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IN THE SUPREME COURT OF FLORIDA

FILED

AUG 10 1988

JOSEPH L. WISE, :
 :
 Petitioner, :
 :
 vs. :
 :
 THE STATE OF FLORIDA, :
 :
 Respondent. :
 _____ :

CLERK OF THE SUPREME COURT
By _____

SUPREME COURT NO. _____
2d DCA CASE NO. 88-1581

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

BRIEF OF PETITIONER ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

On April 12, 1988, the Petitioner was convicted of sexual battery upon a child under 12 years old, attempted sexual battery on a child under 12 years old, lewd and lascivious act in the presence of a child under 16 years old and child abuse (contributing to the delinquency of a minor). The Petitioner was remanded to the custody of Lee County Sheriff. On May 11, 1988, the Petitioner's motion for a new trial was denied. On May 18, 1988, the Petitioner was sentenced to life in prison without the possibility of parole for 25 years on Count I. On Counts II and III he was sentenced to 5 years imprisonment, to run concurrent with each other and the life sentence. He was given 60 days to serve for his conviction on the misdemeanor charge.

Subsequent to his sentencing he filed a notice of appeal and sought supersedeas bail.

The court considered the testimony that was heard at the Petitioner's sentencing and the Petitioner's PSI to determine the Petitioner's eligibility for supersedeas bail. The record revealed that the Petitioner is 33 years old and had been employed in the local fire department for 13 years. He rose to the rank of captain and had the respect of all those that worked for him. The record further revealed that he had never been arrested for nor convicted of any crime. Furthermore, his parents live within the county. The transcript of the comments made by those knowledgeable of the Petitioner's character which were introduced for the purpose of sentencing were considered by

the Judge on the issue of bail. The Court held the Petitioner was not entitled to bail, citing as authority Batie v. State, 521 So.2d 295 (1st DCA 1988).

The Petitioner sought review in the Second District Court of Appeal. The Second District, following Batie v. State, supra, denied Petitioner relief, however acknowledged conflict with Nussdorf v. State, 495 So.2d 819 (4th DCA 1986).

SUMMARY OF ARGUMENT

The Petitioner was convicted of capital sexual battery. He was incarcerated upon his conviction. He was sentenced to life imprisonment without the possibility of parole for 25 years. He has appealed the conviction. He is seeking release from custody on bail pending the appeal. The trial judge denied bail, citing Batie v. State, supra. The First District Court of Appeal in Batie found that as a matter of law, a defendant convicted of capital sexual battery must be denied supersedeas bail. In Nussdorf v. State, supra, the Fourth District Court of Appeal held that a defendant has a legal right to bail on appeal and that a bail hearing was mandated. The Second District Court of Appeal in this case followed Batie and held that the Peititioner was not entitled to bail on appeal. The Second District in this case expressly "acknowledged" a conflict with Nussdorf, supra.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL
IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS
WITH THE DECISION OF THE FOURTH DISTRICT COURT OF
APPEAL IN NUSSDORF v. STATE, 495 So.2d 819 (4th DCA 1986)

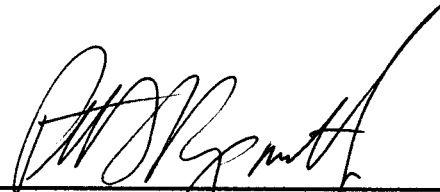
The jurisdictional issue in this case is quite simple. The opinion in this case does expressly conflict with the opinion rendered in Nussdorf. The opinion of the Second District Court of Appeal in this specifically acknowledged that the opinion rendered did conflict with Nussdorf. A plain reading of the opinions in each case established without question the conflict. In Nussdorf, a defendant convicted of capital sexual battery was entitled to a bail hearing after conviction while his case was on direct appeal. In this case, the Petitioner was denied a bail hearing properly requested while his case is on direct appeal. Both opinions cited the same Florida Statute and Criminal Procedure Rule for the holding of the Court.

The Second District Court of Appeal in this case has aligned itself with the holding of the First District Court of Appeal in Batie. This Court has already found that there was a conflict between Batie and Nussdorf, and on June 22, 1988, held oral arguments in Batie to determine the resolution of the conflict raised by the decisions of these two cases. Since this Court has already determined that it must accept jurisdiction to resolve the conflict previously discussed, it should also accept jurisdiction in this case and in all probability, apply the ruling ultimately reached by this Court in Batie to this case.

CONCLUSION

This Court has discretionary jurisdiction to review the decision below and the Court should exercise that jurisdiction to consider the merits of Petitioner's argument.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction has been furnished by mail to The Honorable ERICA RAFFEL, Assistant Attorney General, Department of Legal Affairs, Park Trammell Building, Suite 804, 1313 Tampa Street, Tampa, Florida 33602, this 17th day of August, 1988.



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