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IN THE SUPREME COURT OF FLORIDA

DAVID HUNT DAVIS
Petitioner

vs.

Case No. SC18-1541
Lower Tribunal No(s).:
5D18-104; 482011CF013643000AOX

STATE OF FLORIDA
Respondent

MOTION FOR CLARIFICATION AND/OR REHEARING EN BANC

On November 26, 2018, this Court issued an order stating, “The original petition seeking belated discretionary review is hereby denied.” Pursuant to Rules 9.330(a) and 9.331, Fla.R.App.P., Petitioner respectfully moves this Court for clarification and/or rehearing or rehearing *en banc*.

Petitioner seeks clarification because it is unclear exactly what this Court is denying. Rule 9.030(a), Fla.R.App.P. allows that this Court has jurisdiction in three situations:

- (1) Appeal Jurisdiction
- (2) Discretionary Jurisdiction
- (3) Original Jurisdiction

This Court’s order states that Petitioner’s “‘*original petition*’ seeking belated ‘*discretionary review*’ is denied.” The Court’s wording implies that it believed Petitioner was proceeding under (2) and/or (3) above, either seeking “Original Jurisdiction” or “Discretionary Jurisdiction,” but neither of those options is correct. Petitioner is seeking review through (1) Appeal Jurisdiction.

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Petitioner's pleading was entitled *Petition for Belated Appeal and/or **Petition for Belated Discretionary Review***. The second part of the title is misleading but this Court, in its order of September 14, 2018 directed Petitioner "to file a proper *Petition for Belated Discretionary Review*," in response to Petitioner's *Motion to Accept Notice of Appeal as Timely Filed*.

That raises the question of just what did this Court deny in its November 26, 2018 order. Did the Court decide Petitioner's explanation as to his original *Notice of Appeal* getting hung up in the eFiling Portal was not of sufficient merit to allow him to proceed with his appeal and therefore the November 26th denial was this Court saying it would not grant him a belated appeal under 9.030(a)(1)(A)? Or did the Court accept Petitioner's reasons for filing his *Notice of Appeal* late as meritorious but this Court denied "jurisdiction" because it mistakenly thought Petitioner was seeking discretionary jurisdiction under 9.030(a)(2) and did not qualify because he did not have a written opinion from the district court? Or did this Court accept Petitioner's reasons for filing his *Notice of Appeal* late as meritorious and the Court understood from the contents of Petitioner's motion that he was proceeding under this Court's Appeal Jurisdiction under 9.030(a)(1)(A) but for some reason is denying Petitioner the opportunity to file his brief on the merits.

The decision Petitioner seeks the Court to review is the Fifth District Court of Appeal's affirmation of the ruling by Petitioner's trial court's that rule 3.800(a), Fla. R. Crim. P. cannot be used to correct errors in scoresheet calculations. This Court,

in *State v. Whitfield*, 487 So. 2d 1045 (Fla 1986), added the correction of errors in scoresheet calculations to rule 3.800(a) under authority of the Florida Constitution, which gives this Court sole authority to create and amend Florida's rules of court. Additionally, the Florida Constitution, in the Declaration of Rights, section 1, states "all men are equal before the law"

The Fifth District Court of Appeal, in affirming the decision of Petitioner's trial court, did one of two things: 1) it amended rule 3.800(a) in violation of the Florida Constitution's dictate that only the supreme court can do that; or 2) it was saying rule 3.800(a) is unchanged but it does not apply to Petitioner, which is a violation of the Florida Constitution's dictate that "all men are equal before the law" Whichever was the district court's intention, it results in a decision of a district court of appeal that implicitly "declares invalid a provision of the state constitution," and 9.030(a)(1)(A) states that in such situations, this Court "shall review" such a decision by appeal, which is what Petitioner is seeking to do. Because of this Court's decision in creating rule 9.030(a)(1)(A) to use the mandatory "shall," it creates for Petitioner a mandatory right of appeal as to the decision of the Fifth District Court of Appeal.

Undersigned counsel expresses a belief, based on a reasoned and studied professional judgment, that *en banc* consideration is necessary to maintain uniformity in this Court's decisions with its decision in *State v. Whitfield*, 487 So. 2d 1045 (Fla 1986) (Amendment of rule 3.800(a) to include correcting errors in scoresheet calculation.)

Undersigned counsel also expresses a belief, based on a reasoned and studied professional judgment, that *en banc* consideration is necessary because the Court's decision is of exceptional importance because if the Court's decision of November 26, 2018 was to deny Petitioner his appeal without briefing, allowing such to stand would set a chilling precedent that the district courts of Florida do not have to follow Florida's Constitution. Such would be a manifest violation of the constitutional rights of Florida's citizens to due process and equal treatment under the law and it would undermine the public's confidence in Florida's judicial system as to the ability of a defendant to have the courts abide by Florida's constitution.

Based on the above arguments, Appellant submits that the Court's decision of November 26, 2018 should be considered by the Court *en banc*, and either reheard or clarified.

Respectfully submitted,



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CERTIFICATES OF FONT AND SERVICE

I HEREBY CERTIFY that the font the foregoing is reproduced in 14 point proportionally spaced Times New Roman and that on this 3rd day of December, 2018, I electronically filed the forgoing with the Clerk of the Supreme Court of Florida, using the e-Filing Portal; served the foregoing on Rebecca McGuigan, AAG, the Office of the Attorney General, Criminal Appeals, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, FL 32118, by email to rebecca.mcguigan@myfloridalegal.com; and served the foregoing on the State Attorney's Office for Orange County, by email to Division27@sao9.org.



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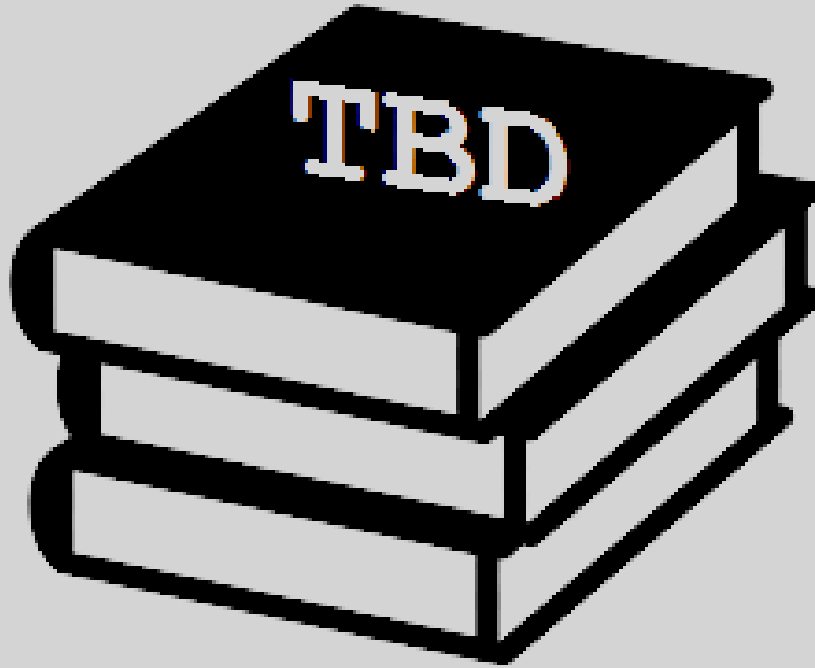
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