IN THE SUPREME COURT OF FLORIDA

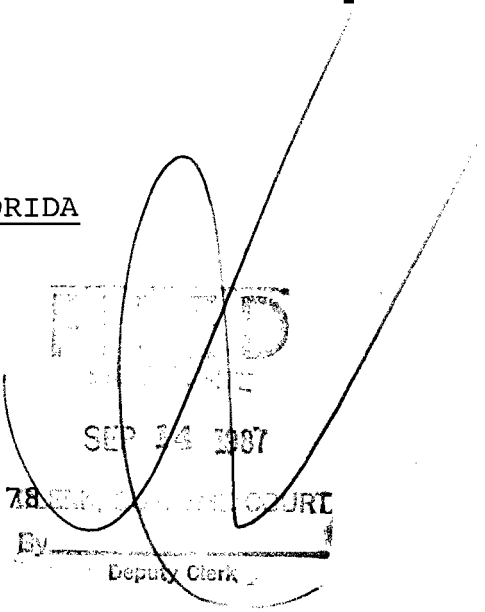
ARDEN M. MERCKLE, :

Petitioner,

vs. : CASE NO: 70,778

STATE OF FLORIDA,

Respondent. :



PETITIONER'S REPLY BRIEF ON THE MERITS

FRANK RAGANO, ESQUIRE of
FRANK RAGANO, P.A.
620 E. Twiggs Street
Tampa, Florida 33602
813/229-1191

ATTORNEY FOR PETITIONER
ARDEN M. MERCKLE

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Issue I

(CERTIFIED QUESTION)

WHETHER A CIRCUIT JUDGE'S CONDUCT IN ACCEPTING A BRIBE AND THE ATTENDANT IMPACT OF SUCH CONDUCT ON SOCIETAL VALUES AND THE DESTRUCTION OF CONFIDENCE OF THE PUBLIC IN THE ADMINISTRATION OF JUSTICE CONSTITUTE CLEAR AND CONVINCING REASONS FOR DEPARTING FROM THE RECOMMENDED GUIDELINES SENTENCE?

We respectfully submit that the Respondent, in its Brief on the Merits, does a great deal of twisting and turning in an attempt to confuse the specific issue that the Second District Court of Appeal certified to this Honorable Court and which this Court has agreed to review. Moreover, the Respondent plays on words when it attempts to distinguish inherent component from matters calculated into the scoresheet.

After all is said and done the fact remains that the issue before this Honorable Court is whether a circuit judge who has been convicted of the offense of bribery should receive a harsher sentence than other persons who might be convicted of the same offense simply because he is a circuit judge. In other words, should a double standard be applied relative to the punishment imposed upon a circuit judge who is convicted under the bribery statute?

Additionally, in its argument the Respondent makes reference to the fact that the Petitioner was a Chief Judge, as though this should be an added reason for a judge to receive a harsher sentence than other persons convicted under the bribery statute. The certified

question makes no mention of a "Chief Judge". It deals specifically with a "circuit judge".

On page 3 of its Brief, the Respondent cites as authority the case of Mischler v. State, (4th DCA 1984), 458 So.2d 37, and quotes an excerpt from the opinion relative to a judge who accepts a bribe. We respectfully submit that a reading of the entire opinion clearly reflects that the quoted portion of the opinion consitutes "dictum" and does not constitute a ruling by the Court. This is further evidenced by this Honorable Court's decision in State v. Mischler, (Fla. 1986), 488 So.2d 523, where no mention is made of the quoted language when this Court reviewed a certified question of the Fourth District Court of Appeal.

The Respondent also cites this Court's decisions in Lerma v. State, (1986), 497 So.2d 736 and Casteel v. State, (Fla. 1987), 498 So.2d 1249. We submit that the Lerma and Casteel cases are not applicable to the certified issue since the ruling in the Lerma case was that trauma was an inherent component of the crime of sexual battery and the ruling in the Casteel case was that trauma was not an inherent component of the crime of sexual battery.

The Respondent also relies on the case of State v. Rousseau, (Fla., June 11, 1987), 12 F.L.W. 291, which distinguishes the type of trauma to any victim of a burglary and trauma which was beyond that which was inherent. The Petitioner has no quarrel with the ruling in the Rousseau case. However, it is not applicable to the specific and narrow issue that this Court has agreed to review.

Finally, the Respondent relies on Scott v. State, (Fla., June 11, 1987), 12 F.L.W. 290, in support of its argument that the last

statement in the trial court's order should not be considered as the trial court's mere disagreement with the guidelines sentence since when it is accompanied by a valid reason it should be considered as the trial court's conclusion that departure is necessarily based upon the valid reasons. Once again, the Petitioner has no quarrel with the ruling of this Court in the Scott case, supra. However, the certified question that this Honorable Court has agreed to review has absolutely nothing to do with the ruling in the Scott case since we are here dealing with the issue of whether a circuit judge shall be dealt with any differently than any other person who has been convicted of the offense of bribery.

We need look no farther than what transpired in the case sub judice and the companion cases of the Petitioner's two (2) co-defendants, Howard L. Garrett and Richard P. Hope, to see the inequities and the unfairness that can result from this Honorable Court's answering the certified question in the affirmative.

