

IN THE SUPREME COURT OF FLORIDA

MICHAEL DENLINGER,)
)
 Petitioner/Appellant,)
)
 v.) CASE NO.
) DCA CASE NO. 4D05-2475
 STATE OF FLORIDA,)
)
 Respondent/Appellee.)
 _____)

PETITIONER-S BRIEF ON DISCRETIONARY JURISDICTION

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PRELIMINARY STATEMENT

Petitioner, Michael P. Denlinger, was the Defendant and Respondent, State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida.

In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will denote the appendix.

STATEMENT OF THE CASE AND FACTS

Upon conviction based upon jury verdict, Petitioner was sentenced as a prison releasee reoffender. To prove release date from prison, the prosecution relied upon a computer print out. On motion to correct sentence, Petitioner maintained that the computer print out was improperly admitted into evidence because the state did not lay a proper predicate to establish that it fell within the business record or public record exceptions to the hearsay rule nor was the document properly authenticated. Absent the improperly admitted computer print out, the state did not establish that Petitioner was a prison releasee reoffender. The motion to correct was denied by the trial court.

On direct appeal to the Fourth District Court of Appeal, the sentence was *per curiam* affirmed on October 11, 2006 with citation to Yisrael v. State, 938 So.2d 546 (Fla. 4th DCA 2006). Denlinger v. State, 31 Fla. L. Weekly D2553 (Fla. 4th DCA 2006). (A-1). On November 8, 2006, Petitioner filed in the Fourth District Court of Appeal his notice to invoke discretionary review. This brief on jurisdiction follows.

SUMMARY OF ARGUMENT

This Court has constitutional authority to review the instant case because the Fourth District Court of Appeal affirmed Petitioner's sentence citing as authority a decision which is presently pending review in this Court based upon a certified conflict with an opinion from another district court of appeal.

ARGUMENT

THIS COURT HAS AUTHORITY TO REVIEW A DECISION OF A DISTRICT COURT OF APPEAL THAT AFFIRMS A SENTENCE BASED UPON A CASE THAT IS PENDING BEFORE THIS COURT ON CERTIFICATION OF CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL

This Court has jurisdiction to review a decision which affirms *per curiam* a judgement and sentence with citation to an opinion that is pending review in this Court. Art. V, ' 3(b)(4), Fla. Const.; International Paper Co. v. Florida Dept. of Revenue, 913 So. 2d 541 (Fla. 2005); Jollie v. State, 405 So.2d 418 (Fla.1981).

Here, the Fourth District Court of Appeal *per curiam* affirmed Petitioner=s sentence as a prison releasee reofficer with citation to Yisrael v. State, 938 So.2d 546 (Fla. 4th DCA 2006). (A 1). In Yisrael, the Fourth District held a letter from the Department of Corrections was admissible at sentencing to establish a defendant=s release date from prison as a public record pursuant to Section 90.803 (8) Florida Statute (2005) and certified conflict with Gray v. State, 910 So.2d 867 (Fla. 1st DCA 2005). Yisrael is pending review in this Court. See, Case No. SC06-2211.

Given that the *per curiam* affirmance of Petitioner=s sentence relies upon Yisrael and Yisrael is pending review in this Court based upon a certified conflict, this Court should exercise its discretion to review the decision at bar.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner requests that this Court exercise its discretion to accept review of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to MONIQUE

LITALIEN, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida, 33401-2299 by courier this ____ day of November 2006.

MARCY K. ALLEN
Appellate Attorney for Mr. Denlinger

CERTIFICATE OF FONT COMPLIANCE

Undersigned Counsel hereby certifies that the Instant Jurisdiction Brief is submitted with Times Roman 14- point font in compliance with *Fla. R. App. P. 9.210*.

MARCY K. ALLEN
Appellate Counsel

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Decision filed October 11, 20061

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I HEREBY CERTIFY that a copy hereof has been furnished to MONIQUE LITALIEN, Assistant Attorney General, 1515 North Flagler Drive, Ninth Floor, West Palm Beach, Florida, 33401-2299 by courier this ____ day of November 2006.

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