FILED
SID J. WHITE
JUL 16 1996
CLERK, SUPREME COURT
By ____________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 88,451

EUGENE EVANS,

Respondent.

_____________________/

JURISDICTIONAL BRIEF OF PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referred to as "the State". Respondent, Eugene Evans, the appellant in the First District and the defendant in the trial court, will be referred to as "petitioner" or by his proper name.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to and Article V, § 3(b)(3), FLA. CONST. which provides, in pertinent part:

> The supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

See also Fla. R. App. P. 9.030(a)(2)(A)(iv). The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). *Accord*, Dept. of Health and Rehabilitative Services v. Nat'l Adoption Counseling Service, Inc., 498 So. 2d 888, 889 (Fla. 1986)(rejected "inherent" or "implied" conflict). Neither the record, nor a concurring opinion, nor a dissenting

opinion can be used to establish jurisdiction. Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980); Reaves, *supra*. Further, it is the "conflict of *decisions*, not conflict of *opinions* or *reasons* that supplies jurisdiction for review by certiorari." Jenkins, 385 So. 2d at 1359 (emphasis in original).

STATEMENT OF THE CASE AND FACTS[1]

The trial court orally pronounced four reasons for its upward departure sentence and contemporaneously prepared a written order containing the departure reasons. Because of a clerical error, the contemporaneously written departure order was misfiled in the probation file instead of the court file.

On appeal, the First District held that the trial court's contemporaneously written departure order was not "filed" within fifteen days of sentencing as required by § 921.0016(1)(c), FLA. STAT. (1993) and Fla. R. Crim. P. 3.702(d)(18)(A). The First District held that it was "constrained" by this Court's holdings in State v. Colbert, 660 So. 2d 701 (Fla. 1995) and Ree v. State, 565 So. 2d 1329 (Fla. 1990), to "strictly construe" the requirement that a written departure order be filed timely. Accordingly, the

[1] All facts are taken directly from the First District's opinion below.

First District vacated respondent's sentence and remanded this case for resentencing within the guidelines.

SUMMARY OF ARGUMENT

The decision below, Evans v. State, 21 FLA. L. WEEKLY D1444 (Fla. 1st DCA June 18, 1996), directly and expressly conflicts with San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992). In both cases, the trial courts properly and timely prepared written departure orders. In both cases, subsequent to the trial courts' preparing the departure orders, a clerical error occurred. In both cases, the clerical errors resulted in the departure orders not being included in the original record on appeal. On these facts, the First District reversed the departure sentence in this case, whereas the Second District affirmed the departure sentence in San Martin, supra. Indeed, the First District itself recognized the conflict between its decision and the Second District's decision in San Martin, *supra*, but declined to resolve the conflict. Both cases expressly rely on this Court's decision in Ree to reach completely contrary decisions.

ARGUMENT

ISSUE

DOES THE FIRST DISTRICT'S DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICT WITH THE SECOND DISTRICT'S DECISION IN SAN MARTIN V. STATE, 591 So. 2d 301 (Fla. 2d DCA 1991), *REV. DENIED*, 598 So. 2d 78 (Fla. 1992)AND REE V. STATE, 565 SO. 2d 1329 (FLA. 1990) ON THE SAME QUESTION OF LAW?

In San Martin v. State, the trial court imposed an upward departure sentence. An oral pronouncement of the decision to depart was made and a timely written departure order prepared. However, this written departure order was lost or misplaced. Nine months later, the trial court entered a replacement departure order. The trial court's nunc pro tunc replacement departure order recited that the trial court previously had prepared a departure order, but the order "must have been lost or misplaced". Id. at 302. The defendant argued that this violated the requirements of Ree v. State, 565 So. 2d 1329 (Fla. 1990), which mandated that departure orders be contemporaneously entered. The Second District disagreed, finding no violation of Ree, *supra*. The Second District held that a nunc pro tunc order, replacing a lost order, is a procedural matter and affirmed the departure sentence. This Court declined review.

In Evans v. State, the trial court also imposed an upward departure sentence, orally pronounced its reasons for departure and contemporaneously prepared a written departure order. However, this written departure order was misfiled by a clerical error and placed in the probation file. The First District held that this violated Ree v. State, 565 So. 2d 1329 (Fla. 1990), in that the contemporaneous written departure order was not contemporaneously filed in the correct file. The district court attributed its reasoning to this Court's decision in Ree. This application of Ree is directly contrary to the construction of the Second District in San Martin.

In both cases, the trial courts properly and timely prepared written departure orders. In both cases, subsequent to the trial courts' preparing the departure orders, a clerical error occurred. In both cases, the clerical errors resulted in the departure orders being omitted from the original record on appeal prepared at the direction of the appellant. In both cases, the record on appeal was supplemented with the missing departure order by the appellee. The only distinction between the two cases strengthens the state's position here that the district court misapplied Ree: in San Martin, the original departure order was completely lost; here it was temporarily misfiled and subsequently located.

