IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC02-1695

ORIGINAL

RALPH GROSS,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS

PRELIMINARY STATEMENT

Petitioner was **the** Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this brief, the parties shall be referred to as they appear before this Honorable Court of **Appeal** except *that* Appellee may also be referred to as the State.

All emphasis in this brief is supplied by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent does not accept Petitioner's statement of the case and facts as it improperly contains numerous alleged facts not found in the opinion. See Reaves w. State, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must appear within the four corners of the majority's decision.").

Petitioner was convicted of RICO offenses which spanned pre and post-1994 guidelines. He filed a motion to correct illegal sentence claiming the for those crimes with a continuing date from 1993 through part of 1994, the guidelines in effect at the end of the criminal enterprise must **be** applied. The trial court disagreed. The Fourth District affirmed. See Gross V. *State*, 820 So. 2d 1043 (Fla. 4th DCA 2002)(copy attached).

SUMMARY OF THE ARGUMENT

This Court should decline to accept jurisdiction to review this case because the opinion of the Fourth District Court of Appeal does not expressly and directly conflict with a decision of another district court of appeal or a decision of this Court.

ARGUMENT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE THIS CASE IS DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THIS COURT OR A DISTRICT COURT OF APPEAL.

For two court decisions to be in **express** and direct conflict for the purpose of invoking this Court's discretionary jurisdiction under Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), the decisions should speak to the same point of law, in factual contexts of sufficient similarity to permit the inference that the result in each case would have been different had the deciding court employed the reasoning of the other court. See generally Mancini v. State, 312 So. 2d 732 (Fla. 1975) (emphasis supplied).

In Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980), this Court defined the limited parameters of its conflict review as follows:

> This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definition of the terms 'express' include: 'to represent in words'; to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary (1961 **ed.** unabr.)

See generally Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958); Withlacoochee River Electric Co-oP v. Tampa Electric Company, 158 So. 2d 136 (Fla. 1963), cert. denied, 377 U.S. 952, 84 S.Ct. 1628, 12 L.Ed.2d 497 (1964); and England and Williams, ~~Florida~~

Appellate Reform One Year Later, 9 F.S.U. L. Rev. 221 (1981). See also Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) ("Conflict between decisions must be express and direct, i.e., it must **appear** within the four corners of the majority's decision. Neither a dissenting opinion nor the record itself can **be** used to establish jurisdiction.") and Mystan Marine, Inc. v. Harrinqton, **339** So. 2d 200, 210 (Fla. 1976) (This Court's discretionary jurisdiction is directed to a concern with decisions as precedents, not adjudications of the rights of particular litigants).

Petitioner contends the decision of the Fourth District in this case expressly and directly conflicts with Puffinberser v. State, 581 So. 2d 897 (Fla. 1991). Contrary to the suggestion in Petitioner's brief, Puffinberser v. State, 581 So. 2d 897 (Fla. 1991), does not stand for the proposition that the ending date of a continuing crime must **be** used in determining the applicable guidelines. Puffinburser simply held that it was not an ex post facto violation to use the ending date. It did not mandate that the ending date be used.

Similarly, contrary to the Fourth District's opinion in Gross, Hankin v. State, 682 So. 2d 602 (Fla. 2d DCA 1996), did not hold that a trial court must apply those guidelines in effect at the end of the criminal episode. In Hankin, the following occurred:

> Appellant maintains that the aggravating circumstances in section 921.0016(3)(n), Florida Statutes (Supp.1994) (effective date: 1/1/94) are unconstitutionally vague, and the court should not have used them to depart from appellant's recommended guidelines range. The state responds that that statutory section does not apply to appellant's offenses because at the operative moment in time, when appellant began committing his offenses, the statute was not in effect. That argument is based on the fact that under section 921.001(4)(b)3, Florida Statutes (1995), felonies with continuing dates of enterprise are to be sentenced under the guidelines in effect on the beginning date of the criminal activity, which, in appellant's case, was December 1991 or April 1992. Appellant completed his offenses in 1994. However, this just-quoted statute, section 921.001(4)(b)3, did not take effect until 1995, with the result that case or statutory law in effect before the enactment of that section would apply. The existing law was Puffinberger v. State, 581 So.2d 897 (Fla.1991), where the supreme court held that the law in effect at the end of the criminal enterprise applied. Accordingly, the 1994 sentencing guidelines would apply to appellant's departure sentence. As such, the court did not err in applying the section 921.0016(3)(n) aggravating circumstances to depart from the guidelines in sentencing appellant.

A close reading of the above indicates that the Second District was merely holding that under Puffinburger, the trial court did not err in applying **the** guidelines in effect at the end of the criminal episode. Harkin did not hold that the trial court was bound to apply those guidelines. It merely held the trial court did not err in doing so. There is no express and conflict.

Respondent also notes that this issue is not likely to recur. Since 1995, Florida Statutes provide that the guidelines in effect at the beginning of a continuing criminal enterprise are to be applied. See §921.001(4)(b)(3) Fla. Stat. (1995).

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to DECLINE to review the instant decision.

Respectfully submitted,
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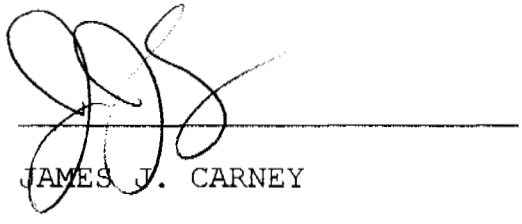
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by U.S. Mail to: Samuel R. Halpern, 2856 E Oakland Park Blvd., Fort Lauderdale, FL 33306, this 15 day of October, 2002.

Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative **Order** of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.



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APPENDIX

820 So.2d 1043
27 Fla. L. Weekly D1591
(Cite as: 820 So.2d 1043)

H

District Court **of** Appeal of Florida,
Fourth District.

Ralph CROSS, 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.

West Headnotes

[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(I) 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).

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MAY, J.

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." ***Curter v. Stute,*** 786 So.2d 1173, 1176 (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 intlict 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 *Blakley v.* Stute, 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 tactual 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 *1045Puffinberger v. Stute,*** **581** So.2d 897 (Fla.1991); and *Hankin v.* Stute, 682 So.2d 602 (Fla. 2d DCA 1996). We disagree.

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 **921.001(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. I 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 resentenced 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." *Blakley,* 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 provisions 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.

[4] Sentencing guidelines are subject to the rule of lenity. Set. ***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 ***1046** 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.

820 So.2d 1043, 27 Fla. L. Weekly D1591

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