

IN THE SUPREME COURT OF FLORIDA

RUDOLPH VITTORIO,

Petitioner/Appellant,

vs.

CASE NO. SC07-

L.T. CASE NO. 4D06-343

STATE OF FLORIDA,

Respondent/Appellee.

PETITIONER'S BRIEF ON DISCRETIONARY JURISDICTION

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ARGUMENT

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventh Judicial Circuit, in and for Broward 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 Petitioner's Appendix. Containing only a copy of the decision sought to be reviewed is referenced as "A."

STATEMENT OF THE CASE

Petitioner, Rudolph Vittorio, appealed his criminal convictions from Broward to the District Court of Appeal, Fourth District which affirmed with a written decision on October 31, 2007, saying:

We affirm appellant's convictions and sentence. See *Yisrael v. State*, 938 So.2d 546 (Fla. 4th DCA 2006), rev. granted, 956 So.2d 458 (Fla.2007). As we did in *Yisrael*, we certify conflict with *Gray v. State*, 910 So.2d 867 (Fla. 1st DCA 2005).

(A 1).

Petitioner timely filed his Notice to Invoke Discretionary Jurisdiction on November 7, 2007. This brief on jurisdiction follows.

SUMMARY OF THE ARGUMENT

This Court has discretionary jurisdiction to review the decision of the district court under Article V, section 3(b)(4) as one certified to be in direct conflict with a decision of another district court of appeal. The District Court certified conflict between the decision in petitioner's case and the First District's decision in *Gray v. State*, 910 So.2d 867 (Fla. 1st DCA 2005).

This Court also has jurisdiction under Article V, section 3(b)(3) because the District Court of Appeal, Fourth District 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). *Jollie v. State*, 405 So. 2d 418 (Fla. 1981).

ARGUMENT

THIS COURT HAS DISCRETIONARY JURISDICTION AS THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN VITTORIO V STATE CERTIFIED CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL AND RELIED ON A DECISION IN WHICH REVIEW IS PRESENTLY PENDING BEFORE THIS COURT.

This is yet another decision of the District Court of Appeal, Fourth District that certifies conflict of decisions with *Gray v. State*, 910 So.2d 867 (Fla. 1st DCA 2005). In the instant decision, *Vittorio v. State*, --- So.2d ----, 2007 WL 3170142 (Fla. 4th DCA October 31, 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 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). In *Yisrael*, the Fourth District, sitting *en banc*, rejected Yisrael's argument that the state had failed to establish the necessary predicate for his HVFO sentence, and certified conflict with *Gray v. State*, 910 So. 2d 867 (Fla. 1st DCA 2005) which held that a letter on Department Of Correction's stationary (not a computer printout) was not admissible as a business record but was hearsay. *Yisrael v. State*, 938 So. 2d at 548-550.

When the Fourth District certified conflict in petitioner's case as it did in *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006) (en banc), *rev. granted*, 956 So. 2d 458 (Fla. 2007), and cited the conflicting case from the First District, *Gray v. State*, the district court said all that was necessary to establish this Court's discretionary certified conflict jurisdiction under Article V, section 3(b)(3).

Discretionary jurisdiction is also evident by affirmance on a case which is pending review before this Court under certified conflict. 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. This 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.

As this issue has a continuing statewide significance and there is conflict within the districts, this issue is appropriate to be resolved by this 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 conflict between the districts on this frequently recurring issue.

CONCLUSION

Wherefore, this Court should exercise its discretion to review the decision of the district court which is certified to conflict with a decision of another district court of appeal and cites as authority, *Yisrael*, which is pending conflict review in this Court in *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 HEIDI BETTENDORF, Assistant Attorney General, 1515 N. Flagler Drive, 9th Floor, West Palm Beach, Florida 33401, this ___ day of November, 2007.

Attorney for Rudolph Vittorio

CERTIFICATE OF COMPLIANCE

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

Attorney for Rudolph Vittorio