The First District itself recognized the conflict between its decision and the Second District's decision in San Martin, *supra*, in a footnote, but refused to correct its error or to resolve the conflict[2]. This footnote is itself in direct and express conflict with well-settled law from innumerable cases. The state's petition for rehearing cited San Martin as an additional authority and pointed out that the district court's erroneous decision had also created direct and express conflict. By refusing to address the conflict or to affirm the trial court if right for any reason, the district court created additional conflict with the settled rule that trial court rulings should be affirmed if right for any

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[2] The footnote in its entirety is:

> We are cognizant that our decision appears to conflict with that rendered by the Second District in San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), review denied, 598 So. 2d 78 (Fla. 1992), which affirmed an upward departure sentence involving written reasons filed outside the 15-day period due to a clerical error. Appellee did not argue this case in its brief, but instead relied upon it for the first time in its motion for rehearing, clarification and certification. Under the circumstances, we decline to entertain that authority now. See Cartee v. Department of Health & Rehab. Servs., 354 So. 2d 81 (Fla. 1st DCA 1978) (on petition for reh'g).

reason and an appellate court shall not reverse a judgment on appeal unless the appellate court determines after a full review of the **entire** record that error occurred which injuriously affected the rights of the appellant. The temporary misfiling of the order and the failure of the appellant to include it in the record on appeal, its subsequent discovery and restoration to the proper file did not prejudice the appellant. § 924.33, Fla. Stat. (1995); Applegate v. Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1980).

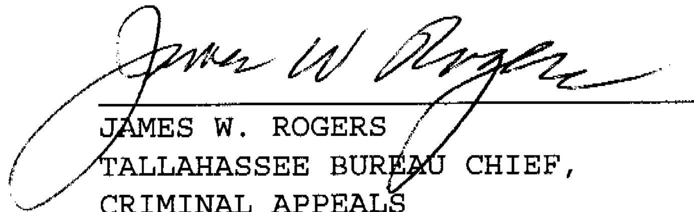
There is direct and express conflict with both San Martin and Ree. This Court should exercise its discretionary jurisdiction under Art. V, § 3(b)(3), to resolve this conflict.

CONCLUSION

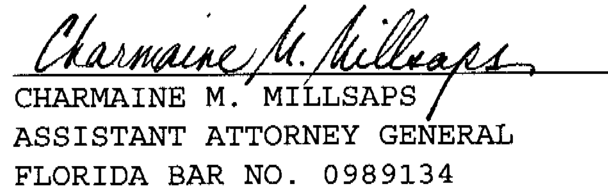
For the above reasons, the state urges this Honorable Court to exercise its discretionary jurisdiction and review the First District's decision in Evans v. State, 21 FLA. L. WEEKLY D1444 (Fla. 1st DCA June 18, 1996).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791



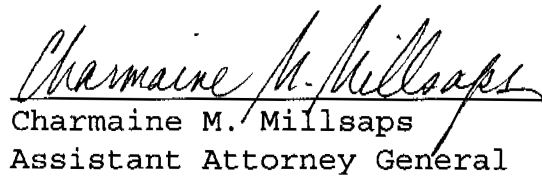
CHARMAINE M. MILLSAPS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0989134

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT
[AGO# 94-111978]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF PETITIONER has been furnished by U.S. Mail to Jamie Spivey, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 16th day of July, 1996.



Charmaine M. Millsaps
Assistant Attorney General

Appendix

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

EUGENE EVANS,

Appellant,

v. CASE NO. 94-3845

STATE OF FLORIDA,

Appellee.

_____________________________/

Opinion filed June 18, 1996.

An appeal from the Circuit Court for Columbia County.
Paul S. Bryan, Judge.

Nancy A. Daniels, Public Defender, Jamie Spivey, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, James W. Rogers, Senior Assistant Attorney General, and Thomas Crapps, Assistant Attorney General, Tallahassee, for Appellee.

ON MOTION FOR REHEARING, CLARIFICATION AND CERTIFICATION.

PER CURIAM.

This cause is before us on appellee's motions for rehearing, clarification and certification. We deny the motions for rehearing and certification, but grant the motion for clarification, and, accordingly, withdraw our former opinion of April 16, 1996, and substitute the following in lieu thereof.

Although the trial court orally pronounced four reasons supporting appellant's upward departure sentence, its written reasons for departure were not filed within 15 days of sentencing, as required by section 921.0016(1)(c), Florida Statutes (1993), and Florida Rule of Criminal Procedure 3.702(d)(18)(A). After writing its departure reasons contemporaneously with its oral sentencing pronouncement, the court assumed that the written reasons had been placed in the court file, but the record discloses that they were erroneously included in the probation file containing the pre-sentence investigative report, apparently due to clerical error. Despite the fact that the error in the misfiling may not have been attributable to the lower court's actions, we are constrained to conclude that the sentence imposed must be reversed and the cause remanded for resentencing within the guidelines on the ground that the courts have consistently strictly construed the requirement that written reasons supporting departures be timely filed.[1] See State v. Colbert, 660 So. 2d 701 (Fla. 1995); Ree v. State, 565 So. 2d 1329 (Fla. 1990); State v. Pease, 669 So. 2d 314 (Fla. 1st DCA

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[1]We are cognizant that our decision appears to conflict with that rendered by the Second District in San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), review denied, 598 So. 2d 78 (Fla. 1992), which affirmed an upward departure sentence involving written reasons filed outside the 15-day period due to a clerical error. Appellee did not argue this case in its brief, but instead relied upon it for the first time in its motion for rehearing, clarification and certification. Under the circumstances, we decline to entertain that authority now. See Cartee v. Department of Health & Rehab. Servs., 354 So. 2d 81 (Fla. 1st DCA 1978) (on petition for reh'g).

1996) (on motion for clarification); Hooks v. State, 656 So. 2d 624 (Fla. 1st DCA 1995); Wilcox v. State, 664 So. 2d 55 (Fla. 5th DCA 1995).

REVERSED and REMANDED for resentencing.

ERVIN, WEBSTER and MICKLE, JJ., CONCUR.