IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-483
DCA CASE NO. 3D05-872

JAVIER D. VENTURA,

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

Petitioner, Javier D. Ventura, was the defendant in the trial court and the appellant in the Third District Court of Appeal. Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties shall be referred to as they stand in this Court.

STATEMENT OF THE CASE AND FACTS

Petitioner appealed from his convictions and sentences for two counts of robbery with a weapon. The pertinent facts as found by the district court are:

> Ventura was charged with three counts of armed robbery with a deadly weapon (a pellet rifle) of three different victims. At trial, Vladimiro Rojas testified that at about two a.m. on October 31, 2002, he was walking from a café toward his car at Collins Avenue and 8th Street with Silvina Burstein and her friend. At the corner, a car pulled up next to them. The car was a brown Ford, a Crown Victoria or a Grand Marquis. Two men got out with guns and demanded their property. One man was skinny; the other was fat. The skinny one had his head shaved, was wearing a white and black tank shirt, and was holding a gun that looked like a rifle. Rojas gave them his cellular phone and jacket. The two men took his friends' things and ran back to their car.
>
> When the car left, Rojas summoned police and reported what had happened. The police officers told him they had stopped the car he had described. An officer drove Rojas and his friends to where they had stopped the car, on the MacArthur Causeway. They brought out the suspects. Rojas identified Ventura as the person who pointed the gun at him, and he also identified the car. He also identified Ventura in the courtroom as the person who had pointed the gun at him.

Silvina Burstein corroborated Rojas's testimony. She reported that at about two a.m. on October 31, 2002, she was walking with Rojas and her friend when she was robbed. Two men came at her and demanded her property; one of them had a gun-he was tall and thin with short hair. She gave them her purse, with her cell phone and credit cards. They drove off in a big, old greyish silver car. Police arrived and subsequently told Burstein that a car had been stopped on the MacArthur Causeway. The police took the victims there, and she identified the car, and identified Ventura as one of her assailants. She also identified Ventura in the courtroom.

Detective Teppenberg identified a photograph of Rojas, with the property taken from him in the robbery and subsequently recovered from inside the car where Ventura was apprehended, a photograph of Burstein, with the property taken from her in the robbery and subsequently recovered, and a photograph of a BB rifle recovered by police during the investigation.

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The State rested following Detective Teppenberg's testimony, and the jury was removed from the courtroom. Defense counsel then moved for a mistrial on the ground that Detective Teppenberg had improperly told the jury that Ventura had refused to make a statement explaining the stolen property in the vehicle when he was entitled to exercise his right to remain silent, and such comment before the jury was improper and highly prejudicial.

The trial court commented that the detective's remarks had been improper, but indicated they did not warrant a mistrial. The court denied the motion.

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[T]he court granted a judgment of acquittal as to Count 2 of the Information, alleging a robbery from the third victim, who had not testified. Only Counts 1 and 3 were submitted to the jury. The jury found Ventura guilty of two counts of robbery with a weapon, as a lesser offense of armed robbery with a deadly weapon.

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The trial court sentenced Ventura to thirty years in state prison as a PRR. Ventura then moved, pursuant to Rule 3.800(b), to correct the

> sentence on the ground that the State had not submitted competent proof that he met the criteria for sentencing as a PRR sentence.
>
> The trial court denied the motion, holding that the documents in the record were under seal, and thus self-authenticating documents, and that they authenticated themselves as public records admissible under the hearsay exception for public records, under *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006). The trial court further held that the documents were public records admissible under the public records exception to the hearsay rule under *Yisrael*. The trial court found that Ventura's release date was sufficiently shown by these public records.

Ventura v. State, 973 So. 2d 634, 635-37 (Fla. 3d DCA 2008).

On January 20, 2008, the district court affirmed in a written opinion. 973 So. 2d 634. The opinion addresses two issues: whether the trial court erred in denying a motion for mistrial and in failing to give an appropriate curative instruction after the lead detective commented on Petitioner's right to remain silent; and whether the trial court erred in relying on hearsay to sentence Petitioner as a PRR.

