IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 71,170

BRUCE ALAN VANKOOTEN,

Respondent.

_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

The respondent's claim that Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), rev. denied, 492 So.2d 1332 (Fla. 1986), has been implicitly overruled by State v. Mestas, 507 So.2d 587 (Fla. 1987) is meritless. The express and direct conflict in fact certified by the district court of appeal in this case does exist. This court should address that conflict so as to assure uniformity in sentencing determinations by this state's trial courts and should reject the holding of the district court in this case which limits a sentencing judge's discretion under the second guidelines cell to imposing only 12-30 months incarceration or community control and refuses to allow a combination of these sentencing alternatives by the trial court in attempting to reach its sentencing goals.

ARGUMENT

POINT ON APPEAL

IN REPLY TO THE RESPONDENT'S CONTENTION THAT THIS COURT IS WITHOUT CONFLICT JURISDICTION DESPITE THE DISTRICT COURT OF APPEAL CERTIFICATION OF CONFLICT.

The district court properly certified conflict in this case and the respondent's assertion that no conflict in fact exists should be rejected. It is clear from Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), rev. denied, 492 So.2d 1332 (Fla. 1986), and the instant case (wherein the district court certified conflict with Francis) that **at least** two district courts disagree on whether a trial judge may **combine** community control and state prison incarceration under the second guidelines cell. That conflict needs to be addressed so that the goal of uniformity in sentencing which was the basic purpose for enactment of the guideline is more fully recognized. Fla. R. Crim. P. 3.701(b). Certainly, there is no reason to allow trial courts in one section of the state to utilize sentencing alternatives not available to courts in another appellate district **solely** due to the judicial decision by that area's district court of appeal.

Respondent's assertion by answer brief and motion to dismiss that no conflict exists because Francis "appears to have been implicitly overruled" by State v. Mestas, 507 So.2d 587 (Fla. 1987), is patently meritless. The tentative manner in which the claim is made (i.e., it only "appears" that no conflict exists)

betrays its factually baseless nature. Mestas does not overrule Francis explicitly or implicitly; to the contrary, in Mestas this court addressed **only** the question of whether community control was a non-state prison sanction properly utilized under the **first** cell of the guidelines. Any reasonable view of the Francis decision makes clear that the issue determined in that case was the propriety of the trial court's combination of **community control and state prison incarceration** under the **second** cell. Although the guidelines recommendation before the trial court is for a first cell non-state prison sanction, the Francis court made clear that because a probation violation was involved the true issue to be determined was the propriety of the two year incarceration/two year community control sentence under the **second** guidelines cell, and in reaching that determination, the court likewise reached the legal conclusion that it was proper to combine state prison incarceration and community control under that guidelines cell:

> We recognize that our holding appears to convert the applicable range to 'community control **and** 12 to 30 months' incarceration.' However, we believe that the use of the word 'or' in this cell was not intended to make the alternatives mutually exclusive but rather was designed to permit the imposition of either or both sanctions. Otherwise, this would be the only cell in the entire burglary category in which an authorized imposition of community control could not be combined with incarceration.

Id. at 349.

Notwithstanding the respondent's assertion to the contrary,

Francis contains more than conflicting "language". It in fact contains a recognition by the Second District Court of Appeal that it is proper under the law for a defendant to be sentenced under the second guidelines cell to community control and state prison incarceration - a determination clearly in conflict with the holding in this case. Unless this honorable court is prepared to allow trial courts in two districts to continuously reach different sentencing results because of the differing interpretation placed upon the second guidelines cell by their state appellate overseers, this obvious conflict should be resolved. Here, the announced rule of law as well as the application of that rule by the Fifth District Court of Appeal conflicts with Francis and therefore, as correctly determined by the Fifth District, conflict jurisdiction is demonstrated. Mancini v. State, 312 So.2d 732 (Fla. 1975).

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the above Petitioner's Reply Brief on the Merits has been furnished by mail to Assistant Public Defender James R. Wulchak, Chief, Appellate Division, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, this 23rd day of November, 1987.

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