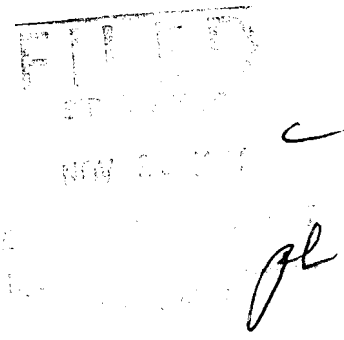

IN THE SUPREME COURT OF FLORIDA

RANDALL SCOTT BLACKSHEAR,

Petitioner,

v. CASE NO. 71,440

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF PETITIONER ON JURISDICTION

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the lower tribunal. Attached hereto as Appendix A is the opinion of the lower tribunal. Appendix B is petitioner's motion for rehearing, and Appendix C is the order denying rehearing.

II STATEMENT OF THE CASE AND FACTS

The history of this case is adequately stated in the opinion of the lower tribunal:

> Appellant was originally sentenced to serve two concurrent 65-year sentences pursuant to his plea of guilty to charges of armed sexual battery and armed kidnapping under Sections 794.011(3) and 787.01(2), Florida Statutes, respectively. Appellant appealed his sentences to this Court in Blackshear v. State, 480 So.2d 207 (Fla. 1st DCA 1985). This Court reversed and remanded for resentencing, stating:
>
> > With regard to the second point presented for review, i.e., the two concurrent 65-year sentences,

> Blackshear contends and the state agrees that the sentences are improper because they are not within the parameters provided by statute. Blackshear pled guilty to a violation of Section 794.011(3), Florida Statutes, [footnote omitted] and Section 787.01 Florida Statutes. [footnote omitted] Both crimes are categorized as life felonies, punishable as provided in Section 775.082(3)(a), Florida Statutes, which states in part that a person convicted of a life felony "committed on or after October 1, 1983, [may be punished] by a term of imprisonment for life or by a term of imprisonment not exceeding 40 years," (emphasis supplied). We find, therefore, that the trial court has imposed an illegal sentence, and we reverse and remand the concurrent 65-year sentences for imposition of a sentence that comports with the law.

Id. at 209-10.

On July 8, 1986, appellant was resentenced. The sentence range which was provided for in the sentencing guideline scoresheet was 12 to 17 years. The court imposed two concurrent life sentences with credit for time served. The trial court gave the following reasons for departure:

> The Defendant has a history of violence in his home. His sister and grandmother testified that he has been violent and fought members of his family most of his life.
>
> The Defendant turned 18 years old in August 1982. From that time and before December 6, 1983 when he was arrested for the instant offenses, the Defendant had been arrested more than eight times. While these arrests were for misdemeanor offenses, the arrests revealed a violent nature in the community. Many of the arrests were for battery and for making threats. There were also arrests for disorderly intoxication and trespassing after warning.
>
> The violent nature of the Defendant as

> revealed in his home life and in his short adult life was further evidenced in the manner in which he committed the offense of Sexual Battery and Armed Kidnapping. The Defendant was not content to force himself upon the victim sexually or to kidnap her by threatening to use a box cutter. He violently and viciously beat the victim about the face and head. He verbally degraded her in the manner of his insistence [sic] that she serve him sexually. He created in the victim a terror that has in effect incarcerated her for the remainder of her life in a prison of fear. She is no longer able to work alone, and she has expressed a sense of uncontrollable fear when she is in the presence of men. The victim indicated that she was psychologically traumatized to the extent that she would have had a nervous breakdown were it not for the support of loving and caring family and friends. The Defendant's violent nature would make him a constant threat to the community wherein he may be at large. There is no evidence that the Defendant will ever be anything but violent.

In his second appeal, petitioner challenged the reasons for departure. The First District treated the departure statement as expressing two reasons for departure: "(1) the violent nature of the defendant; and (2) the psychological trauma inflicted upon the victim by the defendant." Appendix A at 3. The lower tribunal found reason 1 to be valid, reason 2 to be invalid, and remanded again for resentencing. Appendix A at 3-4.

