ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ALBERT LEE MAYS,

Petitioner,

v.

CASE NO. 90,826
5DCA CASE NO. 96-1621

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF AUTHORITIES

CASES:

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SUMMARY OF THE ARGUMENT

The decision in this case does not expressly or directly conflict with any other decision and so this Court should not exercise jurisdiction in this case.

ARGUMENT

THIS COURT HAS NO JURISDICTION TO REVIEW THE DECISION IN THIS CASE WHICH CONCURS WITH A CASE CURRENTLY PENDING REVIEW IN THIS COURT ON AN ENTIRELY SEPARATE ISSUE.

Petitioner's recommended sentencing range was 50.85 to 84.75 months. He received a sentence of 70 months which was within 25% of his recommended sentence of 67.8 months. On appeal he argued that where the recommended range encompassed the statutory maximum, the sentencing court was limited to imposing the statutory maximum. The Fifth District Court of Appeal held that as long as a portion of the recommended range exceeds the statutory maximum, a sentencing judge is not bound by the limitation imposed by the general sentencing statute concurring with Martinez v. State, 22 Fla. L. Weekly D305 (Fla. 3d DCA January 29, 1997). Mays v. State, 22 Fla. L. Weekly D734 (Fla. 5th DCA March 21, 1997). In Martinez, the Third District certified conflict with Thornton v. State, 683 So. 2d 515 (Fla. 2d DCA 1996) on an issue involving the scoring of victim injury points. Rehearing was denied in Martinez v. State, 22 Fla. L. Weekly D1009 (Fla. 3d DCA April 23, 1997).

Petitioner asserts that this court has jurisdiction pursuant to Jollie v. State, 405 So. 2d 418 (Fla. 1981) and Savoie v. State, 422 So. 2d 308 (Fla. 1982). Respondents disagree. A district

court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows the Supreme Court to exercise its jurisdiction. Jollie, supra. However, the Third District in Martinez, supra, certified conflict on an entirely separate issue unrelated to the instant case. The Martinez court certified conflict on an issue involving the scoring of victim injury points.

Petitioner further contends that once this Court accepts jurisdiction over a cause to resolve a legal issue in conflict, in its discretion it can consider other issues properly raised and argued pursuant to Savoie, supra. This Court stated in Savoie:

> We have addressed this issue because, once we accept jurisdiction over a cause in order to resolve a legal issue in conflict, we may, in our discretion, consider other issues properly raised and argued before this Court.

Savoie at 310. In the instant case, we have no way of predicting whether this Court will address or even whether the instant issue will be raised in Martinez. To assume that it will be and to then base conflict jurisdiction upon that is too speculative and presumptuous. Jurisdiction depends upon whether the conflict between decisions is express and direct and not whether the conflict is inherent or implied. Dept. of HRS v. National Adoption

Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986).

There is no conflict with any other court or with this Court in order to exercise jurisdiction pursuant to Article V, Section 3(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv). Every appellate court to consider this issue has ruled the same way. Martinez, supra; Nantz v. State, 687 So. 2d 845 (Fla. 2d DCA 1996). This Court should not accept jurisdiction in this case.

CONCLUSION

Based on the arguments and authorities presented herein, the State respectfully requests this honorable Court to decline to accept jurisdiction in this case.

Respectfully submitted,

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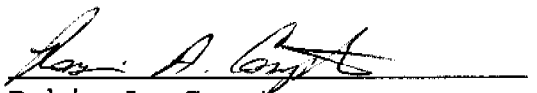
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Jurisdictional Brief of Respondent has been furnished by interoffice mail/delivery to Rebecca M. Becker, Assistant Public Defender, this 9th day of July, 1997.



Robin A. Compton
Assistant Attorney General

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APPENDIX

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effectively informed that Superior was a: (1) financially viable, (2) out of state business, facts which were entirely irrelevant to the plaintiffs' claims. The defendants point out that the verdict form was submitted to the jury by stipulation of the parties, references Superior as being a foreign corporation. Nevertheless, the repeated references to Superior as a California corporation, when combined with the other improper argument, seems designed to improperly convey to the Putnam County jury an "us versus them" mentality. This was improper. *See Kincaid*, 495 So. 2d at 771 (condemning "us against them" plea as creating prejudice by pitting "the community" against a nonresident corporation).

Accordingly, we reverse and remand for a new trial on liability and damages.

REVERSED AND REMANDED. (ANTOON, J., and ORFINGER, M., Senior Judge, concur.)

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[1]"Notwithstanding the Court's rulings, certain questions and answers which the Court ruled to be inadmissible were inadvertently published before the noon recess. Therefore, I am instructing you that you should disregard, not consider any question or answer in the disposition of [Superior's vice-president] which you may have heard after the following question and answer. . . ."

* * *

Criminal law—Post conviction relief—Attempted felony murder was a valid offense prior to *State v. Gray*—No error in denial of motion for post conviction relief challenging conviction for attempted felony murder—Question certified: Whether *State v. Gray*, 654 So. 2d 552 (Fla. 1995), must be applied retroactively to cases which were not pending and/or which were final at the time the decision was rendered

ALFONSO JOSE ALZAMORA, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1380. Opinion filed March 21, 1997. 3.850 Appeal from the Circuit Court for Orange County, Bob Wattles, Judge. Counsel: E. Wesley Blankner, Jr. of Jaeger & Blankner, Orlando, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Lori E. Nelson, Assistant Attorney General, Daytona Beach, for Appellee.

