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IN THE SUPREME COURT OF FLORIDA

RALPH GROSS,
PETITIONER.

Case No. : 02-1695

4th DCA No.: 4D01-2132

-VS-

STATE OF FLORIDA,
RESPONDENT.

PETITIONER'S BRIEF ON JURISDICTION

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CERTIFICATE OF INTERESTED PARTIES

Counsel for Petitioner certifies that the following persons and entities have or may have an interest in the outcome of this case:

Honorable Barry Goldstein
Circuit Court Judge, Seventeenth Judicial Circuit
(Trial Judge originally assigned to this case)

Honorable M. Daniel Futch, Jr.
Circuit Court Judge, Seventeenth Judicial Circuit
(Trial and Sentencing Judge)

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Robert Butterworth, Attorney General
(Appellate counsel for Respondent)

Ralph Gross
(Petitioner)

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STATEMENT OF THE CASE

Petitioner was the Appellant in the Fourth District Court of Appeal and the Defendant in the Circuit Court of the 17th Judicial Circuit in and for Broward County, Florida. Respondent, State of Florida, was the Appellee in the Fourth District Court of Appeal and the prosecution in the circuit court.

The Petitioner's appeal of the circuit court's denial of his motion to correct illegal sentence pursuant to F.R.Cr.P. 3.800(a) was unsuccessful. A Notice to Invoke Discretionary Jurisdiction was timely filed.

The Petitioner, Ralph Gross, shall be referred to as "petitioner." the Respondent shall be referred to as "respondent." References to the Petitioner's Appendix shall be designated by the symbol "A."

STATEMENT OF THE FACTS

The Petitioner was convicted, among other things, of RICO and Conspiracy to Commit RICO, as well as three other crimes which the information alleged were committed during two separate guideline periods; those in effect in 1993 and those in effect in 1994. The trial court utilized the guidelines in effect in 1993 to score all of his convictions. This was the case for those convictions which took place solely in 1993, 1994, and those which overlapped the two guidelines periods.'

The Petitioner filed a motion to correct illegal sentence pursuant to F.R.Cr.P. 3.800(a). The thrust of Petitioner's motion was that he should have **been** resentencd for those crimes which overlapped two guideline periods. It was argued that the guidelines in effect at the *end* of the criminal episode, rather than at the beginning of the criminal episode should apply.' The 1993 and the 1994 guidelines were silent as to which guidelines should apply when scoring crimes which span two guideline periods. In 1995, the guidelines were amended to add a provision which mandated the use of the guidelines in effect at the beginning of the criminal

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'Respondent conceded that a 1994 guidelines score sheet should have been utilized for those crimes which occurred **solely** in 1994, and a 1993 score sheet for those crimes which occurred solely in 1993.

[2] In this case, the guidelines in effect in 1994 resulted in a significantly lower sentence than those in effect in 1993, when the criminal episode began.

episode in such a situation. Fla. Stat. 921.001 (4)(b)3.

Hearings were held on his motion before the Honorable M. Daniel Futch, Jr., on May 2,2001 and on May 11, 2002. The trial court denied his motion and resentenced Petitioner to forty years in prison. This was the same sentence which he had originally been sentenced to.

Petitioner filed a timely appeal to the Fourth District Court *of* Appeal. The district court denied Petitioner relief and issued an opinion wherein they expressly disagreed with Hankin v. State, 682 So.2d 602 (Fla. 2nd DCA 1996) which supported Petitioner's contention that the appropriate guidelines to utilized were those in effect at the end of his criminal episode. Gross v. State, — So.2d _____ (Fla. 4th DCA July 10, 2002, Case No. 4D01-2132), attached as exhibit "A". Petitioner filed a timely Notice to Invoke Discretionary Jurisdiction.

