

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-717

DCA CASE NO. 3D02-2354

SHAMOND BYRD,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief, Criminal Appeals

CONSUELO MAINGOT
Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
The Republic Tower
110 SE 6th Street, 9th Floor
Fort Lauderdale, FL 33301
(954) 712-4653 Fax: 712-4761

TABLE OF CONTENTS

PAGES

TABLE OF CITATIONS	ii
INTRODUCTION	1
STATEMENT OF THE CASE AND FACTS	1
QUESTION PRESENTED	4
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FOURTH DISTRICT COURT'S DECISION IN <u>FRANCO v. STATE</u> , 777 So. 2d 1138 (Fla. 4 TH DCA 2001) ON THE SAME QUESTION OF LAW.	
CONCLUSION	9
CERTIFICATE OF SERVICE	10
CERTIFICATE OF TYPE AND STYLE	10

TABLE OF CITATIONS

STATE CASES

Anders v. California,
386 U.S. 738 (1967) 2

Byrd v. State,
788 So. 2d 981 (Fla. 3d DCA 2001), *review dismissed*,
791 So. 2d 1095 (Fla. 2001), *cert. denied*,
535 U.S. 937 (2002) 2

Cash v. State,
779 So. 2d 425 (Fla. 2d DCA 2000) 3, 8

Franco v. State,
777 So. 2d 1138 (Fla. 4th DCA 2001) 2, 3, 4, 5, 6, 7, 8

Kalapp v. State,
729 So. 2d 987 (Fla. 5th DCA 1999) 3, 8

Raley v. State,
675 So. 2d 170 (Fla. 5th DCA 1996) 2

Reaves v. State,
485 So. 2d 829 (Fla. 1986) 5, 6, 8

Stoltzfus v. State,
735 So. 2d 549 (Fla. 5th DCA 1999) 3, 8

Willis v. State,
785 So. 2d 648 (Fla. 2d DCA 2001) 3, 8

OTHER AUTHORITIES

Article V, Section 3(b)(3), Fla. Const. 6

Rule 3.800(a), Fla.R.Crim.P. 1

Rule 9.030(a) (2)(A)(iv), Fla.R.App.P 6

Section 921.0014(2), Fla. Stat. (1997) 8

Section 921.0016(1)(c), Fla. Stat. (1997) 7

INTRODUCTION

The Petitioner, SHAMOND BYRD, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "App." followed by a letter, colon and page number refers to the appendix to this brief, containing a conformed copy of the slip opinion of the Third District Court of Appeals in the instant cause.

STATEMENT OF THE CASE AND FACTS

The Petitioner, SHAMOND BYRD, challenged his conviction and sentence by a motion to correct illegal sentence pursuant to Rule 3.800(a), Fla.R.Crim.P. (App. A:1). The Third District Court of Appeal affirmed the denial of relief finding Petitioner was convicted of second degree murder with a firearm, aggravated battery with a firearm, and carrying a concealed weapon. Petitioner received a term of life imprisonment with a three-year mandatory minimum sentence for the second degree murder conviction, fifteen years with a three-year mandatory minimum sentence for the aggravated battery, and five years for the concealed firearm conviction. (App. A:2).

On direct appeal, Petitioner's appointed counsel filed a brief under Anders v. California, 386 U.S. 738 (1967), and Petitioner raised,

among others, the claim that the life sentence for the second degree murder conviction could not be imposed without departure reasons. The Third District Court affirmed the convictions and sentences without opinion. Byrd v. State, 788 So. 2d 981 (Fla. 3d DCA 2001), review dismissed, 791 So. 2d 1095 (Fla. 2001), cert. denied, 535 U.S. 937 (2002). (App. A:2).

Petitioner then filed the instant motion to correct illegal sentence, contending that the life sentence could not be imposed without departure reasons. The Third District Court of Appeal determined that as a threshold matter, the claim was procedurally barred because it was raised by the previous *pro se* brief and rejected, citing Raley v. State, 675 So. 2d 170, 173 (Fla. 5th DCA 1996). (App. A:2). The Third District affirmed, holding:

In an abundance of caution, we also address the merits of this claim. The defendant's guidelines scoresheet provided a score of three hundred eighty-four state prison months. Under the applicable version of the guidelines, "If the total sentence points are equal to or greater than 363, the court may sentence the offender to life imprisonment." § 921.0014(2), Fla. Stat. (1997). Since the points score 384, the court was authorized to impose the life sentence and did so.

(App. A:3).

The Petitioner's reliance on the Fourth District Court of Appeal's holding in Franco v. State, 777 So. 2d 1138 (Fla. 4th DCA 2001) – that if the trial court wishes to use the authority to impose the life

sentence in those circumstances, it amounts to a departure sentence and the trial court must announce departure reasons - was rejected by the Third District Court in this case. Franco v. State, 777 So. 2d at 1141. (App. A:3). In support of the proposition that the trial court may sentence an offender to life imprisonment without departure reasons where the sentence points are 363 or more, the Third District Court cited Willis v. State, 785 So. 2d 648 (Fla. 2d DCA 2001); Cash v. State, 779 So. 2d 425 (Fla. 2d DCA 2000); Stoltzfus v. State, 735 So. 2d 549 (Fla. 5th DCA 1999); and Kalapp v. State, 729 So. 2d 987 (Fla. 5th DCA 1999). (App. A:3).

Petitioner filed his notice to invoke the jurisdiction of this Court to review the Third District Court's decision in 3D02-2354 citing conflict with the Fourth District Court of Appeal in Franco v. State, 777 So. 2d 1138 (Fla. 4th DCA 2001).

