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JAN 12 1994

CLERK, SUPREME COURT

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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,945

DEWAYNE JERMAINE PINACLE,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, Dewayne Jermaine Pinacle, was the defendant in the trial court and the appellant in the District Court of Appeal, Third District. The Respondent, The State of Florida, was the prosecution in the trial court and the appellee in the District Court. The symbol "A" will be used to refer to the appendix attached to petitioner's brief followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The petitioner was charged with and convicted of armed burglary of an occupied dwelling; armed burglary of an automobile; armed robbery; armed sexual battery; armed kidnapping; and petit theft. (A. 2).

Petitioner was sentenced to eight concurrent life sentences on the first eight counts which sentences were to include two consecutive minimum mandatory three year sentences for counts III and VII. The Petitioner appealed raising several sentencing issues. (A. 2).

Petitioner's primary argument on appeal was that the trial court erred in assessing forty points for victim injury on the sentencing guidelines score sheet where the victim in this sexual battery case did not suffer any ascertainable physical injury apart from the sexual penetration itself. (A. 3).

The Third District Court of Appeal issued a per curiam opinion on October 12, 1993. The court held that the instant issue was not preserved for appellate review because trial counsel did not make a specific objection to the addition of any points for victim injury (A. 3).

The petitioner filed a motion for rehearing on October 18, 1993. The appellant's motion for rehearing was denied on November 23, 1993. Appellant then filed a notice to invoke this court's discretionary jurisdiction.

QUESTION PRESENTED

WHETHER THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH LINKOUS V. STATE, 618 So. 2d 294 (FLA. 2d DCA 1993) AND HOOD V. STATE, 603 So. 2d 642 (FLA. 5th DCA 1992) AND WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION BELOW.

SUMMARY OF THE ARGUMENT

The Appellant has demonstrated that the decision of the District Court directly and expressly conflicts with a decision of another district court. The state would however submit that this court need not exercise its discretionary jurisdiction to review the decision below as the appellant has an available remedy namely the ability to file a motion pursuant to Rule 3.800 of the Florida Rules of Criminal Procedure.

ARGUMENT

THE DECISION OF THE DISTRICT COURT OF APPEAL IS IN DIRECT AND EXPRESS CONFLICT WITH LINKOUS V. STATE, 618 So. 2d 294 (FLA. 2d DCA 1993) AND HOOD V. STATE, 603 So. 2d 642 (FLA. 5th DCA 1992) BUT THIS COURT DOES NOT NEED TO EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION BELOW AS THE APPELLANT HAS AN AVAILABLE REMEDY NAMELY THE ABILITY TO FILE A MOTION PURSUANT TO RULE 3.800 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

The District Court of Appeal, in finding a waiver of appellate review relied on Perryman v. State, 608 So. 2d 528 (Fla. 1st DCA 1992). The appellee would agree that Perryman does, in fact, expressly and directly conflict with the holdings of the Second District of Appeal in Linkous v. State, 618 So. 2d 294 (Fla. 2d DCA 1993) and of the Fifth District Court of Appeal in Hood v. State, 603 So. 2d 642 (Fla. 5th DCA 1992).

The appellee would nevertheless submit that appellant is not without post-judgment relief. Appellant clearly can file a Rule 3.800 motion. See Weckerle v. State, 18 FLW 2391 (Fla. 4th DCA 1993). As such this Court need not exercise its discretionary jurisdiction.

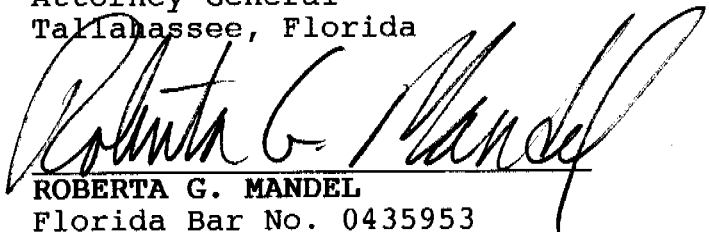
CONCLUSION

The decision of the Third District Court of Appeal expressly and directly conflicts with the decisions of the Second District Court of Appeal and the Fifth District Court of Appeal, pursuant to Rule 9.030(a) (2)(A)(iv), Fla. R.App.P.. The Appellee respectfully submits that this court does not need to exercise its' discretionary jurisdiction.

Respectfully submitted,

ROBERT A. BUTTERWORTH

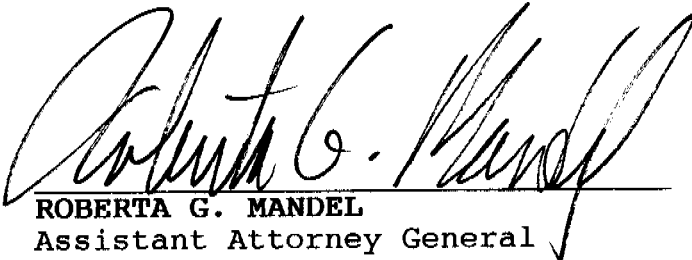
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT was furnished by mail to JEFFERY P. RAFFLE, Attorney for Appellant Pinnacle, 1109 Gables International Plaza, 2655 LeJeune Road, Coral Gables, FL 33134 on this 10th day of January 1994.



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