IN THE SUPREME COURT OF FLORIDA

DONNA COLLINS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 95,869

JURISDICTIONAL BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent State of Florida was the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court and will be referred to in this brief as Respondent, the prosecution, or the State. Petitioner, DONNA COLLINS, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

"PJB" will designate Petitioner's Jurisdictional Brief. That symbol is followed by the appropriate page number.

A bold typeface will be used to add emphasis. Italics appeared in original quotations, unless otherwise indicated.

CERTIFICATION OF TYPE AND FONT

This brief was prepared using New Courier 12.

STATEMENT OF THE CASE AND FACTS

The pertinent history and facts are set out in the decision of the district court attached in slip opinion form. It can also be found at 24 Fla. L. Weekly 981.

The state accepts petitioner's statement for the purposes of determining discretionary jurisdiction.

SUMMARY OF ARGUMENT

Petitioner has not shown that there is direct and express conflict between the decision below and decisions of this Court or other district courts.

The absence of written reasons for departure was not preserved in the trial court and is thus not cognizable on appeal pursuant to numerous authorities relied on by the district court.

Similarly, the **decision** of the district court that petitioner's plea bargain to convictions for various offenses in return for the state nol prossing other charges brought the plea bargain within the control of Novaton v. State, 634 So.2d 607 (Fla. 1994) and waived double jeopardy considerations, does not create conflict with Novaton or other decisions of this Court or other district courts.

ARGUMENT

ISSUE

DOES THE DECISION OF THE DISTRICT COURT, RELYING ON DAVIS V. STATE, 661 SO.2D 1193 (FLA. 1995), THAT FAILURE TO ENTER WRITTEN REASONS FOR A GUIDELINES DEPARTURE IS NOT FUNDAMENTAL ERROR WHICH RENDERS THE SENTENCE ILLEGAL AND, RELYING ON NOVATON V. STATE, 634 SO.2D 607 (FLA. 1994), THAT PETITIONER WAIVED HER DOUBLE JEOPARDY CLAIMS BY A PLEA BARGAIN UNDER WHICH SHE PLED GUILTY TO SPECIFIED CRIMES IN RETURN FOR THE STATE NOL PROSSING OTHER CHARGES CONFLICT WITH DECISIONS OF THIS COURT OR OF OTHER DISTRICT COURTS? (Restated)

Jurisdictional Criteria

Petitioner contends that this Court has jurisdiction pursuant to Article V, § 3(b)(3), Florida Constitution which provides

> :The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So.2d 829, 830 (Fla. 1986). Accord Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So.2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict; dismissed petition). Neither the record, nor a concurring opinion, nor a dissenting opinion can be used to establish jurisdiction. Reaves, supra; Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980)("regardless of whether they are accompanied by a dissenting

or concurring opinion"). In addition, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359.

In Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958), this Court explained:

> It was never intended that the district courts of appeal should be intermediate courts. The revision and modernization of the Florida judicial system at the appellate level was prompted by the great volume of cases reaching the Supreme Court and the consequent delay in the administration of justice. The new article embodies throughout its terms the idea of a Supreme Court which functions as a supervisory body in the judicial system for the State, exercising appellate power in certain specified areas essential to the settlement of issues of public importance and the preservation of uniformity of principle and practice, with review by the district courts in most instances being final and absolute.

Written Departure Order

The trial court imposed an upward departure sentence at the urging of the state and informed Collins as to the reasons for the upward departure at the sentencing hearing. Although the sentencing took place on 10 November 1997, Collins did not file a motion pursuant to Florida Rule of Criminal Procedure 3.800(b)[1] challenging the reasons for the upward departure sentence. Collins argued on appeal that the trial court committed

[1]Rule 3.800(b) became effective 1 January 1997.

reversible error in not entering a written departure order. The district court declined to address the unpreserved sentencing claim, relying on sections 924.051(1)(b) and (3), Florida Statutes (1997); Florida Rule of Criminal Procedure 3.800(b); Neal v. State, 688 So.2d 392 (Fla. 1st DCA 1997); Amendments to the Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996); and Amendments to the Florida Rules of Criminal Procedure, 685 So.2d 1253 (Fla. 1996). All of these authorities require that sentencing issues be first raised in the trial court and reflect the state of the law after the enactment of the Criminal Appeal Reform Act of 1996 and its implementation by this Court in the Amendments above after 1 January 1997.

The district court could also have relied on Florida Rules of Appellate Procedure 9.140(b)(2) and 9.140(d) which unequivocally prohibit appeals of sentencing claims which have not been properly preserved in the trial court.

The district court also relied on this Court's decision in Davis v. State, 661 So.2d 1193 (Fla. 1995), which predates the Reform Act and its implementation by this Court, because of its onpoint holding that the absence of written departure reasons is not fundamental error and does not render a sentence illegal.

Petitioner has not cited any post-Reform Act case which directly and expressly conflicts with the decision below. There is no basis for conflict jurisdiction based on the absence of the written departure reasons.

Double Jeopardy

Collins was charged with 32 criminal counts. She entered into a plea bargain with the state under which she pled guilty to 18 of those counts, in return for which the state nol prossed the remaining 14 criminal counts. These pleas all took place after 1 January 1997 but no motion was filed pursuant to Florida Rule of Criminal Procedure 3.170(l) to withdraw from the plea bargain. Instead, for the first time on appeal, Collins argued that the crimes to which she pled are a double jeopardy violation and that certain of her convictions must be reversed on appeal as fundamental error. In other words, Collins wanted part of the plea bargain to be nullified while she retained the benefit of the bargained for nol prossed charges.

The district court felt compelled to address the double jeopardy claim but decided that there was an obvious plea bargain involved and, pursuant to Novaton v. State, 634 So.2d 607 (Fla. 1994), Collins had waived any double jeopardy claim she might have had **if** there had not been a plea bargain. The district court correctly applied Novaton to the facts of the case and petitioner has not shown any direct and express conflict.

It should also be noted that the district court decision is also consistent with rule 9.140(b)(2) which prohibits any appeal from a plea where no issues have been preserved in the trial court and no motion to withdraw from the plea has been filed. Thus, Collins' remedy, if any, and if she wishes to exercise it, is not in the district court or this Court - it is in the trial

court by motion to withdraw from the plea bargain pursuant to rule 3.170(l).

CONCLUSION

Petitioner has failed to show any direct or express conflict between the decision below and decisions of this Court or of any other district court. The petition for discretionary review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT has been furnished by U.S. Mail to Kathleen Stover, Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 7th day of July 1999.

James W. Rogers
Attorney for the State of Florida

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