In its opinion, the district court held in pertinent part:

> We fail to see how the detective's comment, twice repeated, could have been anything other than an intentional cheap shot at Ventura's constitutional rights. Yet, defense counsel's lackadaisical attitude would seem to indicate that this Court is more offended than defense counsel, who, on this record, never made a valid objection, but merely reserved one. There was no contemporaneous objection.
>
> "Error involving comment on silence must be evaluated under a harmless error analysis." *State v. Hoggins*, 718 So. 2d 761, 772 (Fla.1998). "The harmless error test ... places the burden on the state, as the beneficiary of

the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict ..." *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla.1986). We conclude that the detective's testimony was improper, but harmless beyond a reasonable doubt given the overwhelming evidence of guilt.

As to Ventura's argument that the trial court erred in relying on hearsay to sentence him as a PRR, no such objection was made by defense counsel during the sentencing hearing. Furthermore, Ventura has never alleged that the document relied upon by the court contains an error. Finally, had a proper, timely objection been made, we agree with *Yisrael v. State*, 938 So. 2d at 546, that the letter in evidence could be properly considered by the trial court under the public records exception to the hearsay rule, subsection 90.803(8), Florida Statutes (2005). subsection 90.803(8) provides that:

Public Records and Reports: Records, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth the activities of the office or agency, or matters observed pursuant to duty imposed by law as to matters which there was a duty to report, excluding in criminal cases matters observed by a police officer or other law enforcement personnel, unless the sources of information or other circumstances show their lack of trustworthiness. The criminal case exclusion shall not apply to an affidavit otherwise admissible under s. 316.1934 or s. 327.354.

As this Court stated in *Ward v. State*, 965 So. 2d 308 (Fla. 3d DCA 2007):

Under Florida law, the Department has a statutory duty to obtain and place in its permanent records information as complete as may be practicably available on every person who may become subject to parole ... An inmate's release date is the type of information falling within this statutory duty.

Id. at 309 (citations omitted).

Ventura, 973 So. 2d at 637-38. Petitioner filed a motion for rehearing, which

was denied on February 21, 2008. The mandate issued on March 10, 2008. Petitioner now seeks discretionary review in this Court.

SUMMARY OF THE ARGUMENT

There is no basis upon which discretionary review can be granted in this case. The Third District Court's opinion does not conflict with any case of this Court or of any other district court in Florida. Consequently, conflict jurisdiction does not exist for the exercise of this Court's discretionary jurisdiction to review the decision below. This Court should therefore deny Petitioner's petition to review the decision of the district court.

ARGUMENT

PETITIONER'S APPLICATION FOR DISCRETIONARY REVIEW MUST BE DENIED BECAUSE THE THIRD DISTRICT COURT OF APPEAL'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OR THIS COURT.

Respondent submits this Court does not have any jurisdiction to review the Third District Court's opinion, because, contrary to Petitioner's claim, the decision below is not in express or direct conflict with any decision from this Court or any other district court on the same question of law.

Petitioner first argues the district court's opinion is in express and direct conflict with the harmless error doctrine set forth in *State v. DiGuilio*, 491 So. 2d

1129 (Fla. 1986), "because it credits all the State's evidence in assessing whether the comment on silence was harmless." (Petitioner's Brief on Jurisdiction, p. 5). The district court's opinion does not conflict, directly or indirectly, with *DiGuilio*.

The district court's opinion properly applies the harmless error test and does not conflict with *DiGuilio*. The opinion cites *DiGuilio* and quotes that case for the appropriate harmless error standard, stating "[t]he harmless error test . . . places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict. . ." The court then concluded that the complained of error was improper, "but harmless beyond a reasonable doubt given the overwhelming evidence of guilt." *Ventura*, 973 So. 2d at 637. Based upon the lengthy recitation of facts set forth in the opinion, it is clear that the district court examined the entire record before concluding that the error was harmless beyond a reasonable doubt.

