

IN THE SUPREME COURT OF FLORIDA

ERIC ACOSTA a/k/a RUIZ ACOSTA
a/k/a JOSE RODRIGUEZ,

Petitioner/Appellant,

vs.

CASE NO.
DCA CASE NO. 4D04-4307

STATE OF FLORIDA,

Respondent/Appellee.

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the Appellant in the Fourth District Court of Appeal. Respondent was the Prosecution and the Appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court. The following symbols will be used:

- “R” = Record on Appeal Documents
- “T” = Record on Appeal Transcripts
- “SR2”= Second Supplemental Record on Appeal (which includes complete sentencing hearing)
- “SR3”= Third Supplemental Record on Appeal (Re: 3.800(b)(2) Motion to Correct Sentencing Errors)
- “A” = Petitioner’s Appendix.

STATEMENT OF THE CASE AND FACTS

Petitioner, Eric Acosta a/k/a Ruiz Acosta a/k/a Jose Rodríguez, was charged by separate informations filed in the Fifteenth Judicial Circuit as follows: in Case No. 02 – 10201CFA02, with Count I, burglary of a dwelling, and Count II, grand theft, occurring on or between August 15, 2002 and August 19, 2002 (R 7-8); in Case No. 02 – 14603CFA02, with Count I, burglary of a dwelling, and Count II, grand theft, occurring on or about August 19, 2002 (R 185K-186); and in Case No. 02 – 14604CFA02, with Count I, burglary while armed (with a firearm and/or destructive device and/or explosive and/or dangerous weapon), and Count II, grand theft, occurring on or about August 19, 2002 (R 227-228). The state’s pretrial motion to consolidate the three informations (R 37-38), to which the defense objected (R 309-342, 405-451; T 1-32), was orally granted on July 11, 2003, after a further hearing (SR2 1-6).

Petitioner proceeded to a trial by jury and was found guilty as charged on all counts, except for Count I in Case No. 02-14604 CFA02 in which the verdict form read “burglary of a dwelling while armed with a dangerous weapon,” pursuant to agreement by the court and counsel for both parties (R 149-150; T 666-670, 782-783).

At sentencing, over defense objection, the court found Petitioner to be a prison releasee reoffender (PRR) (SR2 31), adjudicated him (R 159, 221, 270;

SR2 46-48) and sentenced him as follows: in Case No. 02-14604CFA02, to life in prison as a prison releasee reoffender on Count I, and five years in prison on Count II (R 271-273, 274); in Case No. 02-10201CFA02, to 15 years in prison as a PRR on Count I, and five years in prison on Count II (R 160-162, 163); and, in Case No. 02-14603CFA02, to 15 years in prison as a PRR on Count I, and five years in prison on Count II (R 222-224, 225), all terms to be served concurrently with credit for 635 days time served (SR2 45-48).

Petitioner timely appealed his judgment and sentences to the fourth district (R 164-165).

During the pendency of the appeal, undersigned appellate counsel filed a Florida Rule of Criminal Procedure 3.800(b)(2) Motion to Correct Sentencing Errors (SR3 1-26), which the trial court denied without a hearing (SR3 27-31).

As to his sentences, Petitioner contended on appeal that he was illegally sentenced as a prison releasee reoffender (PRR) on three grounds: (1) proof of his prison release date was based solely on hearsay, (2) the use of that hearsay violated his rights under the confrontation clause, and (3) his sentences violate his Sixth Amendment rights as explained in *Shepard v. United States*, 544 U.S. 13 (2005), *United States v. Booker*, 543 U.S. 220 (2005), and *Blakely v. Washington*, 542 U.S. 296 (2004) (A 1).

Petitioner's convictions and sentences were affirmed by the Fourth District Court of Appeal on May 23, 2007 in a per curiam written opinion (A 1-2). *Acosta v. State*, --- So. 2d ----, 2007 WL 1484499 (Fla. 4th DCA May 23, 2007). The fourth district affirmed Petitioner's PRR sentence, citing *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006)(*en banc*), *rev. pending*, *Yisrael v. State*, SC06-2211 (*jur. accepted*, Fla. May 9, 2007); *Gurley v. State*, 906 So. 2d 1264 (Fla. 4th DCA 2005), *rev. denied*, 915 So. 2d 1196 (Fla. 2005) (A 1-2).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction on May 30, 2007. This brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction to review the instant cause.

