ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC00-933

DCA CASE NO. 99-47

CHARLES L. BRYANT,

Petitioner,

-vs-

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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INTRODUCTION

The Petitioner, CHARLES L. BRYANT, was the Defendant in the trial court and the Appellant in the Third District Court of Appeal. THE STATE OF FLORIDA, was the prosecution in the trial court and Appellee in the Third District Court of Appeal. The parties shall be referred to as Petitioner and Respondent in this brief. The symbol "App." followed by a letter, colon and page number refers to the appendix to this brief, containing a conformed copy of the slip opinion of the Third District Court of Appeal in the instant cause and this Court's case which determines the issue of conflict.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for the Respondent, the State of Florida, hereby certifies that 12 point Courier New is used in this brief.

STATEMENT OF THE CASE AND FACTS

The Third District court of Appeal *per curiam* affirmed Petitioner's judgment and sentence on the authority of State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Jordan v. State, 728 So. 2d 748 (Fla. 3d DCA 1998), *review granted*, 735 So. 2d 1285 (Fla.

1999); and Weiss v. State, 720 So. 2d 1113 (Fla. 3d DCA 1998), *review granted*, 729 So. 2d 396 (Fla. 1999). (App. A:1).

QUESTION PRESENTED

WHETHER THE THIRD DISTRICT COURT OF APPEAL'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS OR THE DECISIONS OF SISTER COURTS ON THE SAME QUESTION OF LAW?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal's opinion in this case is not in express and direct conflict with either the opinions of this Court or of the other District Courts of Appeal where the authorities upon which the opinion was based have been affirmed on review by this Court.

That being so, there is no express and direct conflict on this question of law. Therefore, on the authority of Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986) this Honorable Court should deny discretionary jurisdiction.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISIONS NOR THE DECISIONS OF SISTER COURTS ON THE SAME QUESTION OF LAW.

Discretionary jurisdiction of this Honorable Court may be exercised to review, among other matters, decisions of district courts of appeal which expressly and directly conflict with a decision of this Court or of another district court of appeal on the same question of law. Article V, Section 3(b)(3), Fla. Const.; Fla. R, App. P. 9.030(a) (2)(A)(iv). Decisions are considered to be in express and direct conflict when the conflict appears within the four corners of the majority decisions. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986). Neither the record itself nor the dissenting opinion may be used to establish jurisdiction. Id. Respondent respectfully requests this Honorable Court to decline to accept jurisdiction in this case, since Petitioner presents no legitimate basis for the invocation of this Court's discretionary jurisdiction.

Petitioner asserts conflict on grounds that the authorities upon which the Third District based its opinion are pending discretionary review in this Court, alleging that both decisions in Jordan and Weiss conflict with decisions of this court and other

district courts which have consistently reversed, remanded and ordered resentencing within the guidelines where a trial court fails to file a timely written order supporting an upward departure sentence. Recently, and subsequent to Petitioner's briefing on this issue, this Court affirmed both decisions in Jordan and Weiss in Maddox v. State, 25 Fla. L. Weekly S367, S373 (Fla. May 11, 2000), as follows:

> ...In our opinion, while there is a qualitative effect on the integrity of the sentencing process when the trial court fails to file any written reasons for imposing a departure sentence, this same concern is not present when the written reasons are filed late but within sufficient time for the defendant to file a motion to correct the sentence on this basis. *See Weiss*, 720 So. 2d at 1114 (finding that even if the trial court had filed the written reasons for departure three days late, the defendant had not been prejudiced thereby); *Jordan*, 728 So. 2d at 753 (finding the defendant had not been prejudiced when the written reasons for departure were filed twenty-two days late but the defendant was able to attack the court's reasons for imposing the departure sentence on appeal). We agree that when written reasons for imposing a departure sentence were filed late, this late filing does not constitute a fundamental sentencing error if the defendant was not hindered in his or her efforts to challenge the grounds for imposing the departure sentence on direct appeal. *See Weiss*, 720 So. 2d at 1115; *Jordan*, 728 So. 2d at 753.

> ...Accordingly, we approve the district courts' opinions on this issue in *Weiss*, *Johnson*, and *Jordan*.

Maddox v. State, 25 Fla. L. Weekly at S373. Therefore, where the decisions upon which the opinion of the Third District bases its authority have been affirmed, there exists no conflict with the decisions of this Court and the case at bar.

Petitioner further argues that discretionary review of the instant case is still warranted because the decisions in Weiss and Jordan, holding that the Criminal Reform Act precludes raising an unpreserved sentencing error, are in direct conflict with the decisions of Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998) and Bain v. State, 730 So. 2d 296 (Fla. 2d DCA 1999), holding that the Criminal Reform Act does not preclude raising an unpreserved sentencing error if the appellate court's jurisdiction to review has been properly invoked. This Court resolved that question in Maddox:

> We conclude that nothing in the Act or our prior jurisprudence prevents appellate courts from addressing certain unpreserved sentencing errors on direct appeal...., we approve of the district courts' holding in *Nelson*, *Bain*, *Jordan* and *Hyden* to the extent that they recognize that a **narrow class** of unpreserved sentencing errors can be raised on direct appeal as fundamental error.

Maddox v. State, 25 Fla.L.Weekly at S368 (Emphasis added). Continuing its analysis of the review of unpreserved errors which are not deemed fundamental, this Court opined that "only unpreserved sentencing errors that are both patent and serious should be corrected on direct appeal as fundamental error. *Accord Denson*, 711 So. 2d at 1226." Maddox v. State, 25 Fla. L. Weekly at S369. There appears to be no contradiction in these decisions where Weiss and Jordan held that failure to timely file written reasons supporting an upward departure sentence does not constitute fundamental error invoking appellate review, and Denson and Bain hold that unpreserved sentencing errors which are both patent and serious should be corrected on direct appeal as fundamental error. The difference lies in the factual determination of the severity of the unpreserved error, and hinges on the nature of the error, its qualitative effect on the sentencing process and its quantitative effect on the sentence.

Petitioner has failed to demonstrate that discretionary review of this Honorable Court may be invoked where no conflict appears within the four corners of the majority decisions. *See* Reaves v. State, 485 So. 2d 829 (Fla. 1986).

CONCLUSION

WHEREFORE, the State respectfully requests that the petition for discretionary review be denied as there is no express and direct conflict.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was mailed to **ROSA C. FIGAROLA**, Assistant Public Defender, OFFICE OF THE PUBLIC DEFENDER, Eleventh Judicial Circuit Court, 1320 NW 14th Street, Miami, Florida 33125 on this 2 day of June, 2000.

CONSUELO MAINGOT
Assistant Attorney General