Petitioner also challenged the imposition of two life sentences, since he had received concurrent 65 year sentences initially. The lower tribunal found no due process violation and affirmed on this point. Appendix A at 5-6.

On rehearing, petitioner pointed out that the decision on the guidelines departure conflicted with this Court's recent opinion in Vantassell v. State, 512 So.2d 181 (Fla. 1987), and that the decision on the propriety of the life sentences conflicted with this Court's opinion in Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984), cert. den. 470 U.S. 1035 (1985). Appendix B. The lower tribunal denied rehearing without comment. Appendix C.

On November 10, 1987, a timely notice of discretionary review was filed.

III SUMMARY OF THE ARGUMENT

Petitioner will argue in this brief that the decision of the lower tribunal is in express and direct conflict with Vantassell v. State, supra. That case held that the departure sentence could not be based upon offenses for which the defendant was neither charged nor convicted, and could not be based upon factors already calculated into the guidelines sentence. The lower tribunal has violated this holding by approving "the violent nature of the defendant" as a reason for departure, because that conclusion is based solely upon Petitioner's prior record, already scored, and the violent acts referred to by the sentencing which did not result in any criminal convictions.

Petitioner will also argue in this brief that the decision of the lower tribunal is in express and direct conflict with Fasenmyer v. State, supra, Beech v. State, 436 So.2d 82 (Fla.

1983), and Herring v. State, 411 So.2d 966 (Fla. 3rd DCA 1982). Those cases held that a sentence could not be increased following a successful defense appeal, beyond the judge's original overall sentencing scheme. The lower tribunal has violated these holdings by approving the imposition of two life sentences instead of the original 65 year sentences.

This Court must accept review over both issues to resolve the conflict.

IV ARGUMENT

THE OPINION OF THE LOWER TRIBUNAL IS IN DIRECT AND EXPRESS CONFLICT WITH VANTASSELL V. STATE ON THE QUESTION OF WHETHER PRIOR CONVICTIONS AND PRIOR BAD ACTS CAN BE USED AS VALID REASONS FOR DEPARTURE, AND IS IN EXPRESS AND DIRECT CONFLICT WITH FASENMYER V. STATE, BEECH V. STATE, AND HERRING V. STATE ON THE QUESTION OF WHETHER THE TWO LIFE SENTENCES ARE LEGAL.

In its opinion, the lower tribunal found one of the two reasons for departure, "the violent nature of the defendant", slip opinion at 3, to be valid, because petitioner's "violent character was not based upon past convictions alone." Slip opinion at 4.

If it was not based upon petitioner's prior convictions, then what else is there in the record from which the lower tribunal could derive a finding of violence? The answer is found in the language used by the sentencing judge:

> The Defendant has a history of violence in his home. His sister and grandmother testified that he has been violent and fought family members of his family most of his life.

> The defendant turned 18 years old in August 1982. From that time and before December 6, 1983 when he was arrested for the instant offenses, the Defendant had been arrested more than eight times. While these arrests were for misdemeanor offenses, the arrests revealed a violent nature in the community. Many of the arrests were for battery and for making threats. There were also arrests for disorderly intoxication and trespassing after warning. Slip opinion at 2-3; emphasis added.

Thus, it appears that one source of the finding of violence is the prior arrests mentioned above. The same day as the lower tribunal's opinion, this Court reaffirmed the principle that prior bad acts, no matter how loathsome, cannot be used as reasons for departure if they did not result in any convictions: "The trial court may not punish him for other offenses for which there were no convictions and no charges. State v. Tyner, 506 So.2d 405 (Fla. 1987)." Vantassell, 512 So.2d at 183.[1]

There are only five prior convictions listed on petitioner's sentencing guidelines scoresheet, one second degree felony and four misdemeanors (R 53). If petitioner was arrested eight times, and only five were scored as convictions, them three arrests did not result in convictions and cannot be used as reasons for departure.

