

Reg App.

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JUAN OSCAR DOMINGUEZ,

Respondent.

\_\_\_\_\_ /

CASE NO.

70,882

**FILED**  
SID J. WHITE

JUL 20 1987

CLERK, SUPREME COURT

By \_\_\_\_\_  
Deputy Clerk

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
IT IS SUGGESTED THAT DISCRETIONARY REVIEW SHOULD BE GRANTED	3
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Atwaters v. State,</u> Case No. 69,555	2,3
<u>Flournoy v. State,</u> 12 F.L.W. 1216 (Fla. 1st DCA 1987)	1-3
<u>Irwin v. State,</u> 479 So.2d 153 (Fla. 2nd DCA 1985)	3
<u>Seastrand v. State,</u> 474 So.2d 908 (Fla. 5th DCA 1985)	3
<u>State v. Villalovo,</u> 481 So.2d 1303 (Fla. 1986)	3

STATEMENT OF THE CASE AND FACTS

The relevant facts regarding the crime itself are correctly set forth by the District Court and are accepted. The opinion of the District Court is appended.

The District Court, after noting that the question (of whether a "guidelines departure" can be justified by the quantity of drugs possessed) before it had been certified in Flournoy v. State, 12 F.L.W. 1216 (Fla. 1st DCA 1987), ruled on the merits of the case without again certifying the question.

SUMMARY OF ARGUMENT

The case at bar presents the identical legal question submitted for review in Atwaters v. State, Case No. 69,555 and Flournoy v. State, 12 F.L.W. 1216 (Fla. 1st DCA 1987). It is submitted that the pendency of these decisions as well as conflicts with decisions of the Second District Court support an acceptance of this case for discretionary review.

ARGUMENT

IT IS SUGGESTED THAT  
DISCRETIONARY REVIEW SHOULD  
BE GRANTED

An en banc First District Court of Appeal has certified the question of whether a departure from a recommended "guidelines" sentence due to the quantity of narcotic(s) possessed is proper. Flournoy v. State, 12 F.L.W. 1216 (Fla. 1st DCA 1987). This same question was recently argued in Atwaters v. State, Case No. 69,555.

The decision at bar comes from the same District Court as Atwaters and Flournoy, but without the accompanying certified question. Nevertheless, it raises the exact same legal issue and should be resolved together with its predecessors. Of course, the decision not to permit a departure based upon "quantity" of controband expressly and directly conflicts with Seastrand v. State, 474 So.2d 908 (Fla. 5th DCA 1985) and Irwin v. State, 479 So.2d 153 (Fla. 2nd DCA 1985); see also State v. Villalovo, 481 So.2d 1303 (Fla. 1986)(downward departure).

It is suggested that the case at bar should be accepted for review given the pendency of this issue and the need for uniformity in sentencing decisions.

CONCLUSION

It is suggested that discretionary review should be granted.

Respectfully submitted,

ROBERT A. BUTTERWORTH  
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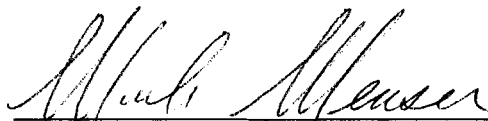
  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Ms. Kathleen Stover, Esq., Assistant Public Defender, Post Office Box 671, Tallahassee, Florida 32302, this 20th day of July, 1987.

  
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OF COUNSEL