FILED
SID J. WHITE
DEC 14 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FREDERICK RUSSELL,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent,

CASE NO: 66209
Appeal No. 84-556

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

FREDERICK RUSSELL will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The Record on Appeal will be referred to by the letter "R" followed by the appropriate page number.

ARGUMENT

ISSUE

WHETHER THE DECISION IN RUSSELL v. STATE, Case No. 84-556 (Fla. 2d DCA, November 9, 1984) IS IN CONFLICT WITH THE FIRST AND FOURTH DISTRICT COURT OF APPEALS?

(As Stated by the Petitioner).

The Respondent has restated the Petitioner's issue, however, will take exception to the wording of that issue since it implies that the granting of discretionary jurisdiction by this Honorable Court is automatic if a conflict is shown. While it is true that conflict between district courts is adequate to invoke the jurisdiction of this Honorable Court, the acceptance by this Court of jurisdiction need not become automatic upon the showing of conflict.

The concept of "conflict jurisdiction" is historically rooted in the high court's concern for future precedent rather than the merits of the cases that conflict themselves. That is to say, the high court has attempted to resolve conflicts only when they are significant, can in no way be harmonized, and when failure to do so would leave the various district courts of appeal in confusion as to which to follow in the future.

Sub judice, the only two cases involved are Russell v. State, Case No. 84-556 (Fla. 2DCA, November 9, 1984) and Young v. State, 455 So.2d 551 (Fla. 1st DCA 1984), as the footnote at page 553 of Young, supra clearly indicates the Sentencing Guidelines have been changed so that the question presented by the Petitioner has become moot with the exception of the two cases that the Petitioner attempts to now contrast.

As to the merits of the Petitioner's argument, the Respondent will argue that the unanimous court holding in Russell as well as the dissent in Young must be considered correct. Could the framers of the guidelines really have contemplated that the penalties for four prior felony convictions should be the same as one hundred?

This Honorable Court has always attempted when considering whether to accept jurisdiction, to harmonize the cases, if at all possible, rather than searching for discord.

Sub judice, if one reads the Second District Court of Appeal opinion in Russell, and the cases upon which it relies, a harmony not requiring high court intervention can be found. The Court, in that opinion, referred to the previous decision in Townsend v. State, 9 FLW 2357 (Fla. 2DCA, opinion filed November 9, 1984) and the cases relied upon therein. Townsend collects the law on many points up to

that time and specifically refers to Hendrix v. State, 9 FLW 1697 (Fla. 5DCA, opinion filed August 2, 1984) and Harvey v. State, 450 So.2d 926 (Fla. 4DCA 1984). The Petitioner herein refers to Harvey in support of his case but clearly the opinion of the Second District Court of Appeal in Russell shows that they are not only aware of that decision but distinguish it when they add the word "compare".

Sub judice, even if the Second District Court of Appeal had followed the reasoning in Young v. State, supra, they would still have gone outside of the guidelines following the doctrine in Hendrix, supra which allows a history of prior crimes to be considered.

This means, then, that even if this Honorable Court were to accept jurisdiction, not for concern regarding precedent in the future but because of concern for the defendant in the case of Russell, the Second District Court of Appeal would still arrive at the same decision since even if all of the prior crimes are considered tabulated under the four-plus category, they can still be considered as criminal histories pursuant to Hendrix to justify going outside of the guidelines.

If the Court on the other hand is concerned about precedent for the future, the Respondent will restate its

argument from above to wit: There is only one case that could even conceivably benefit from this Honorable court accepting jurisdiction (Russell) and the question has become moot because of the change in the Sentencing Guidelines tabulation sheet.

CONCLUSION

This Honorable Court need not and should not accept jurisdiction as the Petitioner suggests.

Respectfully submitted,

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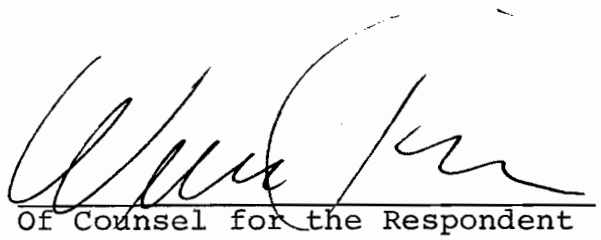
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Regular Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100 - 144th Avenue North, Clearwater, Florida 33520 on this 12th day of December, 1984.



Of Counsel for the Respondent