IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,460

ERIC WEISS,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

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STATEMENT CERTIFYING THE SIZE AND STYLE OF TYPE

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INTRODUCTION

Respondent, **THE STATE OF FLORIDA**, was the prosecution in the trial court and Appellee in the District Court of Appeal of Florida, Third District. Petitioner, **ERIC WEISS**, was the defendant in the trial court and the Appellant in the District Court of Appeal. The parties shall be referred to as they stood in the trial court. The symbol "App." will refer to the opinion of the lower court contained in the appendix to Petitioner's brief on jurisdiction.

STATEMENT OF THE CASE AND FACTS

The Defendant, Eric Weiss, was convicted following a jury trial. (A. 1). The trial court imposed a ten-year upward departure sentence upon the defendant due to the particularly brutal home invasion robbery which among other things, the defendant was found guilty of terrorizing a crippled man and a three-year-old child. (A. 2).

The trial judge announced the reasons for departure when the sentence was orally pronounced on August 19, 1997. The adjudication and sentence were filed with the clerk on August 26,

1997. For unknown reasons, however, the written basis for the departure sentence, which closely tracked those reasons stated at the hearing, was not filed until August 29, 1997. (A. 3).

On appeal, the defendant argued that because this date was ten, rather than seven days after the oral pronouncement, the departure was invalid and should be set aside under Florida Statute 921.0016(1)(c)(1995). (A. 4).

The Third District Court of Appeal concluded that "the date of sentencing" under Section 921.0016 must, in context, be read to mean, not the oral pronouncement of sentence, but rather the filing of the written sentencing order. (A. 4) The Court noted that in this case, no appeal from the sentence could be taken until the written order was filed with the clerk on August 26, 1997. The Court, therefore, concluded that August 26, 1997 was the decisive date under the statute. The Third District Court held that because the written reasons for departure were filed only three days after that, there was no violation of section 921.0016(1)(c). (A. 5)

The defendant filed a petition to invoke the discretion of this Court, and has since filed his brief on jurisdiction. The State's jurisdictional brief now follows:

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER DISTRICT COURTS OF APPEAL?

SUMMARY OF THE ARGUMENT

The decision of the lower court does not conflict with the decision of this Court and other district courts of appeal. The "date of sentencing" under Florida Statute 921.0016 must, in context, be read to mean, not the oral pronouncement of sentence, but rather the filing of the written sentencing order. This conclusion, is in fact, dictated by the decision in State v. Lyles, 576 So. 2d 706 (Fla. 1991), one of the decisions relied upon by the defendant to establish conflict jurisdiction.

The cases relied upon by the defendant were not governed by the Criminal Appeal Reform Act of 1996. As such, those cases are not applicable to the case at hand. The Legislature enacted Section 924.051(3) Florida Statutes (Supp. 1996), which provides, "A judgment or sentence may be reversed on appeal only when an appellate court determines after a review of the complete record that prejudicial error occurred and was properly preserved in the trial court, or, if not properly preserved, would constitute fundamental error." In the instant case, the issue of the late filing of departure reasons was never raised in the trial court. The alleged error did not amount to prejudicial error since it

did not harmfully affect the judgment or sentence. The written reasons for departure, which were filed only three days after the written order was filed with the clerk, was a verbatim typed order containing the oral reasons which were pronounced by the trial judge.

ARGUMENT

THE LOWER COURT'S DECISION DOES NOT CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS.

The Defendant asserts that the lower court's decision conflicts with this Court's decisions in Ree v. State, 565 So. 2d 1329 (Fla. 1990), State v. Colbert, 660 So. 2d 701 (Fla. 1995) and State v. Lyles, 576 So. 2d 706 (Fla. 1991). However, none of these cases presents an express and direct conflict on which this Court can assert jurisdiction. Fla. R. App. P. 9.030(a)(2)(A)(iv).

Committee notes to Florida Rule of Appellate Procedure 9.030 reflect the fact that section 3(b)(3) of Article V of the Constitution of the State of Florida was amended in 1980 and that the Appellate Rules were subsequently revised to reflect the constitutional modifications in the Supreme Court's jurisdiction. The impetus for the modifications was a burgeoning caseload and the attendant need to make more efficient use of limited appellate resources. Consistent with this purpose, revised subdivision (a) of Florida Rule of Appellate Procedure 9.030

limits the Supreme Court's appellate, discretionary and original jurisdiction to cases that substantially affect the law of the State. The pertinent language of Section 3(b)(3) of Article V of the Constitution of the State of Florida, provides that this Court "may 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." The dictionary definitions of the term "express" include: "to represent in words"; to give expression to." "Expressly" is defined: "in an express manner." Webster's Third New International Dictionary, (1961 ed. unabr.). In the instant case, the decision of the Third District Court of Appeal does not expressly and directly conflict with a decision of another district court of appeal or of the Supreme Court on the same question of law.

Initially, the Third District Court of Appeal, concluded that "the date of sentencing" under Florida Statute 921.0016 must be read to mean, not the oral pronouncement of sentence, but rather the filing of the written sentencing order. (A. 4). The Court noted that that conclusion was dictated by the decision in State v. Lyles, which holds that written reasons filed the day after an oral pronouncement complied with the then-existing requirement that the reasons be filed contemporaneously with the sentence. This was in part so, because, this Court in State v.

