IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,183

JUAN NOVATON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL OF FLORIDA,
THIRD DISTRICT

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JURISDICTIONAL BRIEF OF RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Statement of the Case and Facts as presented by Petitioner, with the exception of the following statement found on page 2 of Petitioner's brief:

> The court recognized that its decision is contrary to decisions of the Fourth and Second District Courts of Appeal.

The decision of the court below speaks for itself.

QUESTION PRESENTED

WHETHER THE DECISION BELOW DIRECTLY AND EXPRESSLY CONFLICTS WITH ARNOLD V. STATE OR KURTZ V. STATE?

SUMMARY OF ARGUMENT

In order for this court to assume jurisdiction based upon conflict, the conflict must be both express and direct. Here, neither case cited by Petitioner expressly conflicts with the holding below. As such, there is no basis for this court to assume jurisdiction. Even were there a basis for conflict jurisdiction, the decision below comports with prior precedent of this court, the the court below and the federal courts. As such review of this case would not be an efficient or necessary utilization of this court's resources. Petitioner's application for review should be denied.

ARGUMENT

NEITHER ARNOLD V. STATE NOR KURTZ V. STATE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE HOLDING BELOW.

Petioner asserts that the holding below conflicts with the decisions set forth in Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991), and Kurtz v. State, 564 So. 2d 519 (Fla. 2d DCA 1990). However, a comparison of those cases with the opinion below reveals that there is no conflict in a jurisdictional sense.

In order to support the jurisdiction of this court an alleged conflict must be both direct and express. A conflict which may merely be inferred is insufficient. Art. V, Section 3(b)(3), Fla. Const.; Department of Health and Rehabilitative Services v. National Adoption Counseling Service, Inc., 498 So. 2d 888 (Fla. 1986); Reaves v. State, 485 So. 2d 829 (Fla. 1986); Jenkins v. State, 385 So. 2d 1356 (Fla. 1980).

Here, the court below held that Petitioner waived his double jeopardy claims when he pled to both the convictions and specific sentences received. The court relied upon and extended its previous holding in Guardado v. State, 562 So. 2d 696 (Fla. 3d DCA 1990), rev. den., 576 So. 2d 287 (Fla. 1990). In Arnold, the Fourth District observed that as a general rule, a plea bargain does not result in an automatic waiver of jeopardy claims. Arnold, at 516. It went on to cite Guardado as an example of where

> there are circumstances which will constitute a waiver.

Id.[1] Although the court found that Arnold had not waived his claims, it did not hold that such claims may never be waived. As such no express conflict exists.

In Kurtz, the court did not discuss the issue of waiver. It is not apparent from the opinion whether that issue was raised. At best it can be inferred that the court rejected the waiver argument. However, a conflict by inference will not support the jurisdiction of this court.

Finally, even assuming that conflict existed, this court should decline to accept this case for review. The decision below comports with prior precedent of this court, the Third District and the federal courts. See, State v. Johnson, 483 So. 2d 420 (Fla. 1986); Guardado, supra; Jacobs v. State, 522 So. 2d 540 (Fla. 3d DCA 1988), rev. den., 531 So. 2d 1353 (Fla. 1988); Rodriguez v. State, 441 So. 2d 1129 (Fla. 3d DCA 1983), rev. den., 451 So. 2d 850 (Fla. 1984); Preston v. State, 411 So. 2d 297 (Fla. 3d DCA 1982), rev. den., 418 So. 2d 1280 (Fla. 1982); Smith v. State, 345 So. 2d 1080 (Fla. 3d DCA 1977), cert. den., 353 So. 2d 678 (Fla. 1977); United States v. Broce, 488 U.S. 563, 109 S. Ct. 757, 102 L. Ed. 2d 927 (1989); Ricketts v. Adamson, 483 U.S. 1, 107 S. Ct. 2680, 97 L. Ed. 2d 1 (1987); and Dermota v. United States, 895 F.2d 1324 (11th Cir. 1990), cert. den., ___ U.S. ___, 111 S. Ct. 107, 112 L. Ed. 2d 78 (1990). As

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[1] The court did not set forth what "circumstances" would, in its estimation, constitute a waiver. As such, any finding of conflict would have to based upon supposition as to the Fourth District's future rulings.

such, review of Defendant's case would not be the best use of this court's scarce resources.

CONCLUSION

For the foregoing reasons, Pettioner's application for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF RESPONDENT was furnished by mail to Louis Campbell, Assisitant Public Defender, 1351 Northwest 12th Street, Miami, Florida 33125 on this 8th day of March, 1992.

RANDALL SUTTON
Assistant Attorney General

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