

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
DEBBIE CAUSSEAU

MAR 10 2000

CLERK, SUPREME COURT
BY R.T.

TAURUS HARVEY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 00-513

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

JURISDICTIONAL BRIEF OF RESPONDENT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538

RONALD NAPOLITANO
Assistant Attorney General
Florida Bar No. 175130
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE NO.</u>
STATEMENT OF THE CASE AND FACTS	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	2
ISSUE I.	2
WHETHER THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OR THE SUPREME COURT ON THE SAME ISSUE OF LAW, GIVING THE FLORIDA SUPREME COURT DISCRETIONARY JURISDICTION TO REVIEW THE CASE PURSUANT TO FLA. R. APP. PRO. 9.030(a)(2)(A)(iv) (1999)	
ISSUE II	3
WHETHER THE DISTRICT COURT'S OPINION EXPRESSLY DECLARES A STATE STATUTE TO BE VALID, GIVING THE FLORIDA SUPREME COURT DISCRETIONARY JURISDICTION PURSUANT TO FLA. R. APP. PRO. 3.030(a)(2)(A)(i) (1999)	
CONCLUSION	5
CERTIFICATE OF SERVICE	5

STATEMENT REGARDING TYPE

The size and style of type used in this brief is 12-point Courier New, a font that is not proportionately spaced.

TABLE OF CITATIONS

PAGE NO.

Grant v. State,
745 so. 2d 519 (Fla. 1999) 1,3,4

Harrison v. Hvster,
15 so. 2d 1279 (Fla. 1987) 3

Jollie v. State,
405 so. 2d 418 (Fla. 1981) 2,3

State v. Cotton, 728 So. 2d 251 (Fla. 1998),
review granted, 737 S0.2d 551 (Fla. 1999) 1,2,4

OTHER AUTHORITIES

Fla. R. App. Pro. 9.030(a)(2)(A)(i) (1999) 1

FLA. R. APP. PRO. 9.030(a)(2)(A)(iv) (1999) 1,3

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts as set forth by the petitioner with the following additions:

At the sentencing hearing on July 2, 1999, after having considered the victim's desire that the mandatory prison release reoffender sentence not be imposed (R 87-88), the court decided to impose the mandatory sentence (R 92-93).

S - Y O F T H E A R G U M E N T

Issue I: Respondent acknowledges that this Court has discretionary jurisdiction to review the decision of the Second District Court of Appeals in the instant case based upon the fact that the district court's per curiam opinion cites as controlling authority that court's decision in State v. Cotton, 728 So.2d 251 (Fla. 1998), review granted, 737 So.2d 551 (Fla. 1999). FLA. R. APP. PRO. 9.030(a)(2)(A)(iv) (1999) for which review has been granted.

Issue II: Respondent submits that this Court does not presently have jurisdiction in the instant case based upon the fact that the Second District Court of Appeal's per curiam opinion cites as controlling authority the case of Grant v. State, 745 So.2d 519 (Fla. 1999), and will not have jurisdiction unless or until it accepts jurisdiction in the case cited as authority in the Second District's per curiam opinion. Respondent acknowledges that this Court will have discretionary jurisdiction to review the decision of the Second District Court of Appeal in the instant case pursuant to Fla. R. App. Pro. 9.030(a)(2)(A)(i) (1999) be-

cause the decision expressly declares valid a state statute.

ARGUMENT

ISSUE I

WHETHER THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OR THE SUPREME COURT ON THE SAME ISSUE OF LAW, GIVING THE FLORIDA SUPREME COURT DISCRETIONARY JURISDICTION TO REVIEW THE CASE PURSUANT TO FLA. R. APP. PRO. 9.030(a) (2) (A) (iv) (1999)

Respondent acknowledges that this Court has discretionary jurisdiction to review the instant case based upon the fact that the Second District's per curiam affirmed opinion cites as authority "State v. Cotton, 728 So.2d 251 (Fla. 1998)¹, review granted, 737 S0.2d 551 (Fla. 1999)." (Appendix). Jollie v. State, 405 So. 2d 418, 420 (Fla. 1981) ("We thus conclude that a district court of appeals' per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction.").

¹ Oral arguments were heard on November 3, 1999.

ISSUE II

WHETHER THE DISTRICT COURT'S OPINION EXPRESSLY DECLARES A STATE STATUTE TO BE VALID, GIVING THE FLORIDA SUPREME COURT DISCRETIONARY JURISDICTION PURSUANT TO FLA. R. APP. PRO. 3.030(a)(2)(A)(i) (1999)

Respondent submits that this Court does not currently have discretionary jurisdiction to review this case based upon the fact that the per curiam opinion rendered by the Second District Court of Appeals cites the case of Grant v. State, 745 So.2d 519 (Fla. d. DCA 1999), rev. pending No. 99-164 (Fla. 2000) is a per curiam citation opinion which states:

PER CURIAM

Affirmed. See Grant v. State, 745 So.2d 519 (Fla. 2d DCA 1999).

Petitioner relies upon the reasoning in Jollie v. State, 405 So.2d. 418 (Fla. 1981) which states:

We thus conclude that a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this court to exercise its jurisdiction.

In Harrison v. Hyster, 515 So.2d. 1279 (Fla. 1987), this Court accepted jurisdiction because another case cited as authority in a per curiam opinion, herein after referred to as the "Small case" cited as, had a petition for review pending before the Court. This case reasoned:

..[w]e should not have accepted jurisdiction in this case until it was determined to accept ju-

risdiction in *Small*. *Jollies's* reference to "controlling authority...that is . . .pending review" refers to a case in which the petition for jurisdictional review has been granted and the case is pending for disposition on the merits. Since *Small* never reached that status, our accepting jurisdiction in this case was improvidently issued, and we deny the petition for review.

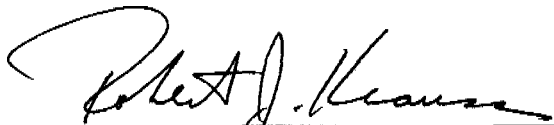
Respondent submits that this Court should not accept jurisdiction in the instant case until it has determined whether it will accept jurisdiction in Grant, *supra*. However, as stated earlier, this Court has discretionary jurisdiction based upon the district's court's citation per curiam opinion referring to Cotton, *supra*, which case has been accepted for review and for which oral argument has been heard regarding numerous constitutional challenges.

CONCLUSION


Respondent respectfully requests that this Court deny review in the instant case.

Respectfully submitted,

**ROBERT A. BUTTERWORTH
ATTORNEY GENERAL**



ROBERT J. KRAUSS
Senior Assistant Attorney General
Chief of Criminal Law, Tampa
Florida Bar No. 238538



RONALD NAPOLITANO
Assistant Attorney General
Florida Bar No. 175130
2002 N. Lois Ave. Suite 700
Tampa, Florida 33607-2366
(813) 873-4739

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Robert D. Rosen, Assistant Public Defender, P.O. Box 9000-Drawer PD, Bartow, Florida 33831, this 8th day of March, 2000.



COUNSEL FOR RESPONDENT