IN THE SUPREME COURT OF FLORIDA

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COURT

Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

JEFFREY R. AVERA,

Respondent.

CASE NO. 71,171

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	PAGE NO.
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	
THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THE INTENT OF THE EXISTING SENTENCING GUIDELINES IN THE SECOND SENTENCING CELL TO ALLOW ONLY FOR INCARCERATION OR COMMUNITY CONTROL, BUT NOT BOTH.	3
CONCLUSION	6
CONCLUSION	6
CERTIFICATE OF SERVICE	

TABLE OF CITATIONS

CASES CITED:	PAGE NO.
Francis v. State 487 So.2d 348 (Fla. 2d DCA 1986)	2,4,5
Hankey v. State 505 So.2d 701 (Fla. 5th DCA 1987)	5
State v. Mestas 507 So.2d 587 (Fla. 1987)	2,5
State v. Williams 195 So.2d 202 (Fla. 1967)	5

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, vs. JEFFREY R. AVERA, Respondent.	))))))))))	CASE NO. 71,171

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

The respondent accepts the statement of the case and facts as set forth in the petititioner's initial brief on the merits.

SUMMARY OF ARGUMENT

The district court correctly determined the intent of the sentencing guidelines second cell which clearly states in the disjunctive "12-30 months **or** community control." The arguments made by the petitioner are nothing more than mere speculation, contrary to the clear language of the guidelines provision.

Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), relied on by the state, has been implicitly overruled in State v. Mestas, 507 So.2d 587 (Fla. 1987).

ARGUMENT

THE DISTRICT COURT OF APPEAL CORRECTLY DETERMINED THE INTENT OF THE EXISTING SENTENCING GUIDELINES IN THE SECOND SENTENCING CELL TO ALLOW ONLY FOR INCARCERATION **OR** COMMUNITY CONTROL, BUT NOT BOTH.

The petitioner contends simply and erroneously that the disjunctive "or" may be read to instead mean the conjunctive "and". (Petitioner's brief, pp. 5-9) The petitioner then seems to question whether the drafters of the guidelines could really have meant "or" to be used in this context. This contention flies in the face of the clear language of the guidelines provision providing that second cells amount to "12-30 months **or** community control" and the clear meaning of the disjunctive connecting the two alternatives.

The speculative exercise engaged in by the petitioner is inappropriately made before this Court; if the petitioner is dissatisfied with the clear meaning of the guidelines cell, then the appropriate place to make such an argument is to the guidelines commission and the legislature. If the guidelines commission and legislature intend for the petitioner's interpretation to be the law, then the appropriate procedure would be for those bodies to amend that provision to provide for an "and/or", or to have a section added stating that community

control may be imposed in addition to incarceration in the second cell. A judicial interpretation such as suggested by the petitioner is unwarranted in the face of clear language to the contrary.

The respondent does not dispute that Francis v. State, 487 So.2d 348 (Fla. 2d DCA 1986), contains language which could be read as conflicting with the holding of the Fifth District in the instant case. However, the primary basis for the holding in the second district case is not the meaning of the word "or", as is the instant issue, but rather was a misinterpretation of the nature of community control and its equation to probation. In Francis, supra, the defendant violated his probation and had a recommended guideline range of any non-state prison sanction. The trial court sentenced him to two years imprisonment followed by two years community control and gave reasons for departure which were challenged on appeal. The second district affirmed, holding that since sentencing followed revocation of probation, the trial court was permitted to increase the punishment one cell without stating any reasons for departure. The court then observed that the guidelines provide that a trial court may impose a split sentence of incarceration followed by a period of probation up to te maximum authorized by law. The court then concluded that since community control essentially functions as a more restrictive form of probation, a trial court may impose a split setence of incarceration followed by a period of community control up to the maximum authorized by law.

In State v. Mestas, 507 So.2d 587 (Fla. 1987), however, this Court recently held that community control may **not** properly be imposed when sentencing under the guidelines cell for any non-state prison sanction without stating clear and convincing reasons for departure. As this Court noted, community control is not equivalent to probation, but is a harsh and more severe alternative to probation. Thus, it appears that this Court's decision in State v. Mestas, supra, has implicitly overruled Francis, supra. Consequently, no conflict exists and the state can find no solace in Francis. Cf. State v. Williams, 195 So.2d 202 (Fla. 1967) (petition for review will be denied where one of the allegedly conflicting decisions is quashed). Moreover, the state sought discretionary review of this issue in Hankey v. State, 505 So.2d 701 (Fla. 5th DCA 1987), (on which case the fifth district relied in the instant decision) based upon an alleged conflict with Francis. On September 18, 1987, this Court, apparently agreeing with the respondent that no conflict existed, denied review. (Case No. 70,548)

Additionally, the petitioner argues that since the respondent received county jail time instead of prison, Hankey does not apply. This contention is erroneous. The respondent submits that any incarcerative term may not be coupled with community control under the dictates of the second cell.

The decision of the fifth district is correct. This Court should either affirm that decision or should quash the granting of discretionary review.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the respondent requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District, and vacate the sentence, or, in the alternative, should quash the order granting discretionary review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by mail to: The Honorable Robert A. Butterworth, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, this 2nd day of November, 1987.

JAMES R. WULCHAK
CHIEF, APPELLATE DIVISION
ASSISTANT PUBLIC DEFENDER