

IN THE SUPREME COURT OF FLORIDA

ARNETTE LOFTON
Appellant/Respondent

Vs.

STATE OF FLORIDA
Appellee/Petitioner

FILED
1988
COURT
Case No. 87-1620

71,896

Respondent's Opposition To Brief
On Jurisdiction

Arnette Lofton #625261
Lake Correctional Institution
Post Office Box 99-588
Clermont, Florida 32711

STATEMENT OF THE CASE

The respondent accepts as being substantially correct the Statement Of The Case as set forth by Petitioner and filed in this cause.

STATEMENT OF THE ARGUMENT

The respondent would deny that this court has jurisdiction over the subject matter in the sense there is no direct or express conflict involved as to any decisions pending before this court for review.

ARGUMENT

While it is true that LOFTON V STATE 12 F.L.W. 2683 (Fla. 5th DCA Nov. 25, 1987) explicitly stated that the departure sentence was based upon the habitual offenders statute and such a sentence would have to be vacated and remanded to have the respondent sentenced under the guidelines. And it is also true that LOFTON specifically cited FRIERSON V STATE, 511 So. 2d. 1016 (Fla. 5th DCA, 1987) and KERSEY V STATE 12 F.L.W. 2305 (Fla. 5th DCA, Sept. 24, 1987). And while that opinion noted a question of viability and procedural application of the habitual offender statutes in conjunction with the intervening sentencing guidelines it by no means suggested that facts, evidence and procedural application of the habitual offender statute in respondent's case was identical to that in FRIERSON'S or KERSEY'S case, Nor that any corrective process afforded should be identical or appropriate. For example, the re-

spondent before the 5th DCA, espoused a viewpoint that the trial court merely invoked the habitual offender statues as a subterfuge for validating otherwise invalid reasons for departure. And that for this reason the sentence should be reversed and cause remanded for resentencing under the guidelines. Moreover, the decision of the 5th DCA, did not operate to foreclosed the sentencing court (on remand) from imposing of a sentence outside the guidelines so long as it noted valid reasons for departure. This court should take judicial notice that the trial court has already re-sentenced respondent on Feb. 9, 1988 to a sentence of 3 and one half years followed by 3 years probation.

Finally, where the petitioner is heard to suggest that there remains a viable conflict between respondent's case and that of Hall Vs State 511 So. 2d. 1038 (Fla. 1st DCA, 1987) and Hoefert V State 509 So. 2d. 1090. (Fla. 2nd DCA, 1987) it is the petitioner who has an initial burden of pointing out such conflict with unmistakable clarity and specificity. And where the petitioner has failed to carry such a burden, he is not entitled to certiarari review. Jollie V State 405 So.2d. 418 (Fla. 1981). Moreover, this failure on part of the petitioner deprives this court of jurisdiction under Article V Section 3 (b) (3) of the Florida Constitution.

Wherefore the respondent moves this honorable court to

decline jurisdiction for review of the case of Lofton Vs.
State 12 F.L.W. 2683 (Fla. 5th DCA, 1987).

Respectfully submitted
S Arnette Lofton
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Post Office Box 99-588
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CERTIFICATE OF SERVICE

That on the 22 day of February 1988 the undersigned surrendered a true and correct copy of the foregoing to prison officials at Lake Correctional officials for deposit in the U.S. Mails addressed to Mr. W. Brian Bayly, Assistant Attorney General of Florida, 125 N. Ridgewood Avenue Fourth Floor, Daytona Beach, Fla 32014.

S Arnette Lofton
Arnette Lofton-Respondent