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JAN 21 1992

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 79,162

RAFAEL JOSE PUERTAS,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent,

ON APPLICATION FOR DISCRETIONARY JURISDICTION

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

This is an application for discretionary review of a decision of the District Court of Appeal of Florida, Third District. The symbol "A" designates the appendix to the brief.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THIS COURT.

STATEMENT OF THE CASE AND FACTS

The defendant was convicted after a jury trial of sexual battery on a person under twelve years of age. The Third District Court of Appeal affirmed his conviction and sentence in a per curiam decision without written opinion on December 24, 1991. (A. 1). As authority for its decision, the district court cited State v. Pardo, 582 So.2d 1225 (Fla. 3d DCA 1991). (A. 2-5). Pardo is pending review in this Court as Case Number 78,318.

SUMMARY OF THE ARGUMENT

Because in the instant case the case cited as authority for the same principle of law is presently pending review in this Court pursuant to its discretionary conflict jurisdiction, this Court has jurisdiction to review the instant case.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT
OF APPEAL IS IN CONFLICT WITH A DECISION
OF ANOTHER COURT OF APPEAL, ALLOWING
THIS COURT TO EXERCISE ITS JURISDICTION.

This Court has discretionary jurisdiction to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal on the same question of law. Art. V, § 3 (b)(3), Fla. Const.; Fla.R.App.P. 9.030 (a)(2)(A)(iv). A district court's per curiam decision without opinion citing as controlling authority a decision that is pending in this Court constitutes express conflict. State v. Lofton, 534 So.2d 1148 (Fla. 1988); Jollie v. State, 405 So.2d 418 (Fla. 1981).

The Third District's opinion in the instant case in its entirety reads as follows:

PER CURIAM
Affirmed on the authority of State
v. Pardo, 582 So.2d 1225 (Fla. 3d DCA
1991).

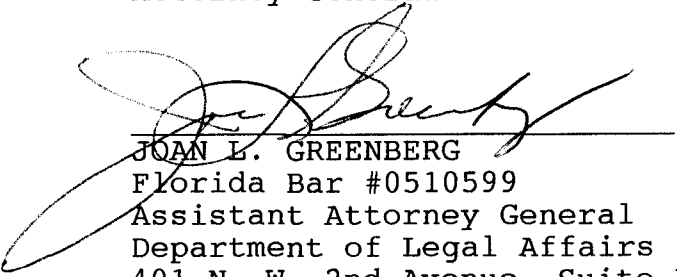
Pardo certified express and direct conflict with Kopko v. State, 577 So.2d 956 (Fla. 5th DCA 1991), and is presently pending review in this Court as Case Number 78,318 on the same issue of law. This being so, the State concedes that this Court has jurisdiction to review the instant case. Art. V, §3 (b)(3), Fla. Const.; Jollie, 405 So.2d 418.

CONCLUSION

Based on the foregoing, the State concedes jurisdiction in the instant case.

Respectfully submitted,

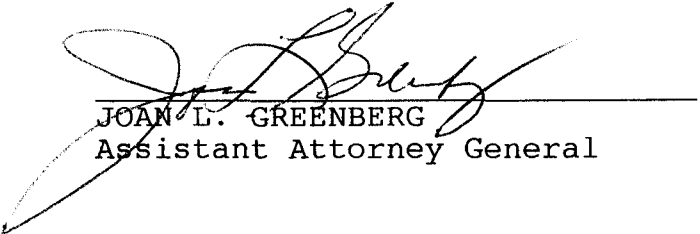
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to MIGUEL SAN PEDRO, ESQ., Law Offices of Miguel San Pedro, P.A., Four Ambassadors, Tower III, Suite 1246, 825 South Bayshore Drive, Miami, Florida 33131 on this 17th day of January, 1992.



JOAN L. GREENBERG
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/bfr