IN THE SUPREME COURT OF FLORIDA

LAWRENCE LOGAN,

Petitioner,

v. **FSC NO.**
2D DCA NO. 2D01-3151

STATE OF FLORIDA,

Respondent.
_____/

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

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

The petitioner was charged with committing six counts of armed robbery with a firearm March 17, 1984. (S.R. 38, 39) He was con-victed of five counts December 11, 1984. (Id. at 40-47) On October 18, 1999 the petitioner filed a motion to correct an il-legal sentence alleging the guidelines did not apply to offenses committed before July 1, 1984 and asserting his right to elect whether to be sentenced under the guidelines. (S.R. 1-5) The state conceded error (Id. at 6-10) and the court granted resen-tencing. (Id. at 11)

At the resentencing on May 8, 2001, the parties argued under the belief that, if the petitioner elected guidelines sentencing, reasons for departure were necessary. (S.R. at T. 5-30) The peti-tioner elected a guidelines sentence. (Id. at 30) The trial court again sentenced him to life in prison for each of the convictions and stated reasons for "departure." (Id. at 38-40) A written order listing the grounds for the departure was never filed.

On May 30, 2003, the Second District affirmed on the basis that the guidelines in effect at the time of the election control and those guidelines were the Criminal Punishment Code. Under the Code, the petitioner's sentences were not departure

sentences for which written reasons were required. (Appellant's Brief, App.)

SUMMARY OF THE ARGUMENT

The state submits that the Court should not entertain jurisdiction in the instant case because the petitioner has failed to demonstrate direct and express conflict between the decision of the Second District below and a decision of another district court of appeal or the Supreme Court. As explained in *Ansin v. Thurs-ton*, *infra*, for decisions to be in direct conflict the decisions must be based practically on the same state of facts with the respective courts reaching opposing holdings. In the instant case there is no direct conflict.

ARGUMENT

THE COURT SHOULD DECLINE TO ENTERTAIN JURISDICTION IN THE INSTANT CASE BECAUSE THE PETITIONER HAS FAILED TO DEMONSTRATE DIRECT AND EXPRESS CONFLICT BETWEEN THE DECISION OF THE SECOND DISTRICT BELOW AND A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THE FLORIDA SUPREME COURT.

The petitioner seeks to invoke the discretionary jurisdiction of the Court, arguing the opinion of the Second District is in direct and express conflict with this Court's earlier decision in *Smith v. State,* 537 So. 2d 982 (Fla. 1989), with *Copeland v. State*, 842 So. 2d 1052 (Fla. 3d DCA 2003), and with *Ree v. State*, 565 So. 2d 1329 (Fla. 1990), *Pope v. State*, 561 So. 2d 554 (Fla. 1990) and *State v. Jackson*, 478 So. 2d 1054 (Fla. 1985). The state responds the court should not entertain jurisdiction in the instant case because the petitioner has failed to demonstrate direct and express conflict between the Second District's decision below and a decision of another District Court of Appeal or the Florida Supreme Court.

Article V, section 3(b)(3) of the Florida Constitution (1980) enables the supreme court to review a 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. *See also* Fla. R. App. P. 9.030(a)(2)(A)(iv). "Express" means "to represent in words"

and "to give expression to." "Expressly" means "in an express manner." *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

A limitation of review to decisions in "direct conflict" evinces a concern with decisions as precedents as opposed to adjudications of the rights of particular litigants:

> A conflict of decisions ... must be on a question of law involved and determined, and such that one decision would overrule the other if both were rendered by the same court; in other words, the decisions must be based practically on the same state of facts and announce antagonistic conclusions. 21 C.J.S. Courts 462.

Ansin v. Thurston, 101 So. 2d 808, 811 (Fla. 1958). Thus, for there to be direct conflict the factual scenarios in each case must be identical with the respective courts reaching opposing holdings. The only facts relevant to the Court's decision to accept or reject jurisdiction are those facts contained within the four corners of the decisions allegedly in conflict. *Reaves v. State*, 485 So. 2d 829, 830 n. 3 (Fla. 1986).

The decision of the Second District is hardly in conflict with *Smith*. As the opinion states:

> A defendant who elects to be sentenced under the guidelines, elects to be sentenced under the guidelines in effect at the time of the election. *Smith*, 537 So. 2d at 987. Because Logan made his election in 2001, he elected to be sentenced pursuant to the Criminal Pun-ishment Code. *See Quevado v. State*, 838 So. 2d 1253, 1254 (Fla. 2d DCA

> 2003) (holding that defendant sentenced in 1999 had right to choose "either a non-guidelines sentence or one under the 1998 Criminal Punishment Code").
>
> Pursuant to the Criminal Punishment Code, the five concurrent life sentences received here by Logan were not departure sentences. Accord-ingly, the trial court was not required to file written departure reasons. *See* s.812.13 (2)(a), Fla. Stat. (2001). Therefore, we affirm Logan's sentences.

(Appellant's Brief, App.) This is certainly a correct statement of the law, with the various district courts reaching the same result.

In *Smith*, *Kunkel v. State*, 765 So. 2d 244 (Fla. 1st DCA 2000), *Braggs v. State*, 642 So. 2d 129 (Fla. 3d DCA 1994), and *Fowler v. State*, 641 So. 2d 941 (Fla. 5th DCA 1994) similarly situated defen-dants, sometimes claiming the right of election under *Smith* at dates much later than their original sentences, e.g., *Kunkel*, al-most fifteen years later, and under much evolved versions of the guidelines, had the right to be sentenced under the guidelines in effect on the date of the election.