Petitioner bases his alleged conflict on his argument that "[the] District Court approached the harmless error analysis by crediting all the State's identification testimony, and giving no weight to the evidence that impaired the identification of the perpetrators of a 2 a.m. street robbery who were initially identified at a suggestive show-up on the McArthur causeway in the middle of the night by only two of the three robbery victims. The jury may have doubted these

identifications." (Petitioner's Brief on Jurisdiction, p. 7). Petitioner's argument is merely speculation as the district court's opinion does not include any analysis of the evidence or discussion of its harmless error analysis. The opinion only states the proper standard and concludes that that standard was met by the State's evidence in this case. There is no express and direct conflict between the four corners of the district court's opinion and *DiGuilio*. Petitioner's disagreement with the district court's conclusion and holding does not constitute express and direct conflict. *Reaves v. State*, 485 So. 2d 829, 830 (Fla. 1986).

Petitioner next argues the district court's opinion is in express and direct conflict with *Yisrael v. State*, 33 Fla. L. Weekly S131, 2008 WL 450398 (Fla. Feb. 21, 2008). Petitioner argues that in *Yisrael*, this court disapproved the reasoning of the Fourth District in *Yisrael v. State*, 938 So. 2d 546 (Fla. 4th DCA 2006). That disapproved Fourth District opinion "was the basis for the ruling below that 'the [release-date] letter in evidence could be properly considered by the trial court under the public records exception to the hearsay rule.'" (Petitioner's Brief on Jurisdiction, p. 9).

In *Yisrael*, this Court held that a DOC release date letter, standing alone, is inadmissible under both the business and public records exception to the hearsay rule because they are not records as set forth in the relevant statutory definitions.

This Court held that DOC "Crime and Time Reports" are admissible as public records if properly authenticated. This Court further found that a signed release date letter, written under seal, may be used to authenticate a DOC "Crime and Time Report," which would then render the entire report admissible as a public record. This Court disapproved the reasoning of the Fourth District, but approved the result because the release date letter at issue in that case was used to authenticate an attached "Crime and Time Report."

There is no express and direct conflict between the district court's opinion and *Yisrael* because the district court's opinion does not identify the documents introduced at sentencing. The district court stated generally that "the documents in the record were under seal, and thus self-authenticating documents." *Ventura*, 973 So. 2d at 637. If the documents used at trial included both a signed, written under seal release date letter and a DOC "Crime and Time Report," like in *Yisrael*, they were properly admitted. That information is not contained within the district court's opinion and Petitioner cannot go beyond the opinion and use the record to attempt to establish a conflict where one does not exist within the opinion.

The district court also rejected Petitioner's argument on the use of hearsay in sentencing based on the fact that the argument was not preserved in the trial court. Petitioner argues that the district court "failed to recognize that, as indicated in

Yisrael," a Fla. R. Crim. P. 3.800(b) motion preserves this issue for appellate review even in the absence of a contemporaneous objection at sentencing. (Petitioner's Brief on Jurisdiction, p. 9). This Court did not expressly find that a Rule 3.800(b) motion preserves the issue for appeal and noted, "[n]either party had addressed the propriety of the application of a rule 3.800(b)(2) claim. Therefore, we do not address this issue in the instant case." *Yisrael,* 2008 WL 450398 at *1, n. 3. Even if this Court had made such an express finding, the district court's opinion does not indicate precisely what issue was included in Petitioner's Rule 3.800(b) motion and whether the denial of that motion was then raised on appeal. The district court stated that Ventura filed a Rule 3.800(b) motion "on the ground that the State had not submitted competent proof that he met the criteria for sentencing as a PRR sentence." *Ventura,* 973 So. 2d at 637. In addressing the hearsay issue raised on appeal, the district court's opinion does not mention the Rule 3.800(b) motion. Petitioner cannot go beyond the district court's opinion and use the record to support a claim of direct and express conflict.

Further, in the decision below, the Third District Court of Appeal did not certify conflict with Petitioner's cited cases, or with any other case, and did not certify a question to this Court. Therefore, the Third District Court's opinion does not give rise to any express conflict and this petition to invoke discretionary review

must be denied.

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction was mailed to Roy A. Heimlich, Assistant Public Defender, 1320 NW 14th Street, Miami, FL 33125 on this ___ day of April, 2008.

ANGEL L. FLEMING
Assistant Attorney General

CERTIFICATE OF TYPEFACE COMPLIANCE

I HEREBY CERTIFY that the foregoing Response was written using 14 point Times New Roman in compliance with Fla. R. App. P. 9.210(a)(2).

_____

ANGEL L. FLEMING
Assistant Attorney General