IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

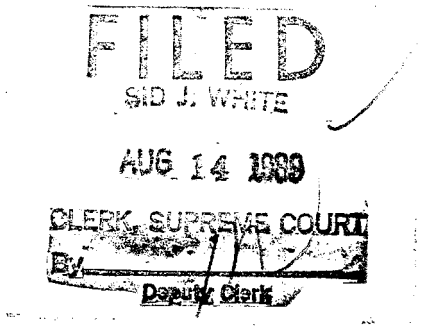
Petitioner,

v.

STANLEY B. ELLISON,

Respondent.

CASE NO.



JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

In June 1988 Respondent was charged with second degree murder and grand theft stemming from an incident involving his use of an automobile. (R 1). He was tried by a jury and convicted on both counts. (R 55-56).

On Appeal the First District issued a written opinion reducing the conviction for second degree murder to a conviction for manslaughter. It held as a matter of law that the evidence was insufficient to support a verdict of second degree murder. Further, the First District ruled that the Respondent' status of being on a Juvenile Furlough from his commitment to the Department of Health and Rehabilitative Services was not legal status at the time of the offense as contemplated by Fla.R.Crim.P. 3.701.

From that ruling Petitioner filed his notice requesting this Court to accept jurisdiction in this case.

SUMMARY OF ARGUMENT

ISSUE I

Two separate District Courts of Appeal have reached diametrically opposite answers to the question of whether a juvenile furlough status is to be considered as "legal status" when computing a guidelines scoresheet. As there is direct and express conflict on this issue and as this is likely to be a reoccurring phenomenon this Court should accept jurisdiction.

ISSUE II

The decision of the First District in this case which holds that, you have to intend to injure a specific victim, conflicts with decision of this Court indicating second degree murder is not a specific intent crime. It also conflicts with decision of Florida courts which hold that the issue of the defendant's intent is a question for the jury.

ARGUMENT

ISSUE

OPINION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT ON THE SAME POINT OF LAW.

In Ellison v. State, 14 F.L.W. 1592, (Fla. 1st DCA 1989), the First District Court of Appeal held that the defendant's status of being on juvenile furlough was not "legal status at the time of the offenses." Therefore, the court ruled that it was error for the trial court to include points in that category when computing a defendant's guideline score.

In sharp contrast to this ruling is the position taken by the Second District Court of Appeal in the case of Butler v. State, 543 So.2d 432 (Fla. 2d DCA 1989). In Butler, the juvenile was also on furlough status at the time he committed another offense. The court held that it was correct and proper to score points for legal constraint pursuant to Rule 3.701(d)(6), Fla.R.Crim.P. Thus, these two cases are in direct and express conflict on the same point of law.

Additionally, by failing to equate adult and juvenile constraints the decision of the First District is also at odds with Espinosa v. State, 496 So.2d 236 (Fla. 3d DCA 1986). In Espinosa the court found it proper to score community control even though the community control was a Juvenile restriction.

Therefore, because express and direct conflict exists on this point of law Petitioner requests this Court to accept jurisdiction and resolve the issue.

ISSUE II

THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL.

The opinion of the First District correctly holds that the grade or degree of a homicidal act is dependent upon the factual circumstance and is typically one for the jury to resolve.

The court then proceeds to reweigh the evidence and purports to find, as a matter of law, the evidence was insufficient because there was no evidence that Ellison acted out of ill will toward or directed at his eventual victim. This action directly conflicts with Tibbs v State, 397 So.2d 1120 (Fla.1981) and State v. Law, 14 F.L.W. 387 (Fla.1989) on the role of appellate courts in dealing with sufficiency of the evidence questions.

This decision also conflicts with established case law in other ways.

Second degree murder is defined in Sec. 782.04(2), Fla.Stat., as

> (2) The unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, is murder in the second degree and constitutes a felony of the first degree, . . .

This court held that second degree murder is a general intent crime. Gentry v. State, 437 So.2d 1097 (Fla.1983). The First District's decision in this case holds that a defendant must have a specific victim in mind in order to commit second degree murder. This adds an element of specific intent to this crime contrary to Gentry. See also Hooker v. State, 497 So.2d 982 (Fla.2d DCA 1986). Further this requirement for a specific victim conflicts with the decision of the Second District Court of Appeal in Manis v. State, 528 So.2d 1342 (Fla.2d DCA 1988), which held that that manner in which one operated a motor vehicle which resulted in the death of another could be second degree murder.

Further in ruling as a matter of law that no construction of the defendant's actions could support a second degree conviction, this case conflicts with the decision of the Fourth District in Hacker v. State, 510 So.2d 304 (Fla.4th DCA 1986). In Hacker the death was caused by an individual who was driving recklessly while fleeing a robbery. In Hacker the court held that the defendant created an inherently dangerous situation and stated that the killing was a predictable result of fleeing the scene at a high rate of speed, and such acts could even support a first degree felony murder conviction.

Further the case conflicts with cases such as Jones v. State, 192 So.2d 285 (Fla.3rd DCA 1966), which indicate that issues of intent are issues for the jury to decide and with

Lincoln v. State, 459 So.2d 1030, 1031 (Fla.1984) in which this Court held that he manner of driving a getaway car in an attempt to avoid the police was sufficient prima facie evidence of intent to participate in the underlying offense so as to allow the trier of fact to properly infer an intent to commit the underlying offense.

Since the decision of the District Court conflicts with the above cited cases and adds a whole new element to second degree murder the petitioner requests this Court accept jurisdiction and resolve this matter.

Lincoln v. State, 459 So.2d 1030, 1031 (Fla.1984) in which this Court held that he manner of driving a getaway car in an attempt to avoid the police was sufficient prima facie evidence of intent to participate in the underlying offense so as to allow the trier of fact to properly infer an intent to commit the underlying offense.

Since the decision of the District Court conflicts with the above cited cases and adds a whole new element to second degree murder the petitioner requests this Court accept jurisdiction and resolve this matter.

CONCLUSION

Based on the above cited legal authorities, Petitioner prays this Honorable Court accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to James T. Miller, Assistant Public Defender, 407 Duval County Courthouse, Jacksonville, Florida, 32202, this 14th day of August, 1989.

EDWARD C. HILL, JR.
Assistant Attorney General