

IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

CASE NO. 78-191

Deputy Clerk

GARY EDWIN SITAR,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent)

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii,iii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	3
ISSUE	4
ARGUMENT	4
THIS COURT MUST DENY THE PETITION FOR WRIT OF CONFLICT CERTIORARI	
CONCLUSION	7
CERTIFICATE OF SERVICE	7
APPENDIX	8

TABLE OF CITATIONS

<u>CASE</u>	<u>PAGE</u>
<u>Abt v. State, 528 So.2d 112</u> (Fla. 4th DCA 1988)	4,5
<u>Albritton v. State, 470 So 20 158</u> (Fla. 1985)	4,5
<u>Blackshear v. State, 521 So 20 1083</u> (Fla. 1988)	6
<u>Brady v. Maryl 373 U.S. 83</u> (1963)	5
<u>Dailey v. State, 488 So 20 532</u> (Fla. 1986)	5
<u>Ford v. Strickland, 696 F.20 804,</u> (11th Cir. 1983), <u>cert. denied,</u> 404 U S 808 (1983)	0
<u>Harris w. Rivera, 454 W S 339</u> (1981)	0
<u>Jenkins v. State, 385 So 20 1350</u> (Fla. 1980)	4
<u>Leffew v. State, 518 So 20 1376</u> (Fla. 2nd DCA 1988)	5
<u>Lerma v. State, 497 So 20 736</u> (Fla. 1986)	5
<u>Quarterman v. State, 13 F.L.W. 431</u> (Fla. July 14, 1988)	5
<u>Sitar v. State, 13 F.L.W. 1982</u> (Fla. 4th DCA August 24, 1988)	1
<u>State v. Jones, 13 F.L.W. 459</u> (Fla. August 18, 1988)	5
<u>State v. Mesa, 520 So.2d 328</u> (Fla. 3rd DCA 1988)	4
<u>State v. Mischler, 488 So.20 533</u> (Fla. 1986)	4
<u>State v. Strasser, 445 So.2d 322</u> (Fla. 1983)	5
<u>Tillman v. State, 525 So.2d 862</u> (Fla. 1988)	4

OTHER AUTHORITY

PAGE

Florida Rules of Appellate Procedure

9.030(a)(2)(A)(iv)

3

9.120(d)

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9.220

1

PRELIMINARY STATEMENT

Petitioner, Gary Sitar, the criminal defendant and appellant below in Sitar v. State, 13 F.L.W. 1982 (Fla. 4th DCA August 24, 1988), motions for rehearing, certification of conflict, certification of question, and stay of mandate denied September 29, 1988, will be referred to as "petitioner." Respondent, the State of Florida, the prosecuting authority and appellee below, will be referred to as "the State."

Pursuant to Fla.R.App.P. 9.120(d) and 9.220, conformed copies of the decision under review and the post-decisional papers are appended to this brief. No references to the record on appeal will be necessary.

All emphasis will be supplied by the State unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Those details relevant to a resolution of the threshold jurisdictional question are related in the unanimous opinion of the Fourth District Court of Appeal in Sitar v. State, which the State adopts as its statement of the case and facts.

SUMMARY OF ARGUMENT

Petitioner seeks to invoke the discretionary jurisdiction of this Court under Article V, Section 3(b)(3) of the Constitution of the State of Florida and Fla.R.App.P. 9.030(a)(2)(A) (iv) on grounds that this decision allegedly expressly and directly conflicts with decisions of this Court and/or other district courts of appeal on the same questions of law.

No basis for jurisdiction exists.

ISSUE

THIS COURT MUST DENY
THE PETITION FOR WRIT
OF CONFLICT CERTIORARI

ARGUMENT

Petitioner claims that the Fourth District's decision in Sitar v. State, through its reliance upon the now-final Abt. v. State, 528 So.2d 112 (Fla. 4th DCA 1988), expressly and directly conflicts with the Third District's decision in State v. Mesa, 520 So.2d 328 (Fla. 3rd DCA 1988) on the question of whether that portion of § 921.001(5), Fla. Stat. mandating the appellate affirmation of all sentencing guideline departures based upon one valid reason may be applied retroactively. Petitioner also claims that Sitar v. State conflicts with this Court's decisions of Albritton v. State, 476 So.2d 158 (Fla. 1985) and Tillman v. State, 525 So.2d 862 (Fla. 1988) on the question of whether an appellate court must reverse a departure based partially upon invalid reasons unless the State shows beyond a reasonable doubt that the valid reasons therefore would have led to the same departure. Petitioner finally essentially claims that Sitar v. State conflicts with this Court's decision of State v. Mischler, 488 So.2d 533 (Fla. 1986) on the question of whether a defendant may suffer a guideline departure for actually committing one of the crimes charged twice.

