

FILED

SID. J. WHITE

JUL 28 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

LARK O'SEAN DUPREE,

Respondent.

CASE NO. 84,106

1st DCA CASE NO. 92-2709

PETITIONER'S BRIEF ON JURISDICTION

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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
 <u>ISSUE</u> 	
IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN <u>RUSSELL V. STATE?</u>	
CONCLUSION	6
CERTIFICATE OF SERVICE	7

TABLE OF CITATIONS

CASES

PAGE

Dupree v. State,
19 Fla. L. Weekly D1404
(Fla. 1st DCA, June 29, 1994)

1,4

Reaves v. State,
485 So. 2d 829 (Fla. 1986)

1

Russell v. State,
572 So. 2d 940 (Fla. 5th DCA 1990)

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OTHER AUTHORITIES

§90.803(23)
§827.04(2), Fla. Stat. (1993)

1,3
4

Art. V, §3(b)(3), Fla. Const.

1

PRELIMINARY STATEMENT

This is a petition for discretionary review pursuant to article V, section 3(b)(3), Florida Constitution, based on a claim that the decision below expressly and directly conflicts with a decision of another district court.

The express and direct conflict must be based on the decisions themselves, not the opinions, and the only relevant facts are those within the four corners of the majority opinions. Reaves v. State, 485 So. 2d 829 (Fla. 1986)

STATEMENT OF THE CASE AND FACTS

The facts are drawn from the decision below, Dupree v. State, 19 Fla. L. Weekly DJ404 (Fla. 1st DCA, June 29, 1994). See Appendix A.

Dupree was convicted of first degree murder based in part on hearsay statements of a child who witnessed the alleged murder. The child witness testified at trial, as did adult witnesses to whom the hearsay statements were made. The hearsay was admitted pursuant to section 90.803(23), Florida Statutes (1993). See, appendix B. The district court reversed, holding that the statutory hearsay exception did not apply to non-victim child witnesses.

SUMMARY OF ARGUMENT

The decision below expressly and directly conflicts with Russell v. State, 572 So. 2d 940 (Fla. 5th DCA 1990) where the court held that the statutory hearsay exception is also applicable to children who witness the charged offense but are not themselves the target of that offense. See appendix C.

ARGUMENT

ISSUE

IS THERE EXPRESS AND DIRECT CONFLICT BETWEEN THE DECISION BELOW AND THE DECISION IN RUSSELL V. STATE?

The decision below that the hearsay exception does not apply to child witnesses who are not themselves the victim of the charged offense conflicts with the decision in Russell. Russell was convicted of capital sexual battery, aggravated battery, and child abuse of her two-year-old daughter. These convictions were based in part on hearsay statements of her four-year-old son which were introduced at trial by adult witnesses. Russell argued on appeal, as respondent does here, that section 90.803(23) "allows only [hearsay] statements by the actual physical victim of the abuse and does not apply to child witnesses of the abuse." Russell, 572 So. 2d at 941-942. The district court of appeal disagreed, holding and opining in relevant part:

The purpose of the statute is to protect victimized children "from emotional harm and trauma occasioned by judicial proceedings." See Chapter 85-53, Laws of Florida, setting forth the legislature's intent in adopting section 90.803(23). The legislature specifically recognized that "children are in need of special protection as victims or witnesses in the judicial system as a result of their age and vulnerability." [Emphasis added [by 5th DCA].] Id. Statements made by a child who witnessed sexual battery and aggravated child abuse and who otherwise meets the statutory criteria are not excepted from admissibility merely because this child was not the object of the attack. The

witnessing child is a victim of the abuse as surely as is the child who physically suffered the abuse. The fact that a defendant is not charged with a criminal act against the witness victim is not relevant. A victim is a victim regardless of any charging document. No logical distinction can be drawn between types of victims for purposes of the statute. Russell. 572 So. 2d at 942.

The district court here acknowledged that Russell "may be read for the proposition that the statute does not distinguish between child witnesses and child victims" but concluded that Russell "is best understood as holding that, where sexual abuse occurs in a child's presence, the 'witnessing child is a victim of the abuse as surely as is the child who physically suffered the abuse.'" Russell v. State, 572 So. 2d 940, 942 (Fla. 5th DCA 1990)." Dupree, fn5 at D1405. Despite this acknowledgment, the district court below declined to certify conflict as urged by the state.

