IN THE SUPREME COURT OF FLORIDA

JAMES TERRY,

Petitioner,

v. CASE NO. SC01-383

STATE OF FLORIDA,

Respondent.
_____)

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL,
FIFTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The argument now made was preserved for appeal, and this court has jurisdiction of this case based on expressly conflicting majority opinions from two District Courts.

The plea agreement in this case left the decisions whether to impose habitual-offender punishment, and whether to impose probation, in the judge's hands; the parties' only agreement was to a prison term no longer than the term of years established by the midpoint of the sentencing guidelines range. The cases relied on by the State, which involve agreements to habitual offender sentences, do not control this case.

ARGUMENT

IN REPLY: THE TRIAL COURT DID NOT IMPOSE AN ENHANCED SENTENCE INITIALLY, AND ERRED BY IMPOSING ONE FOR THE FIRST TIME AFTER VIOLATION OF PROBATION. THE FIFTH DISTRICT COURT MISAPPLIED THIS COURT'S PRECEDENT, AND THIS COURT SHOULD REVERSE ITS DECISION AND ADOPT THE REASONING OF THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL.

The State argues that this court should dispose of this case on the ground that no objection was made at resentencing after the trial court found Petitioner had violated his probation. This is simply untrue. While at the cited record page (R 37; see State's brief at 7) no objection appears, moments earlier in the resentencing hearing counsel articulated the precise argument that has been made on Petitioner's behalf in the District Court and this court. (R 15-17) No motion was filed after sentencing pursuant to Rule 3.800(b) on the habitualization issue because it was already preserved by argument at the sentencing hearing.

The State also suggests that this court should dismiss this case as improvidently granted since there is no conflict jurisdiction based on the four corners of the majority opinions issued in this case and in Yashus v. State, 745 So. 2d 504 (Fla. 2d DCA 1999). (State's brief at 12-13) The opinions do conflict; the majority opinion in Yashus does refer to an agreement reached between the parties at the original sentencing proceeding. 745 So. 2d at 505.

On the merits, the petitioner in this case agreed to a prison term capped at the midpoint of the range established by the sentencing guidelines. The decisions whether to impose that term under the habitual offender statute, and whether to add probation to the agreed-on prison term, were left in the trial judge's hands. Mr. Terry was appropriately admonished by the judge that he *could* be sentenced as a habitual offender if he violated his probation, but he did not *agree* in exchange for some benefit to be sentenced as one. Dunham v. State, 686 So. 2d 1356 (Fla. 1997), Walker v. State, 682 So. 2d 555 (Fla. 1996), and Rodriguez v. State, 766 So. 2d 1147 (Fla. 3rd DCA 2000), relied on by the State, should be distinguished from this case for that reason. A guidelines sentence must be imposed on remand. Yashus; accord Louis v. State, 758 So. 2d 744 (Fla. 3rd DCA 2000).

CONCLUSION

The petitioner requests this court to reverse the decision and quash the opinion issued by the Fifth District Court in this case, to adopt in its place the decision and opinion issued by the District Court in Yashus, supra, and to remand for imposition of a guidelines sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Assistant Attorney General Bonnie Jean Parrish, at 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, FL 32118, by way of the Attorney General's in-basket at the Fifth District Court of Appeal, this _____ day of May, 2001.

_____
NANCY RYAN

CERTIFICATE OF COMPLIANCE

This brief is set in Courier New 12.

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NANCY RYAN