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JUN 21 1999

CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. :

Case No. 95,641

JOHN WAYNE SPELL, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF RESPONDENT ON JURISDICTION

JAMES MARION MOORMAN
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TENTH JUDICIAL CIRCUIT

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STATEMENT CERTIFYING TYPE FONT

This brief is reproduced in 12 point Courier New, a font that is not proportionately spaced.

SUMMARY OF THE ARGUMENT

The two cases which the Petitioner alleges contain conflict actually concerned different facts and different issues. Thus, the Petitioner has failed to show that express and direct conflict exists between the two cases involved.

ARGUMENT

ISSUE I

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO DETERMINE WHETHER THE OPINION OF THE DISTRICT COURT IN SPELL V. STATE, 24 FLA. L. WEEKLY 205B (FLA. 2D DCA JANUARY 15, 1999) EXPRESSLY AND DIRECTLY CONFLICTS WITH FITZHUGH V. STATE, 698 SO. 2D 571 (FLA. 1ST DCA 1997).

Contrary to the Petitioner's argument, no actual conflict exists between the decisions in Spell v. State, 24 Fla. L. Weekly D205 (Fla. 2d DCA Jan. 15, 1999), and Fitzhugh v. State, 698 So. 2d 571 (Fla. 1st DCA 1997), because the facts of the two cases were different.

Both cases involved the issue of whether forty points for victim injury were improperly included on a scoresheet in light of the decision in Karchesky v. State, 591 So. 2d 930 (Fla. 1992). The defendant in Fitzhugh objected after revocation of probation to the inclusion of the forty points on the scoresheet used at his original sentencing. The court in Fitzhugh held that "an appeal from resentencing following violation of probation is not the proper time to assert an error in the original scoresheet." Fitzhugh, 698 So. 2d at 573 (emphasis added).

In Spell, the defendant was objecting to the forty points included on a new scoresheet prepared for sentencing in 1997 upon revocation of community control. Even in his dissent, Judge Altenbernd stated, "I agree that [the appellant] can raise this

issue for the first time at the 1997 sentencing hearing because the relevant scoresheet is new" Judge Altenbernd also stated, "I doubt that a meaningful inter-district conflict exists in this record."

Thus, because the two cases concern different facts and different issues, the Respondent respectfully suggests that no express and direct conflict exists between the cases and that this Court decline to accept jurisdiction.

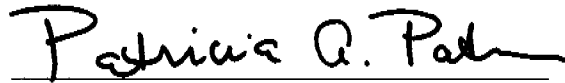
CONCLUSION

This Court should decline to accept jurisdiction on the basis that no express and direct conflict exists.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Ann Pfeiffer Howe, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4739, on this 18th day of June, 1999.

Respectfully submitted,



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