(ANTOON, J.) Alfonso Jose Alzamora (defendant) filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850, challenging his conviction for attempted first-degree felony murder of a law enforcement officer. He contends that his conviction must be vacated under the authority of *State v. Gray*, 654 So. 2d 552 (Fla. 1995), which held that the crime of attempted felony murder is nonexistent. We affirm the trial court's order denying relief because, as noted by the supreme court in *State v. Wilson*, 680 So. 2d 411 (Fla. 1996), attempted felony murder was a valid offense prior to *Gray* and only became nonexistent when the decision in *Gray* was issued. *See also Motes v. State*, 684 So. 2d 852 (Fla. 5th DCA 1996); *Freeman v. State*, 679 So. 2d 364 (Fla. 4th DCA 1996). However, we certify the following question as one of great public importance:

> WHETHER *STATE V. GRAY*, 654 So. 2d 552 (Fla. 1995), MUST BE APPLIED RETROACTIVELY TO CASES WHICH WERE NOT PENDING AND/OR WHICH WERE FINAL AT THE TIME THE DECISION WAS RENDERED.

AFFIRMED. (DAUKSCH and GRIFFIN, JJ., concur.)

* * *

Criminal law—Sentencing—Guidelines—No error in imposing sentence of 70 months incarceration, where guidelines recommended sentencing range was 50.85 months to 84.75 months, even though statutory limit for third-degree felony is five years—Where sentencing guidelines exceed maximum sentence, guideline sentence must be imposed, absent departure—Where the sentencing range, or at least a portion of it that is available to sentencing judge, exceeds statutory maximum, sentencing is outside the limitation imposed by general sentencing statute

ALBERT L. MAYS, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1621. Opinion filed March 21, 1997. Appeal from the Circuit Court for Orange County, Alice Blackwell White, Judge. Counsel: James B. Gibson, Public Defender, and Rebecca M. Becker, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Robin A. Compton, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, J.) In this "hot issue" of the day, Albert L. Mays appeals his sentence imposed under the guidelines but in excess of the statutory maximum. We affirm.

Mays was convicted of a third degree felony and, under the sentencing guidelines, his recommended sentencing range was 50.85 months to 84.75 months incarceration, with a recommended sentence of 67.8 months. Even though generally the statutory limit for a third degree felony is five years, the court sentenced Mays to 70 months incarceration.

Mays recognizes that the sentencing guidelines provide:

> If the recommended sentence under the sentencing guidelines exceeds the maximum sentence authorized for the pending felony offenses, the guideline sentence must be imposed, absent a departure. Such downward departure must be equal to or less than the maximum sentence authorized by section 775.082.

Rule 3.703(d)(26), Fla. R. Crim. Pro.

Mays contends, however, that since the five-year statutory limitation is *within* the recommended sentencing range, the above-cited rule does not apply. But that is not the test. Clearly the sentencing range, or at least a portion of it that is available to the sentencing judge, exceeds the statutory maximum and takes the sentencing outside the limitation imposed by the general sentencing statute. This issue has been ably decided by the Third District in *Martinez v. State*, 1997 WL 30812 (Fla. 3d DCA, Jan. 29, 1997) [22 Fla. L. Weekly D305a], and we concur with that court's reasoning.

AFFIRMED. (DAUKSCH and COBB, JJ., concur.)

* * *

Criminal law—Sentencing—Credit for time spent on home confinement—Trial court lacks authority to sentence defendant to "work release" program permitting "incarceration" in defendant's home—Defendant not entitled to credit for time spent on home confinement with electronic surveillance—If trial court wishes to credit defendant with time spent on house arrest, it should merely reduce time that it would otherwise impose and sentence accordingly

ROBERT McCARTHY, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 96-1659. Opinion filed March 21, 1997. Appeal from the Circuit Court for Orange County, Cynthia MacKinnon, Judge. Counsel: Steven G. Mason, Orlando, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Steven J. Guardiano, Senior Assistant Attorney General, Daytona Beach, for Appellee.

ON MOTIONS FOR REHEARING, CLARIFICATION OR CERTIFICATION

[Original Opinion at 22 Fla. L. Weekly D320b]

(PER CURIAM.) Robert McCarthy appealed the refusal of the trial court to credit against his sentence the time he served on home confinement with electronic surveillance. We affirmed the trial court. *See McCarthy v. State*, 1997 WL 34653 (Fla. 5th DCA Jan. 31, 1997). McCarthy has now moved for rehearing, clarification or certification. He contends that instead of deciding the issue which was before this court on appeal, i.e. whether the trial court was *required* to grant him credit for time spent on home confinement, we instead ruled that the court *could not* grant him such credit. He asserts that the trial courts in Orange County have assumed that they have the discretion to grant credit for such home confinement and routinely do so. He is concerned that unless we clarify our opinion or certify the issue, the judges in Orange County—and other counties which have implemented alternative jail sanctions pursuant to section 951.24, Florida Statutes—will be in doubt as to their authority to exercise their discretion to allow such credit.

We adhere to our original opinion. We find no authority in section 951.24 which would permit the county to provide an incarceration alternative which does not require lodging in a county facility. Although such section permits the county commissioners, with the consent of the sheriff, to set up a work release program, there are further requirements:

> (2)(a) Whenever punishment by imprisonment in the county jail is prescribed, the sentencing court, in its discretion, may at any time during the sentence consider granting the privilege to the