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IN THE SUPREME COURT OF FLORIDA

AUG 18 1997

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By

Chief Deputy Clerk

Paul T. Newell,
Petitioner,

Case No. 91, 135
5th DCA Case No. 97-1023

v.

State of Florida,
Respondent.

PETITIONER'S JURISDICTIONAL BRIEF

On Review From The District
Court of Appeal 5th District
State of Florida

✓
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The decision of the 5th District Court of Appeal in this case expressly and directly conflicts with the decision of this court in *Justice v. State*, 674 So. 2nd 123 (Fla. 1996), *Burdick v. State*, 594 So. 2nd 267 (Fla. 1992), and conflicts directly with the district courts in *State v. Morales*, 678 So. 2nd 510 (Fla. 3rd DCA 1996), and *Hill v. State*, 652 So. 2nd 904 (Fla. 4th DCA 1995).

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TABLE OF CITATIONS

CASES

Burdick v. State, 594 So. 2nd 267 (Fla. 1992).

Farmer v. State, 670 So. 2nd 1143 (Fla. 1st DCA 1996).

Hill v. State, 652 So. 2nd 904 (Fla. 4th DCA 1995).

Justice v. State, 674 So. 2nd 123 (Fla. 1996).

State v. Morales, 678 So. 2nd 510 (Fla. 3rd DCA 1996).

STATEMENT OF THE CASE AND FACTS

The respondent, State of Florida, was the prevailing party in an appeal to the 5th District Court of Appeal of a denial of a motion for post conviction relief.

Prior to the filing of the motion, petitioner had been sentenced to a minimum mandatory sentence by the terms of the written sentencing order. However, no oral pronouncement of a minimum mandatory sentence had been made by the trial court.

The motion was considered by the trial court in April, 1997. The trial court's decision was that, "Although there are conflicts regarding this issue it is clear that this court must follow the 5th District", thereby denying the motion for post conviction relief, yet recognizing the conflict in rulings.

An appeal was filed to the 5th District Court of Appeal and on June 20, 1997, the District Court affirmed the ruling of the trial court. Rehearing was denied on July 16, 1997, and the petitioner's notice to invoke discretionary jurisdiction of this court was timely filed on July 28, 1997. Petitioner received a case number from the Florida Supreme Court on August 13, 1997 (Envelope of receipt attached to court's copy of brief, and files this jurisdictional brief containing said case number.

SUMMARY OF THE ARGUMENT

In this case, the District Court of Appeal affirmed on the basis of *Lowe v. State*, 605 So. 2nd 505 (Fla. 5th DCA 1992). Accord, *Moody v. State*, 22 Fla. L. Weekly D488 (Fla. 2nd DCA Feb. 19, 1997), rev. granted, Case No. 90,014 (Fla. May 2, 1997). Contra, *State v. Morales*, 678 So. 2nd 510 (Fla. 3rd DCA 1996); *Hill v. State*, 652 So. 2nd 904 (Fla. 4th DCA 1995). *Newell v. State*, 22 Fla. L. Weekly D1485 (Fla. 5th DCA 1997).

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Supreme Court or another district court of appeal on the same point of law. Art. V, § 3(b)(3), Fla. Const. (1980); Fla. R. App. P. 9.030(a)(2)(A)(iv).

ARGUMENT

Petitioner's rights in this case are based solely on the outcome of the case of *Moody v. State*, Case No. 90,014, which is pending in this court. This court has recognized the conflict and will resolve this issue. Petitioner solely requests that any rights granted to *Moody* or available to him be awarded to petitioner.

In petitioner's case, the trial judge did not make an oral pronouncement of a minimum mandatory sentence. However, the written sentencing order contained such a provision. Based upon the district court's holdings, the 1st, 2nd and 5th District would require the imposition of a minimum mandatory sentence, while the 3rd and 4th District would not.

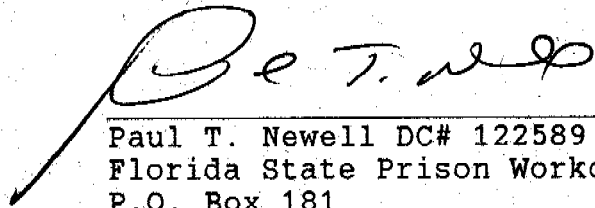
In ruling on the *Newell* case, the 5th District expressly and directly acknowledged the conflict. 22 Fla. L. Weekly D1485 (Fla. 5th DCA 1997).

CONCLUSION

Based upon the above, petitioner requests that the court take jurisdiction of his case, and resolve the issues of conflict in accordance with *Moody*.

CERTIFICATE OF SERVICE

I hereby certify that I mailed a copy of this Jurisdictional Brief, by regular U.S. Mail, to the Offices of Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 14th day of August, 1997.



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