SUMMARY OF ARGUMENT

This Honorable Court has jurisdiction over this case pursuant to Article V, Section 3(b)(3) of the Florida Constitution. This section authorizes the Court to review any decision of a district court which expressly and directly conflicts with a decision of another district court or of the supreme court on the same question of law. See also, Fla. R. App. P.9.030(a)(2)(A)(iv). *Sub judice*, the Fourth District Court of **Appeal** rendered an opinion which expressly and directly conflicts with another district court and with a decision of the supreme court on the same question of law.

ARGUMENT

Article V, Section 3(b)(3) of the Constitution of the State of Florida empowers this Honorable Court to review any decision **of** a district court which expressly and directly conflicts with a decision of another district court of the supreme court on the same question of law. This Court has recently accepted jurisdiction to review such decisions. State v. Betz, 815 So.2d 627 (Fla. 2002)

In the opinion *sub judice*, the district court expressly disagreed with the holding of Hankin v. State, 682 So.2d 602 (Fla. 2nd DCA 1996). Gross v. State, ___ So.2d ____ (Fla. 4th DCA July 10, 2002, Case No. 4D01-2132), attached as exhibit "A". There are no other district court cases which address the issue raised on this appeal and which Hankin had interpreted in the same fashion as Petitioner. Furthermore, this Honorable Court has passed on the

same question of law presented in this appeal. Puffinberger v. State, 581 So.2d 897 (Fla. 1991). Indeed, it was on the Puffinberser decision, as interpreted by Hankin, which formed the basis of Petitioner's legal position. The district court recognized that there was an express difference in interpretation and stated:

> In Hankin, the Second District Court of Appeal construed Puffinberser to mandate the use of the sentencing guidelines in effect at the end of the criminal enterprise. We disagree with that interpretation and conclude that Puffinberaer did not dictate such a result. Thus, while the trial court should have followed Hankin as the law was silent in the Fourth District, we now expressly declare that the trial court had the discretion to apply the guidelines in effect at that beginning of the enterprise.

Gross, supra.

Gross is *expressly* and ***directly*** in conflict with both the Hankin and the Puffinberger decisions from the Second District Court of Appeal and the Supreme Court of Florida respectively.

As indicated in Petitioner's brief on the merits filed in the district court and at the oral argument, failure to follow the Hankin interpretation of Puffinberser resulted in a significant increase in the sentence which Petitioner was exposed to and sentenced to. He has suffered real and substantial detrimental consequences based on the interpretation by the Fourth District Court of Appeal concerning the sentencing question at issue.

It is urged that the Court should exercise it's discretionary jurisdiction in this case in order to resolve the conflict amongst the district courts interpretation of a Florida Supreme Court

decision. If this Honorable Court does not resolve this conflict in the interpretation Puffinberger, a state of confusion will continue to exist between the various districts concerning the sentencing question raised. This will result in unnecessary litigation and disparate sentences being imposed for the same criminal conduct depending solely upon where the crime occurred.

CONCLUSION

Based on the forgoing arguments and authorities, it is submitted that the this Honorable Court exercise their discretionary jurisdiction premised on Art. V, Section 3(b)(3), Fla. Const. and Fla. R. App. P.9.030(a)(2)(A)(iv).

Respectfully submitted,

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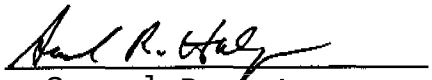
By: 
Samuel R. Halpern

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing was delivered by U.S. mail to James Carney, Assistant Attorney General, Department of Legal Affairs, 1515 Flagler Street, Suite 900, West Palm Beach, FL. 33401-2299, this 5th day of August, 2002.

By: Samuel R. Halpern
Samuel R. Halpern

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared with a 12 point type and Courier New font in accordance with Fla.R.App.P. 9.210(2)E.

By: Samuel R. Halpern
Samuel R. Halpern

2002 WL 1466603
27 Fla. L. Weekly D1591
(Cite as: 2002 WL 1466603 (Fla.App. 4 Dist.))

District Court of Appeal of Florida,
Fourth District.

