SUPREME COURT OF FLORIDA

RICHARD DIAL THORP

vs.

STATE OF FLORIDA

73,767

CASE NO: UNASSIGNED

PETITION FOR WRIT OF CERTIORARI FROM
THE DISTRICT COURT OF APPEAL FOR THE
STATE OF FLORIDA FOURTH DISTRICT

DCA CASE NO: 87-1551

JURISDICTION BRIEF OF PETITIONER

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A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT OF APPEAL

January 6, 1989, Petitioner argued his direct appeal before the District Court of Appeal Fourth District in West Palm Beach, Florida. That Court issued its opinion on January 25, 1989, affirming the Petitioner's conviction but noting a conflict, "among our sister courts as to whether a conviction occurring between the subject offense and sentencing for that offense, for a crime committed prior to the subject offense, may be scored." (See Appendix)

That opinion recognized that at least two district courts of appeal had reached results which directly conflicted with each other and further stated that the Fourth District Court of Appeal had recently aligned itself with one of these camps in its decision in Brown v. State, 529 So.2d 1247 (Fla. 4th DCA 1988).

At oral argument the State conceded that there was a conflict between the district courts of appeal and suggested that the question would be ripe for resolution by this Court.

Mandate was issued on February 10, 1989.

STATEMENT OF THE FACTS

The direct appeal in the instant case dealt with an interpretation of the Florida sentencing guidelines' definition of

"prior record" under Florida Rule of Criminal Procedure 3.701(d)(5)(a).

A line of cases beginning in 1985 has construed this definition section of the guidelines, frequently with differring results. There is a direct conflict between the interpretation of Rule 3.701(d)(5)(a) given by the District Courts of Appeal for the First District and that given by the Districts Court of Appeal for the Second, Fourth and Fifth Districts.

SUMMARY OF THE ARGUMENT

A conflict exists between various district courts of appeal with regard to the interpretation of the Florida Sentencing Guideline's definition of "prior record." The issue has been the subject of litigation since the 1985 change in the Sentencing Guidelines. The frequency of this litigation and the enormous impact of the varying applications to individual defendants would dictate that this Court accept jurisdiction pursuant to Rule 9.030(a)(2)(A)(iv) of the Florida Rule of Criminal Procedure.

ISSUE

WHETHER THIS COURT WILL EXERCISE ITS DISCRETIONARY JURISDICTION TO RESOLVE THE DIRECT CONFLICT IN INTERPRETATION OF RULE 3.701(d)(5)(a), FLORIDA RULES OF CRIMINAL PROCEDURE, BETWEEN THE INTERPRETATION GIVEN BY THE FIRST DISTRICT COURT OF APPEAL AND THE INTERPRETATION GIVEN BY THE SECOND, FOURTH AND FIFTH DISTRICT COURTS OF APPEAL?

ARGUMENT

The substantive issue in the instant case revolved around the definition of "prior record" as promulgated in the Florida Sentencing Guidelines. Prior to 1985, that definition read:

> "prior record" refers to any past criminal conduct on the part of the offender, resulting in conviction, disposed of prior to the commission or the primary offense. Prior record includes all prior Florida, federal, out-of-state, military and foreign convictions. (Emphasis Added).

July 1, 1985, the words "disposed of" were deleted from the rule. However, this Court stated that the elimination of the words "disposed of" did not alter the intent of 3.701(d)(5)(a). The Florida Bar: Amendment to Rules of Criminal Procedure (3.701. 3.988--Sentencing Guidelines, 468 So.2d 220 (Fla. 1985).

The unanimous reading of the definition of "prior record" before 1985 gave the language of the rule its ordinary meaning--that a crime that is to be scored as "prior record" had to have resulted in a conviction reached before the commission of the offense for which the defendant was before the Court.

The First District Court of Appeal in Hunt vs. State, 468 So.2d 1100, (Fla. 1st DCA 1985) followed this uncontroverted

reading. In that case the Court was dealing with one of a series of reasons given by the Court for departure--another crime committed in close proximity to the time of the primary offense. The Hunt Court found that that crime could not be used in the guidelines' computation but could be used as a reason for departure. It affirmed that "prior record" included only those convictions which were obtained prior to the commission of the offense for which the defendant was before the Court.

The Fifth District Court of Appeal in Davis vs. State, 455 So.2d 602 (Fla. 5th DCA 1984) recognized that it should use only convictions which were obtained prior to the primary offense for scoring purposes. Subsequent offenses are to be used for departure from the guidelines rather than for inclusion in the computation of the guideline sentence. That case was cited with approval in prince vs. State, 461 So.2d 105 (Fla. 4th DCA 1984).

In the First District Court of Appeal in Merriex vs. State, 521 So.2d 249 (Fla. 1st DCA 1988), the defendant argued that an offense and a sentencing for that offense which intervened between the commission of the primary offense and the sentencing for that primary offense should have been scored under the guidelines. However, the Court used the offense == aggravation rather than as a scored offense.

A footnote in Frank vs. State, 490 So.2d 190 (Fla. 2nd DCA 1986) spawned a series of cases which departed from that inter-

pretation of the definition of "prior record". That Court found that because the words "resulting in conviction" were set off in the rule by commas, the rule meant that the past conduct had to have occurred prior to the commission of the primary offense, but the defendant's "disposition" or sentencing could occur after the commission of the primary offense.

The Second District Court of Appeal very soon thereafter in Falzone vs. State, 500 So.2d 1337 (2d DCA 1986) followed suit.

The Fifth District Court of Appeal in Smith vs. State, 518 So.2d 1336 (Fla. 5th DCA 1988) has aligned itself with the Second District Court of Appeal in Falzone.

The Fourth District Court Appeal in 1988, overruled its reliance on prince and with no discussion, adopted the Second District Court Appeal reasoning in Cousins vs. State, 507 So.2d 651 (Fla. 2d DCA 1987) and Falzone vs. State, supra. Brown vs. State, 529 So.2d 1247 (Fla. 4th DCA 1988).

However, the Fourth District Court of Appeal in State vs. Rogers, 13 F.L.W. 2703 (Fla. Dec. 23, 1988) appeared to recede somewhat from the Brown position. In that case a defendant was being sentenced for a violation of probation, for one count of a two count conviction. At the original sentencing he received a sentence of three and one-half years on Count I, and a further sentence of five years' probation on Count 11. At the revocation hearing the three and one-half year jail sentence could not be scored as part of the prior record because it was "not disposed

of" prior to the commission of the second offense.

It is clear that the issue which was being raised in the appeal in the instant cause is one which is causing considerable litigation. It is submitted by the petitioner that this Court should exercise its discretionary jurisdiction because of the clear conflict between the various district courts of appeal on the matter.

WHEREFORE, the petitioner requests that this Court exercise discretionary jurisdiction and accept this case for determination on its merits.

Respectfully submitted,

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By: Mary Catherine Bonner
MARY CATHERINE BONNER, ESQ.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of the foregoing instrument was mailed to the Office of the Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401, on this 3rd day of March, 1989.

By: Mary Catherine Bonner
MARY CATHERINE BONNER, ESQ.