

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,806

THE STATE OF FLORIDA

Petitioner,

-vs-

ROBERTO L. BETANCOUB

Respondent.

FILED

SID J. WHITE

APR 6 1989

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By

Deputy Clerk

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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TABLE OF CONTENTS

INTRODUCTION, 1

STATEMENT OF THE CASE AND FACTS... 2

QUESTION PRESENTED, 2

SUMMARY OF ARGUMENT, 3

ARGUMENT, 4

WHETHER THE DISTRICT COURT DECISION REQUIRING
THE TRIAL COURT, UPON REMAND, TO RESENTENCE
WITHIN THE GUIDELINES, EXPRESSLY AND DIRECTLY
CONFLICTS WITH TWO OTHER DISTRICT COURT
DECISIONS CONCERNING WHETHER THE TRIAL COURT
MAY NOW, UPON REMAND FOR RESENTENCING, DEPART
FROM THE GUIDELINES?

CONCLUSION, 5

CERTIFICATE OF SERVICE, 6

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGES</u>
<u>DYER v. STATE</u> 534 So.2d 843 (Fla. 5th DCA 1988).....	4
<u>WALDRON v. STATE</u> 529 So.2d 772 (Fla. 2d DCA 1988).....	4

OTHER AUTHORITIES

FLORIDA RULES OF APPELLATE PROCEDURE

Rule 9.030(a)(2)(A)(vi).....	4
Rule 9.120(d).....	4

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Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

ODU

The respondent, Roberto L. Betancourt, was the defendant in the trial court and the appellant in the Third District Court of Appeal. The petitioner, the State of Florida, was the plaintiff in the trial court and the appellee in the Third District Court of Appeal. In this brief, the parties will be referred to as they stand in this court. The symbol "A" will be used to refer to portions of the appendix attached hereto. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts the petitioner's Statement of the Case and Facts.

QUESTION PRESENTED

WHETHER THE DISTRICT COURT DECISION REQUIRING THE TRIAL COURT, UPON REMAND, TO RESENTENCE WITHIN THE GUIDELINES, EXPRESSLY AND DIRECTLY CONFLICTS WITH TWO OTHER DISTRICT COURT DECISIONS CONCERNING WHETHER THE TRIAL COURT MAY NOW, UPON REMAND FOR RESENTENCING, DEPART FROM THE GUIDELINES?

SUMMARY OF ARGUMENT

Respondent concedes that discretionary jurisdiction appears to exist as to the limited question of law concerning what the trial court may do at resentencing.

ARGUMENT

WHETHER THE DISTRICT COURT DECISION REQUIRING THE TRIAL COURT, UPON REMAND, TO RESENTENCE WITHIN THE GUIDELINES, EXPRESSLY AND DIRECTLY CONFLICTS WITH TWO OTHER DISTRICT COURT DECISIONS CONCERNING WHETHER THE TRIAL COURT MAY NOW, UPON REMAND FOR RESENTENCING, DEPART FROM THE GUIDELINES?

The petitioner suggests that the decision under review [Appendix to this Respondent's Brief and hereafter referred to as the *Betancourt* decision] expressly and directly conflicts with the decision of the Second District in Waldron v. State, 529 So.2d 772 (Fla. 2d DCA 1988) and of the Fifth District in Dyer v. State, 534 So.2d 843 (Fla. 5th DCA 1988).

Because the *Betancourt* decision acknowledges that its rule (as to what may occur upon resentencing) conflicts with two other district court decisions, it would appear that this Court has jurisdiction. Cf. Florida Rules of Appellate Procedure 9.030(a)(2)(A)(vi) and 9.120(d) ("When jurisdiction is invoked pursuant to Rule 9.030(a)(2)(A)(v) or (a)(2)(A)(vi) (certifications by the district courts to the Supreme Court), no briefs on jurisdiction shall be filed.").

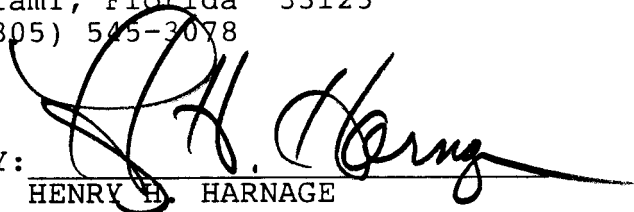
CONCLUSION

Based on the cases and authorities cited herein, the respondent respectfully concedes that this honorable Court may decline to accept, or accept, or postpone its decision on discretionary jurisdiction in this cause.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite N-921, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 4TH day of April, 1989.


HENRY H. HARNAGE
Assistant Public Defender