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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

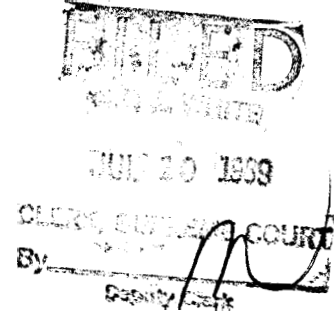
Petitioner,

vs.

Case No. 74,315

CHARLES E. MCCRAY,

Respondent.



DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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TENTH JUDICIAL CIRCUIT
FLORIDA BAR NO. 0143265

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PRELIMINARY STATEMENT

Respondent Charles E. McCray was the defendant in the trial court and the appellee in the District Court of Appeal, Second District. Petitioner, the State of Florida, was the plaintiff in the trial court and the appellant in the District Court. Petitioner is seeking review of the District Court's opinion dismissing Petitioner's appeal. The opinion is set forth in the appendix to this brief. References to the appendix are designated by "A" and the page number.

STATEMENT OF THE CASE AND FACTS

The following statement of the case and facts is taken from the decision of the District Court of Appeal, Second District:

On November 30, 1987, Respondent pleaded guilty to several charges and the trial court entered judgments of guilt and placed him on two years' community control to be followed by five years' probation. This punishment represented a downward departure from the recommended guidelines' sentencing range of 5 1/2 to 7 years' incarceration. On December 14, 1987, the trial court filed its written reasons for the departure. On December 21, 1987, two orders entitled "judgment of guilt placing defendant on probation" and "judgment of guilt placing defendant in community control" were filed in the circuit court clerk's office. These orders, dated November 30, 1987, stated the conditions of probation and community control. The State filed its notice of appeal on December 21, 1987, which identified the December 14, 1987, order of written reasons for the guidelines departure as the subject of the appeal.

(A2)

Respondent moved to dismiss the State's appeal on the ground that the notice of appeal was untimely filed. The Second District agreed and dismissed the appeal. (A1)

SUMMARY OF THE ARGUMENT

Although Respondent agrees that the Second District's decision in this case conflicts with a decision of the Third District Court of Appeal, it is unnecessary for this Court to grant discretionary review. First, the Second District's decision to dismiss the State's untimely appeal in which the notice of appeal was filed more than fifteen days after the guidelines departure sentences were rendered was plainly correct. Second, the conflict will be resolved in another case in which this Court has already granted review.

ARGUMENT

ISSUE I

SHOULD THIS COURT EXERCISE ITS
DISCRETIONARY JURISDICTION TO REVIEW
THE DECISION OF THE SECOND DISTRICT
COURT OF APPEAL?

Respondent agrees that the decision of the District Court of Appeal, Second District dismissing the Petitioner's untimely appeal (A1-3) conflicts with State v. Williams, 463 So.2d 525 (Fla. 3d DCA 1985). (A4-5) However, Respondent respectfully requests this Court to exercise its discretion to deny review of the Second District's decision on the ground that review is unnecessary.

Review is unnecessary in this case for two reasons: (1) The Second District's decision is correct on its face. (2) The conflict between the Second District and the Third District will be resolved by this Court in State v. Hieber, Case No. 73,531.

In this case, the Second District dismissed as untimely the State's appeal from guidelines departure sentences because the notice of appeal was filed more than fifteen days after the sentences were rendered. (A1-3) The State has the statutory right to appeal a sentence imposed outside the range recommended by the guidelines. § 924.07(1)(i), Fla. Stat. (1987). However, the State was required to file its notice of appeal within fifteen days of rendition of the orders to be reviewed, i.e. the sentences. Fla. R. App. P. 9.140(c)(2). The untimely filing of the notice of appeal was a jurisdictional defect and required the Second District to dismiss the appeal. Lampkin-Asam v. District Court of Appeal,

364 So.2d 469, 471 (Fla. 1978).

The conflict of decisions between the Second District and the Third District more clearly appears in the Second District's decision in State v. Hieber, 541 So.2d 1208 (Fla. 2d DCA 1988).

(A6) Petitioner asserts that this Court has already accepted jurisdiction to review that decision in State v. Hieber, Case No. 73,531. Brief of Petitioner on Jurisdiction, page 2. Therefore, this Court can resolve the conflict in Hieber, and it is unnecessary to grant Petitioner's request for review in this case.

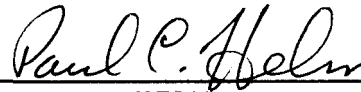
CONCLUSION

Respondent respectfully requests this Honorable Court to deny the petition for discretionary review.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to the Tampa Attorney General's Office on this ~~7th~~ day of July, 1989.

Respectfully submitted,



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