ORIGINAL

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

EUGENE EVANS,

Respondent.

CASE NO. 88,451

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal, will be referred to as Petitioner or the State. Respondent, EUGENE EVANS, the Appellant in the First District Court of Appeal will be referred to as Respondent or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. The symbol "ST" will refer to the transcript of the hearing held to supplement the record on appeal. Each symbol will be followed by the appropriate page number in parentheses.

All double underlined emphasis is supplied.

JURISDICTIONAL STATEMENT

Respondent conceded conflict in his jurisdictional response but now argues that the decision below, Evans v. State, 21 FLA. L. WEEKLY D1444 (Fla. 1st DCA June 18, 1996), does not expressly and directly conflict with San Martin v. State, 591 So. 2d 301 (Fla. 2d DCA 1991), *rev. denied*, 598 So. 2d 78 (Fla. 1992). The two decisions do expressly and directly conflict. The First District recognized the conflict between its decision and the Second District's decision in San Martin, in a footnote, but refused to certify conflict.[1]

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[1] 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).

Respondent now claims that the cases are factually distinguishable because the departure order was available to the defendant for his appeal in San Martin, whereas the order was not available to Evans for his appeal and the departure order was signed in San Martin, but not signed in Evans. Respondent's factual distinctions are incorrect.

In both cases, the orders were signed by the trial courts. In San Martin, the original departure order was never located, but the trial court entered a *nunc pro tunc* departure order explaining its departure reasons and stating that the original order must have been lost or misplaced. This *nunc pro tunc* departure order was presumably signed.[2] In Evans, the trial court entered a notice of filing. This notice explained that the trial court had located the misfiled original departure order. The notice was signed by the

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[2] Respondent improperly relies on facts that are not in the opinions themselves to establish the lack of conflict between the decisions. Conflict, or lack of conflict between decisions "must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986); 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 or the lack of jurisdiction. Reaves, supra; Jenkins v. State, 385 So. 2d 1356, 1359 (Fla. 1980). Neither the San Martin decision, nor the Evans decision refer to the departure order being signed or not signed.

trial court. (Supp. 3). Thus, in both cases, the trial court's orders were signed.

In both cases, the written departure order were not available to the defendants at the time they filed their notices of appeal. In San Martin, the Second District stated "[a]lthough a copy of the order stating the valid reason for departure was not in the record when this appeal was filed" and "the order specifying the valid reason was not in the record on appeal when the parties began this appeal". Id. at 302. In the instant case, the misfiled departure order was not located and placed into the correct file until February 6, 1996, but the notice of appeal was filed November 16, 1994. (R. 108; Supp. DCA brief at 5). Thus, in neither case was the written departure order available to the defendant at the beginning of their appeal.

Thus, San Martin and Evans are not factually distinguishable. The decisions expressly and directly conflict. Therefore, this Court has conflict jurisdiction pursuant to ART. V, § 3(b)(3), FLA. CONST.

SUMMARY OF ARGUMENT

Respondent claims that he was denied the benefit of having the trial court's written departure reasons when making the decision to appeal. This argument is properly limited to a defendant who did not appeal and had no knowledge of the trial court's departure reasons. The lack of written departure reasons clearly did not adversely affect respondent's decision to appeal. Respondent did appeal. Thus, the misfiling of the written departure order did not adversely affect his decision to appeal.

Additionally, respondent claims that the statutory amendment to the sentencing guidelines allowing a trial court seven days to file departure orders "vitiates any concern over sentencing windfalls". § 921.0016(1)(c), FLA. STAT. (1995). This statutory amendment does not address, much less vitiate, the issue in this case. If a trial court "files" a departure order on the seven day but the order is actually misfiled on that date, will the defendant be entitled to a windfall due to the clerical error. Respondent would have seven and a half years deleted from his sentence due to the misfiling that occurred in this case. A clerical error in the ministerial act of filing should not entitled a defendant to a sentencing windfall.

ARGUMENT

ISSUE

WHETHER A CONTEMPORANEOUSLY WRITTEN DEPARTURE ORDER, THAT WAS TEMPORARILY MISFILED BUT SUBSEQUENTLY RESTORED TO THE PROPER COURT FILE, IS VALID?

Respondent claims that he was denied the benefit of having the trial court's written departure reasons when making the decision to appeal. This argument is properly limited to a defendant who did not appeal and had no knowledge of the trial court's departure reasons. The lack of written departure reasons clearly did not adversely affect respondent's decision to appeal. Respondent did appeal. Moreover, respondent had the benefit of the trial court's reasons for departure available to him when deciding whether or not to appeal. The trial court orally explained its reasons for departing in greater detail than in its written departure order. For example, the written departure order merely checked the pre-printed box next to the sentence the victim suffered extraordinary physical or emotional trauma. The trial court's oral pronouncement explained that the victim suffered emotional trauma because the victim thought he was going to be killed when Evans threatened him with a gun. Thus, the misfiling of the written departure order did not adversely affect his decision to appeal, nor did the misfiling

limit his appellate attorney from raising any claim that the departure reasons were invalid.

Additionally, respondent claims that the statutory amendment to the sentencing guidelines allowing a trial court seven days to file departure orders "vitiates any concern over sentencing windfalls". § 921.0016(1)(c), FLA. STAT. (1995). This statutory amendment does not address, much less vitiate, the issue in this case. If a trial court "files" a departure order on the seven day but the order is actually misfiled on that date, will the defendant be entitled to a windfall due to the clerical error. Respondent would have seven and a half years deleted from his sentence due to the misfiling that occurred in this case. A clerical error in the ministerial act of filing should not entitled a defendant to obtain such a windfall.

Respondent argues that this Court has previously heard and rejected the State's arguments in State v. Colbert, 660 So. 2d 701 (Fla. 1995). At issue in Colbert was the trial court's failure to provide timely written departure reasons as required by this Court's precedent. In others words, the issue was whether Ree v. State, 565 So. 2d 1329 (Fla. 1990) should be overruled. The issue before this Court differs from the issue in Colbert. The issue in this case is: if the trial court follows this Court's legal

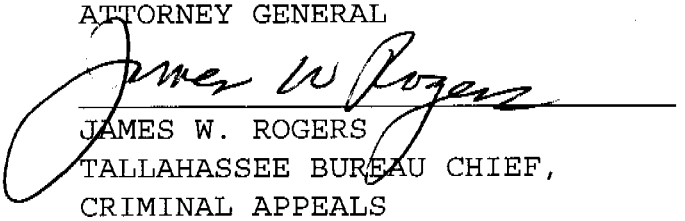
precedent but a clerical error occurs, is the departure order valid. The State's argument in this case is not that Ree should be overruled, but that Ree does not mandate a departure order be rendered invalid based merely on a clerical error.

CONCLUSION

The State respectfully requests this Court follow San Martin and disapprove the decision of the First District Court of Appeal in Evans, and affirm the departure order.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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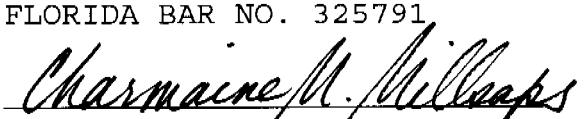

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY BRIEF ON THE MERITS 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 3rd day of January, 1997.

Charmaine M. Millsaps

Charmaine M. Millsaps
Assistant Attorney General

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