In *Smith*, it appears the defendant elected to be sentenced under the 1988 version of the guidelines. In *Kunkel*, assuming the defendant elected guidelines sentencing, this would necessarily have required sentencing under the Criminal

Punishment Code, as the *Kunkel* opinion was filed August 9, 2002 and the motion to correct illegal sentence was filed in July, 1999.[1] It appears in *Braggs* and *Fowler*, cases decided respectively in September, 1994, any election for guidelines sentencing would have required sentencing under the 1994 or, at the latest, the 1995 sentencing guidelines. *See also Quevado v. State*, 838 So. 2d 1253 (Fla. 2d DCA 2003) (giving defendant option to elect sentencing under Criminal Punish- ment Code); *Sheely v. State*, 820 So. 2d 1080 (Fla. 2d DCA 2002) (same).

The petitioner argues the *Logan* decision is in conflict with *Smith* because *Smith* did not provide for election between the parole system and the Criminal Punishment Code or future sentencing schemes to be enacted; this supposedly follows from the fact the sentencing guidelines contain an election provision while the Crim-inal Punishment Code does not. However, as the state argued below, regardless of semantics, the Code is an evolutionary refinement of the guidelines as originally enacted in 1983. "[T]here is no con-stitutional right to sentencing guidelines – or more generally, to a less discretionary

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[1]The Criminal Punishment Code is applicable to all felony offenses, except capital felonies, committed on or after October 1, 1998. *Fla. Stat*. s. 921.002 (2000). The Court has upheld the constitutionality of the Code. *Hall v. State*, 823 So. 2d 757 (Fla. 2002).

application of sentences than that permitted prior to the guidelines ..." *Peterson v. State*, 775 So. 2d 376, 379 (Fla. 4th DCA 2000), *mandamus denied*, 817 So. 2d 849 (Fla. 2002).

As a result, "the legislature had the authority to change the nature of the sentencing structure, and, in doing so, to reduce the statutorily created rights which accrued to defendants under the earlier versions of the sentencing guidelines." 775 So. 2d at 370 (discussing Criminal Punishment Code). Further, as to the argu-ment the Code has no election provision, chapter 97-194, Laws of Florida, creating the Code, provides, in section 1, that section 921.001, inter alia, is repealed as amended by the act except that the sections shall remain in effect with respect to any crime com-mitted before October 1, 1998. Thus, the election provision as discussed in *Smith* remained applicable.

As the *Smith* court explained, the ex post facto problem is in- applicable because the defendant's crimes took place at a time when there were no effective sentencing guidelines. 537 So. 2d at 987 n. 3. His first valid selection of guidelines sentencing occurred on June 23, 1988. *Id.* As section 921.001(4)(b)1, Florida Statutes (2000) provides, "[t]he guidelines enacted effective October 1, 1983 apply ... [and] to all felonies, except capital and life felonies, committed before

October 1, 1983, when the defendant affirmatively selects to be sentenced pursuant to such provisions." Accordingly, the guidelines in effect at the time of the selection apply.

The *Copeland* decision is not in direct and express conflict with the decision of the Second District. The opinion correctly notes the defendant may elect to be sentenced under the guidelines. *Id*. at 1052. The Third District then states as dicta that if the defendant elects to be resentenced under the guidelines, the trial court is free to reimpose a departure sentence, erroneously im-plying that the pre-1998 guidelines would be applicable and citing *Bragg*. However, *Bragg* clearly states that where a defendant elects to be sentenced under the guidelines, the sentencing court is to use the version of the guidelines which is in effect on the date the defendant makes an effective election. 642 So. 2d at 131 n. 6.

The decision below is also not in conflict with *Ree*, *Pope*, and *Jackson*. Under the Criminal Punishment Code, the trial judge may impose a sentence up to and including the statutory maximum for any offense, including an offense before the court due to a violation of probation or community control. *Fla. Stat*. s. 921.002 (1)(g) (2000). *See also* Fla. R. Crim. P. 3.704(d)(25) (permissible range for sentencing lowest permissible sentence up to and including the statutory maximum

as defined in s. 775.082 for primary and any ad-ditional offenses set for sentencing).

Since the petitioner was convicted of five (5) counts of armed robbery with a firearm, a first-degree felony punishable by life, *Maddox v. State*, 461 So. 2d 176, 178 (Fla. 1st DCA 1984), under the Code he could be sentenced to life imprisonment without reasons for departure. In short, there is no direct and express conflict demonstrated by the decision below with this Court or any district court of appeal. *Copeland* is mentioned only in the summary of the argument, not the argument of the petitioner's brief. The Court should decline jurisdiction.

The petition for discretionary review should be denied.

CONCLUSION

The Honorable Court should decline to exercise discretionary jurisdiction because the petitioner has failed to show direct and express conflict.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Carol J.Y. Wilson, Esq., Assistant Public Defender, P.O. Box 9000, Drawer PD, Bartow, Florida 33831 on this ____ day of July, 2003.

CERTIFICATE OF COMPLIANCE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

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OF COUNSEL FOR RESPONDENT