---

[1]The lower tribunal had held all of the reasons for departure struck by this Court to be valid. Vantassell v. State, 498 So.2d 649 (Fla. 1st DCA 1986).

A second source of the finding of violent propensities may be in the further language used by the sentencing judge:

> The violent nature of the Defendant as revealed in his home life and in his short adult life was further evidenced by the manner in which he committed the offense of Sexual Battery and Armed Kidnapping. Slip opinion at 3.

If these conclusions were relied upon by the lower tribunal, as shown by the statement that: "the record in this case supports the court's conclusion regarding the defendant's violent propensities", slip opinion at 4, then it has made the same second error as it did in Vantassell, supra. There the sexual battery defendant suffered a departure sentence because he had used excessive force against the victim, even though his scoresheet, like that of petitioner (R 53), assessed points for only penetration or slight injury. The Supreme Court reversed:

> The first reason, that excessive force resulted in the victim sustaining extensive physical injuries, it is invalid because the extent of victim injury was already calculated in the guidelines. Vanover v. State, 498 So.2d 899, 901 (Fla. 1986). Petitioner received forty points on his scoresheet for "penetration or slight injury" and points were not scored for serious injury. Factors already taken into account in calculating the guidelines score cannot support a departure sentence. Hendrix v. State, 475 So.2d 1218 (Fla. 1985). Vantassell, 512 So.2d at 183.

Thus, the violence involved in the instant crimes cannot be used to support the judge's finding and the lower tribunal's approval of the "violent nature" as a reason for departure.

In its opinion, the lower tribunal failed to realize that this Court's opinion in Fasenmyer v. State, supra, controlled

the outcome of the challenge to petitioner's life sentences. He had originally received 65 year concurrent sentences. These were admittedly illegal as being unauthorized by the statute in effect at the time. However, when resentenced, he received two life sentences, instead of another net sentence of 65 years, which the judge could have fashioned very easily by imposing any combination of years on the two counts to total 65 years. The lower tribunal found no double jeopardy violation, even though this Court held in Fasenmyer that double jeopardy prohibits the imposition of a more severe sentence following a successful appeal. See also Smith v. State, 365 So.2d 1058 (Fla. 2nd DCA 1978), in which the defendant was illegally sentenced to four concurrent 25 year sentences because the judge thought the crimes were life instead of second degree felonies, and the appellate court directed that the total sentences imposed on remand not exceed a net sentence of 25 years.

The lower tribunal's decision on this point is also in express and direct conflict with Beech v. State, supra. In that case the defendants were given split sentences of lengthy terms in prison followed by terms of probation. When they successfully challenged the split sentences as illegal, they received prison terms longer than the original ones, but shorter than the overall original sanction of prison and probation. This Court approved such a procedure, because the overall sentencing scheme intended by the judge originally had not been increased.

The lower tribunal's decision on this point is also in express and direct conflict with Herring v. State, supra. In that case the defendant was given 15 concurrent 10 year sentences for grand theft, which is punishable by a maximum of five years. The defendant appealed the illegal sentences, and the court agreed that they were illegal. The court further held that the judge was free at resentencing to run some of the five year sentences consecutive, so that the judge's original sentencing goal of a 10 year aggregate sentence would be satisfied. The court further noted that a net sentence in excess of 10 years would be a due process violation, because it would penalize the defendant for having exercised his right to appeal the illegal sentences.

In the instant case, the judge intended to originally impose 65 year sentences upon petitioner. The lower tribunal's approval of the subsequent life sentences cannot be reconciled with the above-cited cases.

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court accept jurisdiction to review the continuing erroneous interpretation of the guidelines by the lower tribunal, and the violation of petitioner's double jeopardy and due process rights.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing Brief on Jurisdiction has been furnished by hand delivery to Robert A. Butterworth, Attorney General, The Capitol, Tallahassee, Florida, and a copy has been mailed to petitioner, #077828-61-105, P.O. Box 221, Raiford, FL. 32083, this 17 day of November, 1987.

P. DOUGLAS BRINKMEYER