This decision creates conflict in at least two major respects. First, the characterization of, and truncated quote from, Russell does not accurately reflect the basis for the Russell decision which the Fifth District Court itself set out in the extended quote above. Note particularly the emphasis placed by the Fifth District on the legislative intent to protect children "as victims or witnesses" and the unequivocal holding that the "witnessing child is a victim of the abuse as surely as is the child who physically suffered the abuse." The distinction which the district court here tries to make between its decision and the Russell decision is simply untenable. Second, the child

here who witnessed the murder of his infant sister was himself, at the least, a victim of child abuse pursuant to section 827.04(2), Florida Statutes (1993): "who, knowingly or by culpable negligence, inflicts ... mental injury to the child, shall be guilty of a misdemeanor of the first degree." As the Russell court held:

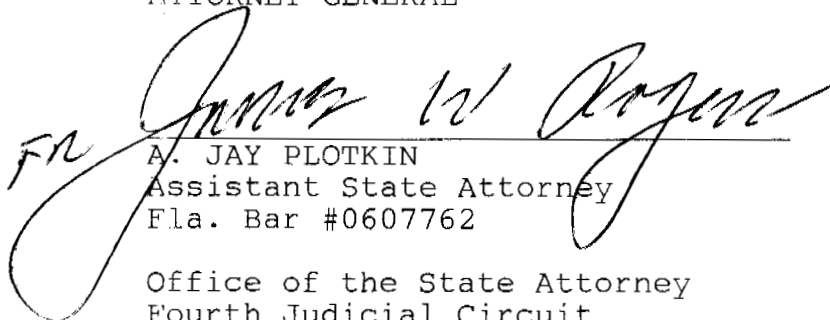
The fact that a defendant is not charged with a criminal act against the witness victim is not relevant. A victim is a victim regardless of any charging document. No logical distinction can be drawn between types of victims for purposes of the statute. Russell, 572 So. 2d at 942.

CONCLUSION

This Court should accept discretionary review based on express and direct conflict between the decision below and Russell.

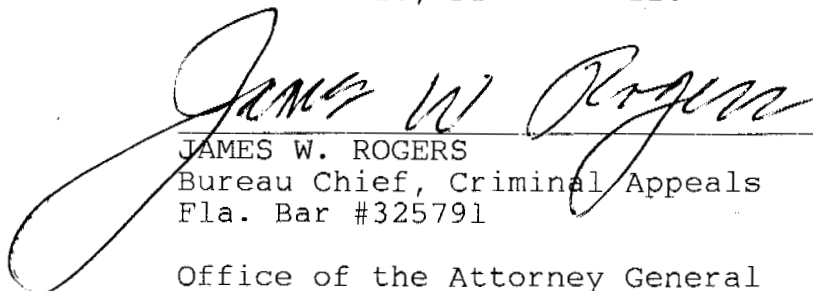
Respectfully submitted,

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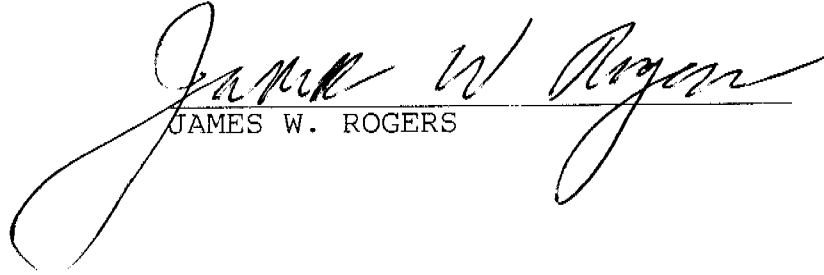
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David P. Gauldin, Assistant Public Defender, Leon County Courthouse, Tallahassee, Florida 32301, this 28th day of July, 1994.



JAMES W. ROGERS

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APPENDIX TO

PETITIONER'S BRIEF ON JURISDICTION

DOCUMENT

Opinion, <u>Dupree v. State</u> , 19 Fla. L. Weekly D1404 (Fla. 1st DCA, June 29, 1994)	Appendix A
§90.803(23), Fla. Stat. (1993)	Appendix B
Opinion, <u>Russell v. State</u> , 572 So. 2d 940 (Fla. 5th DCA 1990)	Appendix C