IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE FIELDS,

Respondent.

CASE NO. 69,211

RESPONDENT'S ANSWER BRIEF ON JURISDICTION

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TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the appellant in the District Court of Appeal, Fourth District. Petitioner was the prosecution and appellee in the lower courts.

"R" will denote record on appeal filed in Fourth District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following clarifications and additions.

During the hearing, on Respondent's Motion to Dismiss, Respondent's trial counsel stated:

> My position is, Judge, Mr. Fields has testified under oath, he lived at the same address. He has not moved or changed his name or done anything to evade service in this case. Finally, Judge, some three and a half years after the offense occurred, Mr. Fields was served with a capias when he came to court on a traffic summons. I think there is no justifiable reason. The statute of limitations had run early in 1985. For that reason, we are asking the Court to discharge at this time.
>
> R4.

At bar, the trial judge made the following findings in his written order granting Respondent's Motion to Dismiss:

> 1. That the alleged offense occurred on January 4, 1982.
>
> 2. That the charge of Aggravated Assault was filed on January 20, 1982 an a capias for the defendant's arrest was issued on that date.
>
> 3. That the defendant has resided at the same address for the past five years.
>
> 4. That the state knew of the defendant's address.
>
> 5. That no attempt was made to execute the capias on the defendant until August 7, 1985.
>
> 6. That over 3 1/2 years elapsed from the time of the offense until the defendant was served with a capias.

7. That the prosecution of this case was not commenced within the Statute of Limitations because of the unreasonable delay in executing the capias.

R 23.

SUMMARY OF THE ARGUMENT

The decision of the Fourth District Court of Appeal herein does expressly and directly conflict with any of the opinions cited by Petitioner in its Jurisdictional Brief.

In Sturdivan v. State, 419 So.2d 300 (Fla. 1982) the crime giving rise to the appeal occurred at a time when a previous statute of limitations was in effect, section 932.465 F.S. (1971). The crime giving rise to the appeal at bar occurred after the effective date of section 775.15 which includes a definition of the term "commencement" under that statute, section 775.15(15). Hence Petitioner's petition for review should be denied.

ARGUMENT

POINT INVOLVED

PETITIONER HAS NOT PROPERLY INVOKED THE JURISDICTION OF THIS COURT SINCE THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH DECISIONS OF THIS COURT OR OTHER DISTRICT COURTS OF APPEAL

Under Article V, Section 3(b)(3), Fla. Const. and Fla.R.App.P. 9.030(a)(2)(A)(iv), discretionary jurisdiction to review decisions of district courts of appeal which expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. As identified by this court, there are two principle situations which justify the invocation of conflict jurisdiction: (1) the decision announces a rule of law that conflicts with a rule previously announced by the supreme court or by another district court of appeal; (2) the decision applies a rule of law to produce a different result in a case involving controlling facts substantially similar to those in a prior case decided by the supreme court of another district court. Mancini v. State, 312 So.2d 732 (Fla. 1975); Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960).

The test of jurisdiction under this provision is not whether the supreme court necessarily would have arrived at a conclusion different from that reached by the district court, but whether the district court decision on its face so collides with a prior decision of the supreme court or of another district court on the

same point of law as to created an inconsistency or conflict among precedents. Kincaid v. World Insurance Co., 157 So.2d 517 (Fla. 1963). The conflict must be of such magnitude that if both decision were rendered by the same court, the later decision would have the effect of overruling the earlier decision. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

Section 775.15(2), Florida Statutes (1983) provides that any non-first degree felony should be commenced within three years after it is committed. Section 775.15(5), Florida Statutes (1983) provides:

> (5) A prosecution is commenced when either an indictment or information is filed, provided the capias, summons, or other process issued on such indictment or information is executed without unreasonable delay. In determining what is reasonable, inability to locate the defendant after diligent search or the defendant's absence from the state shall be considered.
>
> (e.s.).

The holding at bar does not expressly and directly conflict with the decisions cited by Petitioner in its Brief on Jurisdiction. In Sturdivan v. State, 419 So.2d 300 (Fla. 1982), the defendant was charged with committing an offense in 1971. This Honorable Court held: "It is settled law in Florida that for the purposes of the Statute of Limitations, prosecution has commenced when a warrant has been issued and placed in the hands of the proper official for execution. Dobbs v. Lehman, 100 Fla. 799, 130 So.2d 36 (1930); Rosengarten v. State, 171 So.2d 591 (Fla. 2d

DCA 1965). Id. at 301. However the crime giving rise to that appeal occurred at a time when a previous statute of limitations, section 932.465, F.S. (1971) was in effect.