Ralph GROSS, Appellant,
v.
STATE of Florida, Appellee.

No. 4D01-2132.

July 10,2002.

Following affirmance of convictions of Racketeer Influenced and Corrupt Organizations Act (RICO) violations, 728 So.2d 1206, defendant moved to correct illegal sentence. The Seventeenth Judicial Circuit Court, Broward County, M. Daniel Futch Jr., J., denied motion in part. Defendant appealed. The District Court of Appeal, May, J., held that trial court had discretion to sentence defendant under guidelines in effect at start of criminal enterprise.

Affirmed.

[1] Sentencing and Punishment ⚿2254

350Hk2254 Most Cited Cases

To be illegal within the meaning of rule governing correction of illegal sentence, the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances; on the other hand, if it is possible under all the sentencing statutes--given a specific set of facts--to impose a particular sentence, then the sentence will not be illegal even though the judge erred in imposing it. West's F.S.A. RCrP Rule 3.800(a).

[2] Sentencing and Punishment ⚿653(6)
350Hk653(6) Most Cited Cases

Sentencing court had discretion to apply sentencing guidelines in effect at beginning of continuing criminal enterprise rather than those in effect at end.

[3] Statutes ⚿241(1)
361k241(1) Most Cited Cases

The rule of lenity should be construed strictly. West's F.S.A. § 775.021(1).

[4] Sentencing and Punishment ⚿661
350Hk661 Most Cited Cases

Sentencing guidelines are subject to the rule of lenity. West's F.S.A. § 775.021(1).
Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; M. Daniel Futch Jr., Judge; L.T. Case No. 94-13482CF10E.

Samuel R. Halpern, of Samuel R. Halpern, P.A., Fort Lauderdale, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and James J. Carney, Assistant Attorney General, West Palm Beach, for appellee.

MAY, J.

*1 The continuing nature of the defendant's criminal enterprise, which spanned pre and post-1994 guidelines, provided the trial court with an interesting sentencing option. The trial court was given the choice of applying the sentencing guidelines in effect at the beginning of the enterprise or those in effect at the end of the enterprise. The trial court chose the earlier date, which resulted in a forty year prison sentence. From that sentence, the defendant appeals. We affirm.

On September 20, 1996, a jury convicted the defendant of multiple counts, including RICO violations and Conspiracy to Commit RICO. He appealed to this court, which affirmed his, conviction. He subsequently filed a pro se motion to correct sentence, pursuant to Florida Rule of Criminal Procedure 3.800(a). He successfully argued that the trial court had used the wrong sentencing guidelines scoresheet to determine his sentence. He claimed that for those crimes that were part of a continuing criminal enterprise which spanned two periods encompassing both the pre-

and post-1994 guidelines, the trial court was required to use both guidelines scoresheets. The State agreed and the offenses were rescored.

He **also** argued that for those crimes with a continuing date from 1993 through part of 1994, the guidelines in effect at the end of the enterprise applied. He was not successful in this argument. The trial court applied the guidelines in effect at the beginning of the criminal enterprise.

At issue is whether the trial court imposed an illegal sentence on the defendant when it applied the sentencing guidelines in effect at the beginning of the defendant's criminal enterprise rather than those in effect at the end. We find that the sentence under consideration was legal and did not violate the defendant's constitutional rights. As such, the trial court properly denied the defendant's 3.800(a) motion to correct the sentence in this regard.

[1] Rule 3.800(a) provides that a "court may at any time correct an illegal sentence imposed by it." Fla. R.Crim. P. 3.800(a). The **Rule is** "intended to balance the need for finality of conviction and sentences with the goal of ensuring that criminal defendants do not serve sentences imposed contrary to the requirements **of** the law." ***Carter v. State,*** 786 So.2d 1173, I176 (Fla.2001).

> To be illegal within the meaning of rule 3.800(a) the sentence must impose a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances. On the other hand, if it is possible under all the sentencing statutes--given **a** specific set of facts--to impose a particular sentence, then the sentence will not be illegal within rule 3.800(a) even though the judge erred in imposing it.

