IN THE FLORIDA SUPREME COURT
STATE OF FLORIDA

CORNELIUS C. SIRMONS,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

Case No. 79,754

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

BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

In the instant case, the court advised Appellant:

> THE COURT: "The point is though is that if Mr. Sirmons is not going to like what I come up with I am not about to let him withdraw his plea. I am saying I will give him a guidelines sentence." (R167)
>
> MR. GARBER: (Counsel for Petitioner below) "The agreement that we have, subject to your approval is for nine years in prison with three year mandatory minimum and no probation to follow or three year mandatory minimum followed by five years probation. So we have the option there, that's if he is sentenced as an adult which is one of the decisions you will be making after you have seen the report."

Although Appellant stated he would request a youthful offender sentence, he represented uncertainty in the court's acquiescence in such a sentence, and based on the plea as represented hereinabove, counsel stated:

> "I believe that he wants to enter the plea based on that representation." (R168-169)

SUMMARY OF THE ARGUMENT

There is no conflict between the instant case and that of Lang v. State, infra inasmuch as the instant plea bargain contemplated a waiver of findings pursuant to Fla. Stat. §39.111 and Lang v. State holds that such a waiver can in fact be manifest in the plea agreement.

ARGUMENT

ISSUE I

WHETHER THE DECISION IN SIRMONS V. STATE, CASE NO. 90-03713 (FLA. 2ND DCA MARCH 25, 1992) IS IN CONFLICT WITH THE FIFTH, FOURTH, THIRD AND FIRST DISTRICT COURTS OF APPEAL AS TO WHETHER ADULT SANCTIONS CAN BE IMPOSED ABSENT A SPECIFIC WAIVER OF THE REQUIREMENTS OF CHAPTER 39, FLA. STAT.

The plea agreement itself in the instant case allows Petitioner to appeal the ruling waiving him to adult court. It further sets a prison sentence with a nine year cap and a three year minimum mandatory if sentenced as an adult. Certainly the colloquy referred to herein in the Statement of the Case and Facts contemplated clearly the imposition of an adult sentence. Not only does this clearly contemplate a waiver of written findings, but fails to create conflict with Lang v. State, 566 So.2d 1354 (5th DCA 1990) because that opinion specifically held that a waiver could be manifest in a plea agreement. Taylor v. State, 534 So.2d 1181 (4th DCA 1988) cited by Petitioner in his assertion of conflict, involved not a plea but rather a trial. Nevertheless the court stated:

> "It appears to us that where a waiver has been found to have occurred it was because, in connection with a plea bargain, the defendant was questioned in open court, as is customarily done, to determine whether his plea was intelligent and knowing. If his plea was intelligent and knowing, he had waived the §39.111 procedure having intelligently and knowingly agreed to

imposition of the particular adult sanctions." Id. at 1182.

In Sheffield v. State, 509 So.2d 1350 (1st DCA 1987) also cited by Petitioner in his assertion of conflict, the court found there was in the nolo plea entered in that case, no indication in the plea bargain that the juvenile bargained away his right to have the trial court consider whether adult sanctions were suitable pursuant to Fla. Stat. §39.111. Therefore that opinion too contemplates that a waiver can be inherent in the bargain itself. Respondent would assert the instant plea before the court clearly incorporated a waiver of the necessity of any findings pursuant to §39.111 (Fla. Stat.) in order for Mr. Sirmons to be sentenced as an adult.

Further, in this case, the trial court referred, at sentencing and the imposition of an adult sentence "for the reasons I already said." (R181-182) Mr. Sirmons failure to include in the instant record, those "reasons" the court "already said" and was referring to at sentencing should not inure to his benefit either on direct appeal or in a presentation of urged conflict before this Court.

Finally, in Dixon v. State, 451 So.2d 485 (3rd DCA 1984) also asserted by Petitioner in his brief before this Court on jurisdiction in his assertion of conflict held, on rehearing, on the basis of this Court's opinion in State v. Rhoden, 448 So.2d 1013 (Fla.1984) which was decided subsequent to the Third

District's original decision in Dixon v. State that the findings required by §39.111(6)(c)(d) Fla. Stat. (1983) were required to be made either after trial or as in Dixon upon a plea of guilty or nolo contendere. The opinion entirely deletes any contemplation that a plea agreement itself may incorporate a waiver of the necessity of such findings and therefore cannot possibly be in conflict with the instant case.

In light of the foregoing, it is apparent that no conflict exists between the instant case and any of the cases cited by Petitioner, and in any event the decision of the Second District Court of Appeals was so clearly correct that this Court need not exercise its jurisdiction over the instant cause.

CONCLUSION

WHEREFORE based on the foregoing argument, citations of authority and references to the record, this Honorable Court should decline to exercise its jurisdiction over the instant cause.

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 JENNIFER Y. FOGLE, Assistant Public Defender, Polk County Courthouse, P. O. Box 9000-Drawer PD, Bartow, Florida 33830 this 13th day of May, 1992.

COUNSEL FOR RESPONDENT