But see Vicknair v. State, 483 So.2d 896 (Fla.5th DCA 1986)." (A3). Such a "but see" citation is the functional equivalent of a certification of direct conflict with decisions of other district courts of appeal, which basis also establishes this Court's discretionary jurisdiction to review the decision in Petitioner's case. In holding that Petitioner "was an habitual felony offender" was a proper reason for departure the district court's decision conflicts with Vicknair, supra.

The district court also held that the following was an acceptable reason for departure:

It was necessary to remove appellant from society as he presented a clear and present danger thereto. This is equivalent to a finding that a sentence within the guidelines would not be sufficiently long to accomplish reasonable rehabilitation, which is ordinarily an acceptable reason for departure.

(A3).

In stating that aggravation of Petitioner's sentence would be valid because he presents a danger to society the district court's decision conflicts with the Second District's decision in Heston v. State, 11 FLW 1344 (Fla.2d DCA June 13, 1986), where society's "right to be protected" from the defendant was not a proper reason for departure, and Martinez-Diaz v. State, 484 So.2d 633 (Fla.2d DCA 1986) where the fact that the defendant "is a threat to the people and property of the State of Florida" was held to be an improper reason for departure. Holding this reason as valid is also in express and direct conflict with the decision in Sabb v. State, 479 So.2d 845 (Fla.1st DCA 1985), where the First District held that a defendant's "threat to society" was an impermissible reason to depart from the guidelines. Also, the district court's decision that a departure would be warranted where "the guidelines would not be sufficiently long to accomplish reasonable rehabilitation" is in direct conflict with the First District's decisions in Burch v. State, 462 So.2d 548 (Fla.1st DCA 1985) and Brooks v. State, 456 So.2d 1305,1307 (Fla.1st DCA 1984), where need for rehabilitation was held not to be a proper reason for departure when the departure decision does not involve deviation from a non-prison guideline sanction.²

Finally, the district court held that because the attempted first degree murders and robberies were "committed in a cold and calculated manner leaving disabling injuries" departure was warranted (A4). This in direct conflict with State v. Mischler,

² In the present case it is facially impossible for Petitioner's recommended guideline sentence for two attempted first degree murders and two robberies to involve a non-prison sanction.

488 So.2d 523 (Fla. 1986), which holds that departure cannot be based on an inherent component of the crime and with Carney v. State, 458 So.2d 13 (Fla.1st DCA 1984) where premeditation was found to be an inherent component of robbery, thus an improper reason for departure. Accordingly, this Court has discretionary jurisdiction to review the decision in Petitioner's case on this basis also. Article V, §(3)(b)(3), Florida Constitution.

This Court should exercise its discretion to accept jurisdiction to maintain uniformity among the district courts as to what constitutes a specific jury finding so as to permit reclassification of an offense for the use of a weapon, and to maintain uniformity as to whether certain reasons constitute valid reasons to justify a sentencing guideline departure. The kind of inter-district conflict which is demonstrated here is precisely the type of matter which can only be resolved by this Court. Therefore, this Court should accept jurisdiction of this cause and proceed to dispose of the issues after briefing on the merits by the parties.

CONCLUSION

WHEREFORE, based on the foregoing reasons, Petitioner respectfully requests this Honorable Court to exercise its certiorari jurisdiction to review the decision of the district court.

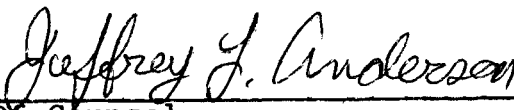
Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier to RICHARD BARTMON, Assistant Attorney General, Room 204 Elisha Newton Dimick Building, 111 Georgia Avenue, West Palm Beach, FL 33401, this 19th day of August, 1986.


Of Counsel