Id.* at 1178** (quoting ***Blakely v. State, 746 So.2d **1182** (Fla. 4th DCA 1999)).

[2] We must determine whether a sentence, which applied the guidelines in effect **at** the beginning of a criminal enterprise rather than those in effect at the end, is "a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." *Id.* The defendant argues that the existing case law required the application of the guidelines in existence at the end of the criminal enterprise. ***See Puffinberger v. State,*** **581** So.2d 897 (Fla.1991); and ***Hankin v. State, 682*** So.2d 602 (Fla. 2d DCA 1996). We disagree.

*2 The main issue in *Puffinberger* was whether a defendant's nonscoreable juvenile record could be used as a reason to depart from sentencing guidelines. The Supreme Court of Florida held that the record could only be used if it was "significant" and the resulting departure was not greater than it would have been if the record could have been scored. The Court further found that the use **of** sentencing guidelines that applied to the end dates of a continuing crime did not violate the prohibition against ex post facto laws. In ***Hunkin,*** the Second District **Court** of Appeal construed ***Puffinberger*** to mandate the use of the sentencing guidelines in effect at the end of the criminal enterprise. We disagree with that interpretation and conclude that ***Puffinberger*** did not dictate such a result. Thus, while the trial court should have followed ***Hankin*** as the law was then silent in the Fourth District, we now expressly declare that the trial court had the discretion to apply the guidelines in effect at the beginning **of** the enterprise.

The defendant argues, however, that the trial court violated the prohibition against ex post facto laws by applying the 1995 version **of** section **92**1.001(4)(b)3, Florida Statutes (1995), to a criminal enterprise that ended in 1994. That statute now dictates the use of the guidelines in existence at the beginning of the continuing criminal enterprise. **A** thorough review of the sentencing, which took place in two separate hearings over a nine-day time period, fails to reveal that the trial court relied upon that statute in sentencing the defendant. The trial court simply stated: "I've thought about this sentence a lot before I even sentenced Mr. Gross. I gave him originally 40 years. 1 thought it was fair then and I think it's fair now. And I can't find any reason to mitigate it." Thus, the defendant's argument fails in this regard.

There simply was no statute or supreme court decision dictating the use **of** the end dates at the time the trial court reseotenced the defendant. Thus, we cannot say that the sentence imposed was "a kind of punishment that no judge under the entire body of sentencing statutes could possibly inflict under any set of factual circumstances." ***Blakely,*** 746 So.2d at 1186-87.

The defendant also argues that the rule of lenity dictates **a** reversal as it would require the application of guidelines resulting in the lowest sentence. We disagree. The rule of lenity, codified in section 775.021(1), Florida Statutes (2001), provides that "[t]he provision of this code and offenses defined by other statutes shall be strictly construed; **when** the language is susceptible of differing constructions, it shall be construed most favorably to the accused."

[3] The rule of lenity, which by its **own** terms requires strict construction, should be construed strictly. What does it require? First, it requires courts to "strictly construe" provisions of the code and offenses defined by other statutes. Second, when statutory language "is susceptible of differing constructions", courts are required to construe it "most favorably to the accused." What the rule of lenity doesn't address is what to do when the law is silent on an issue.

*3 [4] Sentencing guidelines are subject to the rule of lenity. See Williams *v.* State, 680 So.2d 532 (Fla. 1st DCA **1996).** However, no statute addressed the issue of which guidelines apply to a continuing criminal enterprise. Strict construction does not equate to court creation. When there is no statute or rule to construe, the rule of lenity has no application. It cannot apply to that which does not exist.

As the sentence was legal, the trial court properly denied the 3.800(a) motion on this issue. The order and sentence are affirmed.

GUNTHER and STEVENSON, JJ., concur.

2002 WL **1466603** (Fla.App. **4** Dist.), 27 Fla. L. Weekly D1591

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