Petitioner totally misses the point that "it is conflict of decisions, not conflict of opinions or reasons, that supplies jurisdiction for review by certiorari" in this Court. Jenkins

v. State, 385 So.2d 1356, 1359 (Fla. 1980) (emphasis in original; attribution omitted). The State must stress that it opposed petitioner's motions for rehearing, certification of conflict, certification of question, and stay of mandate in the Fourth District regarding his sentencing claims as follows:

The State recognizes that this Court affirmed the instant departure under Abt v. State, 528 So.2d 112 (Fla. 4th DCA 1988) by finding that only one of the four reasons expressed therefore was valid, but would submit that this departure could be affirmed even under the old prodefense standard of Albritton v. State, 476 So.2d 158 (Fla. 1985) because all four of these reasons were in fact legally sufficient:

1.) Appellant's plea bargain, see Quarterman v. State, 13 F.L.W. 431 (Fla. July 14, 1988);

2.) Appellant's leaving the scene twice, failing to render aid, see Lerma v. State, 497 So.2d 736, 739 (Fla. 1986);

3.) Appellant's commission of increasingly serious driving offenses in close temporal proximity, see Leffew v. State, 518 So.2d 1376 (Fla. 2nd DCA 1988) and State v. Jones, 13 F.L.W. 459 (Fla. August 18, 1988); and

4.) Appellant's concealing of incriminating evidence, cf. Brady v. Maryland, 373 U.S. 83 (1963).

("Appendix" to "Answer Brief of Appellee," p.2). The factual sufficiency of these reasons was not preserved for further review given appellant's general failure to challenge same below, Dailey v. State, 488 So.2d 532 (Fla. 1986). Any certification of this cause to the Florida Supreme Court would thus constitute and cause an unnecessary expenditure of judicial labor, State v. Strasser, 445 So.2d 322, 323 (Fla. 1983).

(State's "Reply In Opposition to Appellant's Motions for Rehearing, Certification, and Stay of Mandate," p.2-3, State's Appendix).

The Fourth District, by denying all of petitioner's post-decisional motions, necessarily agreed with the State that regardless of any academic conflicts between its opinion and reasoning in Sitar and petitioner's proffered cases, there was no conflict between its ultimate decision and these cases requiring this Court's intervention. This Court should, of course, presume that the Fourth District acted honorably, see Harris v. Rivera, 454 U.S. 339, 344 (1981); Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983), cert. denied, 464 U.S. 868 (1983).

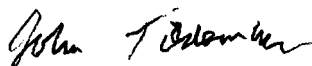
Since the Fourth District's decision in Sitar v. State as to petitioner's sentencing claims is thoroughly consistent with this Court's precedents even under the most pro-defense view, this Court must decline to exercise its certiorari jurisdiction to review this case. Jenkins v. State. Petitioner tacitly admits that he is primarily pursuing his sentencing claims here in the hope that he can bootstrap thereupon his challenge to his convictions which the Fourth District affirmed sub silentio (Petitioner's "Motion to Extend Supersedeas," p.2); this is procedurally improper, see Jenkins v. State and Blackshear v. State, 521 So.2d 1083, 1084 (Fla. 1988). The State trusts that this Honorable Court will put an end petitioner's machinations by summarily denying his petition.

CONCLUSION

WHEREFORE respondent, the State of Florida, respectfully submits that this Honorable Court must summarily DENY the petition for writ of conflict certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by United States Mail to: CHARLES W. MUSGROVE, Esquire, Congress Park, Suite 1-D, 2328 South Congress Avenue, West Palm Beach, Florida 33406, this 1st day of November, 1988.



Of Counsel