The Fourth District Court of Appeal affirmed Petitioner's sentence on the authority of a case in which review is presently pending before this Court, *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006)(*en banc*), *rev. pending*, *Yisrael v. State*, SC06-2211 (*jur. accepted*, Fla. May 9, 2007). Hence, Petitioner submits discretionary jurisdiction is provided pursuant to *Jollie v. State*, 405 So. 2d 418 (Fla. 1981). In the alternative, Petitioner requests that this Court stay this cause pending the resolution of *Yisrael* in this Court.

ARGUMENT

THIS COURT HAS DISCRETIONARY JURISDICTION AS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN ACOSTA V. STATE RELIED ON A DECISION IN WHICH REVIEW IS PRESENTLY PENDING BEFORE THIS HONORABLE COURT.

Petitioner respectfully submits that this Honorable Court has discretionary jurisdiction to review the instant cause.

In the instant decision, *Eric Acosta a/k/a Ruiz Acosta a/k/a Jose Rodríguez v. State*, --- So. 2d ----, 2007 WL 1484499 (Fla. 4th DCA May 23, 2007), the Fourth District Court of Appeal affirmed Petitioner's prison releasee reoffender (PRR) sentence on the authority of a case in which review is presently pending before this Honorable Court, *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006)(*en banc*), *rev. pending*, *Yisrael v. State*, SC06-2211 (*jur. accepted*, Fla. May 9, 2007).

The fourth district, sitting *en banc* in *Yisrael*, rejected Yisrael's argument that the state had failed to establish the necessary predicate for his HVFO sentence, which relied upon *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005) (holding that a prison release letter identical to the one at issue in *Yisrael* constituted inadmissible hearsay). *Yisrael v. State*, 938 So. 2d at 548-550. In doing so, the fourth district certified conflict with *Gray*. *Id.* at 550.

Review is presently pending before this Court in *Yisrael*. Thus, Petitioner submits that discretionary jurisdiction is established by reference to the cited case. *See Jollie v. State*, 405 So. 2d 418 (Fla. 1981). In *Jollie*, this Court recognized that the “randomness of the District Court’s processing” should not control a party’s right to Supreme Court review. *Jollie*, 405 So. 2d at 421. Hence, this Honorable Court has discretionary jurisdiction to accept review of the instant cause from the fourth district because the cited authority, *Yisrael*, is presently pending review before this Court.

In the alternative, Petitioner requests that this Court stay this cause pending the resolution of *Yisrael*.

This Court has discretionary jurisdiction pursuant to Article V, Section 3(b)(3) of the *Florida Constitution*. As this issue has a continuing statewide significance and there is conflict within the districts, this issue is appropriate to be resolved by this Honorable Court.

Therefore, this Court should exercise its discretionary review jurisdiction in order to afford Petitioner a resolution consistent with similarly-situated defendants such as Mr. Yisrael when this Court resolves the intradistrict conflict on this frequently recurring issue.

CONCLUSION

Whereas, Petitioner prays this Honorable Court will exercise its discretion, provided pursuant to *Jollie v. State*, to accept jurisdiction and review the instant decision of the fourth district court. In the alternative, Petitioner requests that this Honorable Court stay this cause pending the resolution of *Yisrael v. State*, SC06-2211.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner’s Brief on Jurisdiction has been furnished by courier to Don M. Rogers, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this ____ day of MAY, 2007.

Attorney for Eric Acosta a/k/a Ruiz Acosta
a/k/a Jose Rodríguez

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Petitioner’s Brief on Jurisdiction has been prepared with 14 point Times New Roman type.

Attorney for Eric Acosta a/k/a Ruiz Acosta
a/k/a Jose Rodríguez