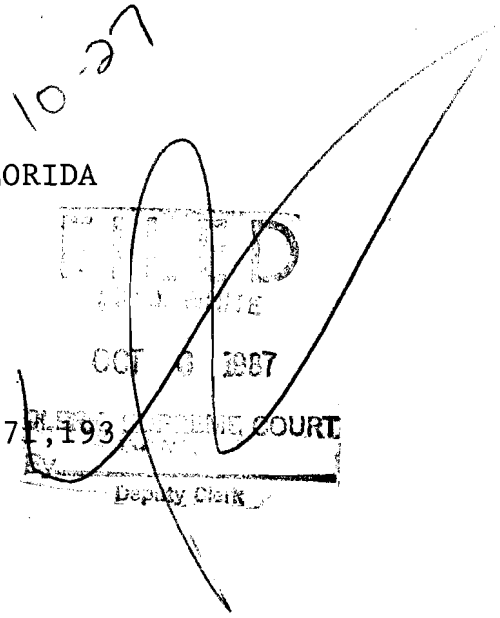
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v. CASE NO. 71,193

TIMOTHY LEE JOHNSON,

Respondent.

_____/

PETITIONER'S BRIEF ON JURISDICTION

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AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

After being adjudicated guilty of aggravated assault Johnson was sentenced pursuant to the guidelines. His presumptive guideline sentence fell within the second cell of "community control or 12-30 months incarceration." The trial court sentenced him to thirty months incarceration, followed by two years community control and six months probation for a total sentence of five years. Johnson appealed contending that the combination of incarceration and community control constituted a guidelines departure without valid written reasons.

The district court of appeal agreed holding that the "or" language of the second cell requires a trial court to utilize either incarceration or community control only, to the exclusion of the other remedy, such that the trial court is precluded from fashioning a sentence combining the two. Accordingly, the district court reversed and remanded for resentencing. (see appendix hereto) Johnson v. State, 11 F.L.W. 2080 (Fla. 5th DCA 1987) (on motion for rehearing or for clarification). In reaching that determination the district court specifically noted that its holding was contrary to the Second District Court of Appeal in Francis v. State, 487 So.2d 348 (Fla. 2d DCA), review denied, 492 So.2d 1332 (Fla. 1986).

The petitioner then timely filed a notice to invoke discretionary jurisdiction based on the express and direct conflict presented by the district court opinion.

SUMMARY OF ARGUMENT

The district court holding limiting sentencing under the second guidelines cell to either incarceration or community control and forbidding a combination of the two expressly and directly conflicts with Francis v. State, 487 So.2d 348 (Fla. 2d DCA), review denied, 492 So.2d 1332 (Fla. 1986).

ARGUMENT

THE DISTRICT COURT HOLDING THAT A TRIAL COURT IS PRECLUDED FROM SENTENCING A DEFENDANT TO COMMUNITY CONTROL AND INCARCERATION IN COMBINATION UNDER THE SECOND CELL OF THE GUIDELINES, EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN FRANCIS V. STATE, 487 So.2d 348 (Fla. 2d DCA), review denied, 492 So.2d 1332 (Fla. 1986).

The petitioner submits that to demonstrate express and direct conflict for purposes of invoking this Court's discretionary jurisdiction it is necessary only to refer to the specific language of the district court decision wherein the court conceded that its holding was "contrary to Francis v. State, 487 So.2d 348 (Fla. 2d DCA), review denied, 492 So.2d 1332 (Fla. 1986), cited by the state...". (See appendix A hereto) Indeed, it is because of this express and direct conflict with Francis that the Fifth District Court of Appeal later certified conflict with that decision in Vankooten v. State, 12 F.L.W. 2121, (Fla. 5th DCA September 3, 1987) and Avera v. State, 12 F.L.W. 2127, (Fla. 5th DCA September 3, 1987) (see appendix B and C attached hereto).

In Vankooten and Avera, the district court's holding was the same as in this case, i.e., that a trial court may not impose both community control and incarceration under the second guidelines cell because of the alleged limitation of the "or" conjunction. This Court has accepted jurisdiction in Vankooten (Fla. S.Ct. Case No. 71,170) and Avera (Fla. S.Ct. Case No. 71,171) and ordered that petitioner's brief on the merits shall be served on or before October 13, 1987, with the cases to be considered together after briefing. (See appendix D attached here) There exists no legal or logical distinction between this case and the express and direct

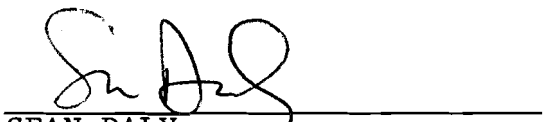
conflict conceded in the district court's opinion on rehearing, and the conflict certified to exist in Vankooten and Avera upon which this Court has accepted jurisdiction.

CONCLUSION

Wherefore based upon the arguments and authorities presented the petitioner urges this court to exercise its discretionary jurisdiction given the express and direct conflict presented and to include this case with the aforementioned Vankooten and Avera cases now pending before this Court for briefing and determination.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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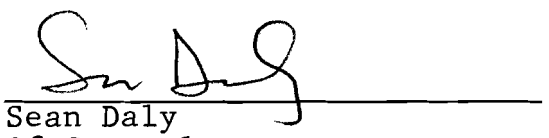
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing has been furnished by mail to Assistant Public Defender Brynn Newton, 112 Orange Avenue, Suite A, Daytona Beach, FL 32014, this 2nd day of October, 1987.



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