

IN THE SUPREME COURT OF FLORIDA

FILED
THOMAS D. HALL

SEP 25 2002

CLERK, SUPREME COURT
BY _____

JAMES GANDY, Jr.,
petitioner,

vs.

STATE OF FLORIDA,
respondent.

CASE No. SC02-2049

TO BE SUPPLIED BY THE CLERK

APPEAL CASE No. 2D02-2417

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

By: James Gandy, Jr. #360824

James Gandy, Jr., #360824

A - Dorm

Avon Park Correctional Institution

P.O. Box 1100

Avon Park, Florida 33826-1100

In prose

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STATEMENT OF THE CASE

On June 11, 2002 Petitioner filed a timely Petition for Writ of Habeas Corpus alleging he was denied his constitutional right to effective assistance of appellate counsel guaranteed by the Sixth Amendment to the United States Constitution when his appellate counsel failed to brief the issue in his appellant brief for relief on direct appeal that it was error for the trial Court to impose a departure sentence from the guidelines without providing contemporaneous written reasons for the departure, with the Second District Court of Appeal denied the Petition on July 17, 2002. See: Appendix A. (A. 1).

On July 19, 2002 Petitioner filed a timely Motion for Rehearing, Rehearing En Banc or, in the alternative, for Certification to the Florida Supreme Court. The motion was denied on September 11, 2002. See: Appendix B. (A. 2).

A notice to invoke discretionary jurisdiction on the basis of conflict was filed on September 13., 2002.

SUMMARY OF ARGUMENT

The Second District Court of Appeal decision conflicts with the decision of another district court of appeal where life sentence imposed on defendant for second degree murder, pursuant to statute permitting trial court to sentence defendant to life imprisonment if sentence points totalled 363 or more, varied by more than 25% from recommended sentence of 31.9 years, and was therefore a departure sentence requiring written findings.

ARGUMENT

ISSUE 1

THE SECOND DISTRICT COURT OF APPEAL DECISION IS IN DIRECT CONFLICT WITH ANOTHER DISTRICT COURT OF APPEAL RELATING TO LIFE SENTENCE IMPOSED ON DEFENDANT FOR SECOND DEGREE MURDER, PURSUANT TO STATUTE PERMITTING TRIAL COURT TO SENTENCE DEFENDANT TO LIFE IMPRISONMENT IF SENTENCE POINTS TOTALLED 363 OR MORE, VARIED BY MORE THAN 25% FROM RECOMMENDED SENTENCE OF 31.9 YEARS, AND WAS THEREFORE A DEPARTURE SENTENCE REQUIRING WRITTEN FINDINGS.

This case is important for the issue it raises as to ineffective assistance of appellant counsel for failure to raise the meritorious issue that it was error for the trial court to impose a departure sentence from the guidelines without providing contemporaneous written reasons for the departure. The Fourth District Court of Appeal has held that where life sentence imposed on defendant for second degree murder, pursuant to statute permitting trial court to sentence defendant to life imprisonment if sentence points totalled 363 or more, varied by more than 25% from recommended sentence of 31.9 years, and was therefore a departure sentence requiring written findings, and that it was error for the trial court to impose a departure sentence from the guidelines without providing

contemporaneous written reasons for the departure. see: Franco vs State, 777 So. 2d 1138 (Fla. 4th DCA 2001).

Since Petitioner like Franco life sentence imposed for second degree murder, pursuant to statute permitting trial court to sentence Petitioner to Life imprisonment if sentence points totalled 363 or more, varied by more than 25 % from recommended sentence of 22.8 years, and was therefore a departure sentence requiring written findings, and that it was error for the trial court to impose a departure sentence from the guidelines without providing contemporaneous written reasons for the departure.

The decision of the Second District Court of Appeal denying Petitioner's Petition for Writ of Habeas Corpus for ineffective assistance of appellant counsel for failing to raise the meritorious issue that it was error for the trial court to impose a departure sentence from the guidelines without providing contemporaneous written reasons for the departure, is contrary to the decision of another district court of appeal on the same question of law.

CONCLUSION

Jurisdiction for review should be granted because the Second District Court of Appeal's decision is contrary to the decision of another district court in France and does not respect the decision of another district court of appeal. This case provides the proper vehicle for resolving a conflict with the decision of another district court of appeal on the same question of law. The issue is presented clearly in this case since the Second District court of Appeal decision conflicts with a decision of another district court of appeal on the same question of law.

Respectfully submitted,

James Gandy, Jr. #360824

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In Prose

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CASE No. _____

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APPEAL CASE No. 2D02-2417

APPENDIX

1. Appendix A. (A. 1). A copy of the Second District Court of Appeal denying Petitioner's Petition for Writ of Habeas Corpus on July 17, 2002.
2. Appendix B. (A. 2). A copy of the Second District Court of Appeal denying Petitioner's motion for rehearing, rehearing en banc or in the alternative, for certification to the Supreme Court of Florida on September 11, 2002.

APPENDIX. A (A.1)

**IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327**

July 17, 2002

CASE NO.: 2D02-2417

L.T. No. :

James Gandy, Jr.,

v. State Of Florida,

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Petitioner's petition for writ of habeas corpus is treated as a petition alleging ineffective assistance of appellate counsel and is denied. See § 921.002(g), Fla. Stat. (Supp. 1998).

BLUE, C.J., and WHATLEY and NORTHCUTT, JJ., Concur.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.

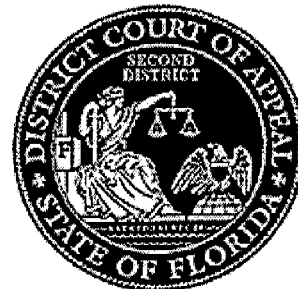
Served:

James Gandy, Jr.

Attorney General

bp


James Birkhold
Clerk



APPENDIX B. (A. 2)

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
SECOND DISTRICT, POST OFFICE BOX 327, LAKELAND, FL 33802-0327

September 11, 2002

CASE NO.: 2D02-2417

L.T. No. :

James Gandy, Jr.,

v. State Of Florida,

Appellant / Petitioner(s),

Appellee / Respondent(s).

BY ORDER OF THE COURT:

Petitioner's motion for rehearing, rehearing en banc or, in the alternative, for certification to the Supreme Court of Florida is denied.

I HEREBY CERTIFY that the foregoing is a true copy of the original court order.


Served:

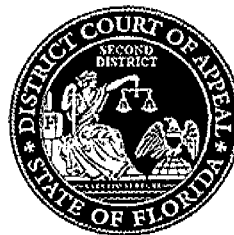
James Gandy, Jr.

Attorney General

Richard M. Weiss, Clerk

dm


James Birkhold
Clerk



CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction, has been furnished to the office of the Attorney General, Criminal Section, Department of Legal Affairs, 2002 N. Lois Avenue, Westbrook center - suite 700, Tampa, Florida 33607-2366 by U.S. Mail delivery this 23rd day of September 2002.

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Office of the Clerk
Supreme Court of Florida
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1925

FILED
THOMAS D. HALL
SEP 25 2002
CLERK, SUPREME COURT
BY _____

Re: JAMES GANDY, Jr., vs STATE OF FLORIDA, CASE No. _____
TO BE SUPPLIED BY THE CLERK
APPEAL CASE No. 2002-2417

COVER LETTER TO THE CLERK

Dear Honorable clerk:

Please enclosed find an original copy of Brief of Petitioner on Jurisdiction,
to be filed in this Court.

Dated this 23rd day of
September 2002.

Sincerely,
James Gandy, Jr. #360824
James Gandy, Jr, # 360824