At bar, Judge Letts writing for the Fourth District noted that the Sturdivan case was inapplicable to this cause as follows:

> Yet it appears to us that the Sturdivan court did not purport to be interpreting section 775.15(5), and never alluded to it. Moreover, in the Sturdivan decision, the holding of the case did not address itself to the timeliness of the execution of the arrest warrant, but rather to the effect of a late filed indictment. Further, the court in Sturdivan relied on Rosengarten v. State, 171 So.2d 591 (Fla. 2d DCA 1965), as authority for its statement that prosecution is commenced when a warrant has been issued and placed in the hands of a proper official for execution. The court in Rosengarten, however, was interpreting section 932.05, Florida Statutes (1965), a predecessor statute to section 775.15 when it propounded the above-stated general rule. The predecessor statute , quite unlike the current statute in many respects, does not contain the language now expressed in section 775.15(5) regarding execution of a warrant without unreasonable delay. We therefore conclude that the rule enunciated in Sturdivan and Rosengarten is not applicable to the present case.

In State ex rel. Welch v. Parnham, 11 F.L.W. 854 (Fla. 1st DCA, April 9, 1986), the crime charged occurred on September 8, 1977. The First District held:

> In Sturdivan, however the crime giving rise to the appeal occurred at a time when a previous statute of limitations, section 932.465, Fla. Stat. (1971), was in effect. Section 932.465 did not include a definition of the term "commencement" and under that statute, the court held that prosecution could be commenced by the issuance of a warrant. However, due to the express and unambiguous definition of the

> term "commencement" in the current statute, the rationale of Sturdivan is not applicable to prosecutions for crimes committed after the effective date of section 775.15.

Therefore on the grounds cited, supra, the Rosengarten and Sturdivan decisions do not expressly and directly conflict with the decision at bar.

In State v. Chacon, 479 So.2d 229 (Fla. 3d DCA 1985) the defendant was charged with grand theft. The Third District held that the applicable statute of limitations for the crime charged was five not three years. The five year period had not expired when the defendant filed his pre-mature motion to dismiss in the lower tribunal. This was the holding of the case. Since a five year limitation applied to the crime charged, the court's reference to the "commencement" of the prosecution was not essential to the holding. It is clearly obiter dictum and can not be a basis to obtain conflict jurisdiction.

In Warren v. Wainwright, 483 So.2d 820 (Fla. 3d DCA 1986), the petitioner filed a writ of habeas corpus alleging the incompetency of his appellate counsel. The Third District cited Sturdivan for authority. However the court does not indicate when the crime occurred or which statute of limitations applied to the situation. Hence this decision does not expressly and directly conflict with the decision at bar.

In the instant case, Judge Letts did not acknowledge "conflict" with the Warren and Chacon decisions. Rather Judge Letts stated that these two decisions "appear to be in conflict

with that which we now hold. They also rely on the statement in Sturdivan however, the mere issuance and delivery for execution of an arrest warrant commences the prosecution. Neither of these cases cites or appears to consider the impact of section 775.-15(5), Florida Statutes, and that is why we come to the opposite result."

To properly invoke the "conflict certiorari" jurisdiction of this Honorable Court, the Petitioner must demonstrate that there is "express and direct conflict" between the decision challenged herein and the cases cited. This Petitioner has failed to do. Therefore because the opinion in the case at bar is not in direct and express conflict with the decisions cited by Petitioner, this Honorable Court should deny Petitioner's request for jurisdiction.

CONCLUSION

Based on the grounds stated herein, Respondent respectfully requests this Honorable Court to deny Petitioner's Petition for Jurisdiction.

Respectfully submitted,

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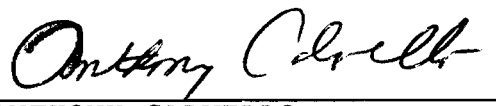
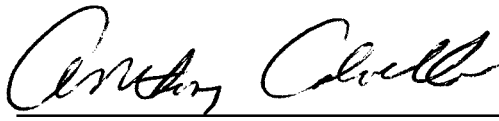


ANTHONY CALVELLO
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to AMY DIEM, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 15th day of September, 1986.



Of Counsel