Lyles, said the very reason for the rule, as stated in Ree v. State, supra, was that:

> If a sentence is entered and filed with the clerk on the day of sentencing, but the written reasons are delayed in being prepared and consequently are not filed on the same date, the decision to appeal may have to be made without benefit of those written reasons because the time for appeal begins to run from the date the sentencing judgment is filed, not the written reasons.

Lyles, 576 So. 2d at 708 (emphasis added).

The State would respectfully submit that this Court should decline to accept jurisdiction in this matter. See Reaves v. State, 485 So. 2d 829 (Fla. 1986) (conflict must be express and direct, i.e., it must appear within the four corners of the majority decision. There is no such conflict in the instant case.

In State v. Lyles, for instance, this Court ruled that the then-existing requirement of law had been satisfied "when express oral findings of fact and articulated reasons for the departure are made from the bench and then reduced to writing without substantive change on the same date...The ministerial act of filing the written reasons with the clerk on the next business day does not, in our view prejudice the defendant in any respect." Id. at 708-709. The decision in Lyles, therefore, holds that a nonprejudicial clerical snafu should not be the basis for reversal of a departure order. The Third District held that the decision in State v. Lyles, dictated the decision in the

instant case. Clearly, there is no conflict with the decision in State v. Lyles, or any of the other cases relied upon by the defendant, in support of his petition for discretionary review.

Furthermore, in the instant case, the Third District relied upon the Criminal Appeal Reform Act as the basis for the decision. The Third District Court of Appeal, in fact, noted that the case was governed by the Criminal Appeal Reform Act of 1996, section 924.051, Florida Statutes (Supp. 1996). (App. 5). As such, even if, arguendo, a technical error did occur, it may not be made the basis of reversal under the operative provisions of the Act. See Jordan v. State, ---So. 2d --,(Fla. 3d DCA Case no. 97-2002, opinion filed, September 16, 1998) [23 FLW D2130, D2132-33]. The Third District Court of Appeal properly concluded that as was the situation in dealing with a similar claim of error in Jordan v. State, the arguably late filing of departure reasons was not cognizable on appeal, because it was not raised below, and because, even if it were, the meaningless procedural hiccup involved could constitute no more than non-prejudicial, harmless error. The Third District thereafter, concluded that the Reform Act rendered the general harmless error statute, unequivocally applicable to alleged sentencing miscues. The Third District contended that the legislature in enacting the Reform Act expressly precluded the courts from setting aside an otherwise

appropriate sentence just because a piece of paper was filed immaterially late. (A. 6).

The cases relied upon by the defendant, were not governed by the Reform Act, as such there is no express and direct conflict. The Third District noted that the Legislature said in the Reform Act that a judgment or sentence cannot be reversed on appeal unless there has been a prejudicial error, that is, "an error in the trial court that harmfully affected the judgment or sentence." Section 924.051(1)(a)(3), Fla. Statute (Supp. 1996).

The Third District, properly receded from cases such as Pierre v. State, 708 So. 2d 1037 (Fla. 3d DCA 1998) as that case was not governed by the Reform Act. (A. 5). In Pierre, the Third District had relied upon earlier decisions such as State v. Colbert, 660 So. 2d 701 (Fla. 1995), in holding that the seven day period runs from the announcement of an upward departure at sentencing. The Third District's, recession from earlier decisions, does not establish direct and express conflict.

The defendant notes that the Third District noted in the instant case, that the passage of the Act was intended to overrule such cases such as Ree v. State, 565 So. 2d 1329 (Fla. 1990). (See Appellant's brief page 6). The defendant concludes, that, therefore, the opinion in Weiss is in conflict with this Court's opinion in Ree. The State does not agree with this contention. The intent of the Legislature in passing the Act was

the conservation of judicial resources. See, Davis v. State, 705 So. 2d 133 (Fla. 5th DCA 1998). (Legislature intended in enacting Criminal Appeal Reform Act, that terms and conditions of collateral review and procedural bars to collateral review would be strictly enforced). A finding of conflict in the instant case, would clearly contravene the very intention of the Act. In any regard, even if the enactment of the Act overruled cases decided before the Act, that in of itself does not establish express and direct conflict which is a prerequisite to Supreme Court review.

CONCLUSION

WHEREFORE, based on the preceding authorities and arguments, Respondent respectfully requests that the Court deny jurisdiction to review this cause.

Respectfully Submitted,

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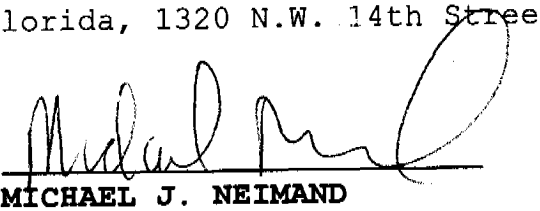
CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Appellee was mailed this 21 day of December, 1998, to **LISA WALSH**, Assistant Public Defender, Public Defender, Eleventh Judicial Circuit of Florida, 1320 N.W. 14th Street, Miami, Florida 33125.



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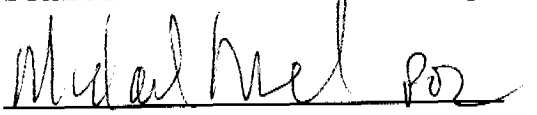

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