QUESTION PRESENTED

THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE FOURTH DISTRICT COURT'S DECISION IN FRANCO v. STATE, 777 So. 2d 1138 (Fla. 4TH DCA 2001) ON THE SAME QUESTION OF LAW.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal's opinion in this case holding that the trial court was authorized to impose a life sentence without departure reasons where the sentencing guidelines points totaled 363 points or more, is not in express and direct conflict with the Fourth District Court of Appeal in Franco v. State, 777 So. 2d 1138 (Fla. 4th DCA 2001) where the Fourth District reversed upon holding the trial court erred for failing to excuse a juror for cause and the trial court's prejudice against the defense counsel required his disqualification, stating in passing, that after retrial the issue could arise concerning whether a life sentence without any form of early release, which can be imposed when sentencing points total 363, is a departure sentence requiring written findings.

That being so, there is no express and direct conflict on this question of law. Therefore, on the authority of Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) this Honorable Court should deny discretionary jurisdiction.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S
DECISION DOES NOT EXPRESSLY AND DIRECTLY
CONFLICT WITH THE FOURTH DISTRICT COURT'S
DECISION IN FRANCO v. STATE, 777 So. 2d 1138
(Fla. 4TH DCA 2001) ON THE SAME QUESTION OF
LAW.

Discretionary jurisdiction of this Honorable Court may be exercised to review, among other matters, decisions of district courts of appeal which expressly and directly conflict with a decision of this Court or of another district court of appeal on the same question of law. Article V, Section 3(b)(3), Fla. Const.; Fla.R.App.P. 9.030(a)(2)(A)(iv). Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id. Respondent respectfully requests this Honorable Court to decline to accept jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner asserts conflict on grounds that the Third District Court's affirmation of the trial court's imposition of a life sentence without departure reasons directly conflicted

with the Fourth District Court's holding in Franco v. State. He is mistaken.

In Franco the Fourth District opined in *obiter dictum* that:

We have considered the other issues raised by appellant and find them to be without merit, except for one sentencing issue, which could arise again after retrial. That issue is **whether a life sentence without any form of early release, which can be imposed when sentencing points total 363, is a departure sentence requiring written findings.**

Franco v. State, 777 So. 2d at 1140-1141 (Emphasis added). The Fourth District Court went on to define a departure sentence pursuant to §921.0016(1)(c), Fla. Stat., to include the "life sentence" permitted by the guidelines if the total sentencing points are 363 points or more. The district court further determined that the life sentence in Franco based upon the total sentencing points of 411 points did vary by more than 25% from the recommended sentence of 31.9 years - a calculation which is a result of the trial court's rejection of the life sentence option in favor of the next option of a term of years which is calculated by reducing the sentencing points by a count of 28 to arrive at the total State prison **months**. Once the number of State prison months is determined with the minimum and maximum months factored according to the sentencing guidelines formula, if the trial court deviates by 25% on the term of months/years, then the argument as

to the propriety of the departure is germane - not before and not if the trial court chooses the first option of a life sentence.

The Fourth District Court specifically stated that the sentencing issue was one **which could arise again after retrial**, and its holding in Franco v. State did not include the sentencing issue. Rather, reversal was based exclusively upon 1]the trial court's failure to excuse a juror for cause and 2]the trial court's patently discernible prejudice against defense counsel which required his disqualification. Franco v. State, 777 So. 2d at 1138, 1139-1140.

In contrast, here, the Third District Court followed § 921.0014(2), Fla. Stat. and specifically rejected the Petitioner's departure argument, holding 1]defendant was procedurally barred from asserting a claim that had been addressed on direct appeal from the conviction, and 2]the trial court was authorized to impose a life sentence without departure reasons if the sentence points are 363 or more (412 in this case), and citing as authority Willis v. State, Cash v. State, Stoltzfus v. State and Kalapp v. State.

Therefore, there appearing no express and direct conflict within the four corners of the majority decisions in Byrd v. State and Franco v. State, this Court should decline discretionary review. Reaves v. State, 485 So. 2d at 830.

CONCLUSION

WHEREFORE, the State respectfully requests that the petition for discretionary review be denied as there is no express and direct conflict.

Respectfully Submitted,

CHARLES J. CRIST, JR.
Attorney General

RICHARD L. POLIN
Bureau Chief, Criminal Appeals

CONSUELO MAINGOT
Assistant Attorney General
Florida Bar Number 0897612
Office of the Attorney General
Criminal Appeals Division
110 SE 6th Street - 9th Floor
Fort Lauderdale, FL 33301
(954) 712-4653 Fax: 712-4761

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to **SHAMOND BYRD**, *Pro Se*/DC #M26138, NEW RIVER CORRECTIONAL INSTITUTION, PO Box 333, Raiford, Florida 32083-0333 on this ____ day of March, 2004.

CONSUELO MAINGOT
Assistant Attorney General

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-717

DCA CASE NO. 3D02-2354

SHAMOND BYRD,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

APPENDIX TO
BRIEF OF RESPONDENT ON JURISDICTION

INDEX

Byrd v. State,
No. 3D02-2354 (Fla. 3d DCA February 19, 2003)....App. A

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing
APPENDIX TO BRIEF OF RESPONDENT was mailed to **SHAMOND BYRD**, *Pro Se/DC*
#M26138, NEW RIVER CORRECTIONAL INSTITUTION, PO Box 333,
Raiford, Florida 32083-0333 on this ____ day of March, 2004.

CONSUELO MAINGOT

Assistant Attorney General
Florida Bar No. 0897612
Office of the Attorney General
110 SE 6th Street - 9th Floor
Ft. Lauderdale, Florida 33301
(954) 712-4653 Fax: 712-4761