IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA :

PETITIONER :

v. : Case No. 79,912

PARIS D. VARNER :

RESPONDENT :

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

BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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Respondent.

STATEMENT OF THE CASE

Respondent would accept Petitioner's Statement of the Case.

STATEMENT OF THE FACTS

Respondent would accept Petitioner's Statement of the Facts.

ARGUMENT

ISSUE

WHETHER THREATENING THE WITNESS IS A VALID REASON FOR DEPARTURE FROM THE GUIDELINES WHEN THE SUPREME COURT AND THE FIRST, THIRD, AND FOURTH DISTRICT COURTS OF APPEAL HAVE FOUND IT TO BE A VALID REASON. [As stated by Petitioner]

The District Court of Appeal, Second District, heard the instant case en banc in order to resolve both an intra, as well as, an inter-district conflict. Of the two reasons given for imposing a departure sentence, one was clearly erroneous. The second, the validity of which is now before the court, deals with the question of whether the trial court could impose a departure sentence on the basis the defendant [Petitioner] allegedly threatened a witness prior to trial.

The Second District, while recognizing conflict with earlier opinions and decisions of other district courts of appeal, chose to base its decision of the long-standing principle that a judge cannot depart based upon an offense for which the defendant has not been previously convicted. Fla. R.Cr.Pro. 3.701(d)(11)

Respondent would point out the problem inherent in allowing collateral wrongdoing of the defendant, for which he has not been convicted, to be a basis for an upward departure. As Judge Altenbernd pointed out in his concurring opinion, if the Respondent had been convicted of witness tampering and the points applied to Respondent's scoresheet, his total score would only have increased one point. At worst this would mean Respondent's recommended sentencing range would increase one cell upward if he was on the borderline, or not at all otherwise. It seems preposterous that an actual conviction for the offense would have little or no affect on a defendant, while no conviction at all warrants the maximum sentence of fifteen years. An unscrupulous prosecutor could affirmatively choose not to prosecute for some collateral wrongdoing and then turn around and use the same wrongdoing as grounds for a requested upward departure. Petitioner contends that such a possibility was the reason for the prohibition in rule 3.701 (d)(11) against using conduct for which convictions have not been obtained as the rationale for an upward departure.

While admittedly the Second District itself, as well as, other district courts have held to the contrary, this does not

mean they cannot choose to change their mind and recede from their earlier position. Respondent would ask this court to affirm the decision of the Second District Court as being in keeping with the spirit and the letter of rule 3.701 and reject the decisions of the other districts.

CONCLUSION

In light of the foregoing reasons, arguments and authorities, Respondent respectfully requests that this Honorable Court to affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Sue R. Henderson, Assistant Attorney General, Westwood Center, 2002 North Lois Avenue, 7th Floor, Tampa, FL 33607, and to Paris Varner, this 16th day of July, 1992.

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