It was the theory of the State's case at the trial of the case sub judice that the Petitioner, Garrett and Hope conspired with one another to carry out the object of the conspiracy, namely, to bring about a probationary sentence for Hope's nephew instead of a prison sentence. The Petitioner and his two (2) co-defendants strenuously objected since they were not charged with a conspiracy. However, over their objections the trial court instructed the jury on the law of conspiracy to the effect that if the jury found that the Petitioner, Garrett and Hope were engaged in a conspiracy, then the Petitioner, Garrett and Hope would each be bound by the acts and utterances of the other two (2) co-conspirators. By its verdict, the jury

obviously found that the Petitioner, Garrett and Hope were engaged in such a conspiracy. Therefore, the circumstantial evidence as it applied to the Petitioner, Garrett and Hope was identical.

Yet,the Second District Court of Appeal held that the circumstantial evidence as it applied to Garrett was insufficient (Garrett had been sentenced to a five (5) year prison term); the reasons given by the trial judge for deviating from the Sentencing Guidelines as they applied to Hope were invalid (Hope was likewise sentenced to a five (5) year prison term and upon resentencing was placed on probation); and only because the Petitioner was a judge, his five (5) year prison sentence was upheld. Hope v. State, (2nd DCA 1987), 508 So.2d 425.

We respectfully submit that since the circumstantial evidence that was presented at the trial was identical as to each of the three (3) defendants under the trial judge's instructions to the jury on the law of conspiracy, it is fundamentally unfair for the Petitioner to be the only one of the three (3) defendants to have to serve a prison sentence simply because he was a judge. Such a holding, we submit, would clearly violate the Petitioner's rights to due process of law and equal protection of the law as guaranteed to him under the Fourth and Fourteenth Amendments to the United States Constitution.

ISSUE II

WHETHER THE DECISION SOUGHT TO BE REVIEWED CONFLICTS DIRECTLY AND EXPRESSLY WITH A DECISION OF ANOTHER DISTRICT COURT AND/OR THIS COURT?

The gist of the Respondent's argument under this Issue is that the discretionary jurisdiction of this Honorable Court lies only where the decision of a District Court of Appeal expressly and directly conflicts with another District Court on the same question of law. That to be "expressly" in conflict there must be a conflict of decisions and that this Court's holding in Jenkins v. State, (Fla. 1980), 385 So.2d 1356, requires that there be a conflict in the text of the opinions. The Respondent then goes on to argue that there is nothing in the opinion which states the standard by which circumstantial evidence is judged to be sufficient by the finder of fact and that there was nothing in the opinion which states that this was not the standard applied. Petitioner disagrees.

It is to be noted that albeit the appeals from the convictions of the Petitioner, Garrett and Hope were separate and apart from one another, they were tried together in a joint trial and that all of the circumstantial evidence as it applied to the Petitioner, Garrett and Hope was identical since it was the State's theory of the case that the Petitioner, Garrett and Hope were engaged in a conspiracy and the jury was instructed on the law of conspiracies. Yet, the rule applied by the Second District Court of Appeal regarding an appellate court's review of circumstantial evidence on appeal in the case sub judice was in direct conflict with the rule applied in

the Garrett case. Garrett v. State, (2nd DCA, May 15, 1987), 508 So.2d 427. In the Garrett case the Second District Court of Appeal applied the rule that while the weight of the evidence is a matter for a jury to determine, the legal sufficiency of the evidence to support a conviction is a matter of law for the Court to determine. In the case sub judice the District Court of Appeal, in holding that the circumstantial evidence was sufficient to sustain the conviction of the Petitioner, applied the rule that it must review the evidence only to determine if there was legally sufficient evidence to support the jury's verdict, the weight of the evidence being solely within the province of the jury.

We respectfully submit that when the decisions in the case sub judice and the Garrett case are considered together the text of the opinions clearly demonstrate an express and direct conflict between the two (2) decisions, as well as an express and direct conflict of the decision in the case sub judice and the decisions cited by the Petitioner in his Brief on the Merits.

CONCLUSION

Based upon the facts, decisions and authorities contained in this Reply Brief as well as Petitioner's Brief on the Merits, we respectfully submit that this Honorable Court should vacate the convictions and sentence of the Petitioner and direct the trial court to discharge the Petitioner, or, as the very least, this Honorable Court should answer the certified question in the negative.

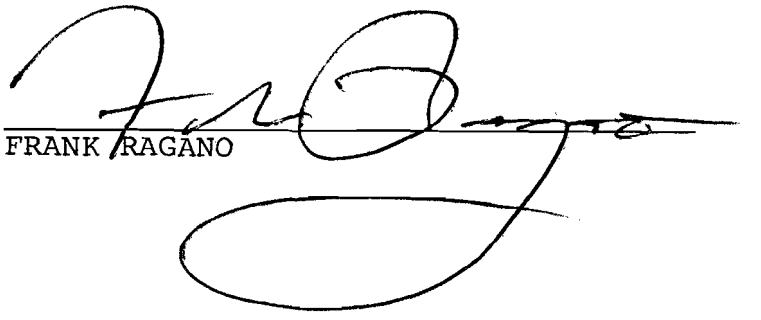
Respectfully submitted,

FRANK RAGANO, ESQUIRE of
FRANK RAGANO, P.A.
620 E. Twiggs Street
Tampa, Florida 33602
813/229-1191

ATTORNEY FOR PETITIONER
ARDEN M. MERCKLE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished, by mail, this 10th day of September, 1987 to Gary O. Welch, Esquire, Assistant Attorney General, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602.



FRANK RAGANO