IN THE SUPREME COURT
OF THE STATE OF FLORIDA

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CASE NO. SC05-979
4th DCA CASE NO. 4D04-4825

STATE OF FLORIDA,
Petitioner.

VS.

SALVATORE BENNETT,
Respondent.

Respondent's Answer Brief

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INTRODUCTION

Respondent invokes the authority as set forth by the United States Supreme Court and the Fifth Circuit Court of Appeals, wherein, they have consistently ruled that Pro'se prisoners are allowed greater latitude in drafting their documents than are those standards as set out for that of professional counsel.

SUMMARY OF ARGUMENT

Respondent acknowledges conflict with McCall v. State, 862 So. 2d 807 (FLA 2nd DCA), However, in the McCall decision, conflict is certified with Richardson. McCall is not final, and no mandate has been issued.

The State, in their reliance on Kyle v. Kyle, 139 So. 2d 885, 887 (FLA 1962), to determine precedent, has blatently lied, misstating the mandate and citing the exact opposite of its published structure.

Richardson v. State, 884 So. 2d 950 (FLA 4th DCA 2003), is the earlier decision, therefore should be the reliant decision in McCall v. State, and this present cause.

Numerous cases have been decided in agreement with Richardson v. State, using voluminous case precedent. This makes McCall v. State the outlier in its' dissenting opinion.

ARGUMENT

POINT 1

In the present case, the 4th DCA, in directing the State to adress Richardson v. State, certified conflict with McCall v. State. The State is basing their Argument on the Assumption McCall will be, and is in fact the precedent case. This, however, is not factually based. In Rendering its opinion, the 2nd DCA certified conflict in the McCall case with Richardson v. State. McCall is not final and no mandate has been issued. Therefore, McCall v. State, is not, as of yet, the precedent case to be reliant upon.

POINT 2

In the State's Brief on Jurisdiction to this court, dated June 07, 2005, on page 6, paragraph 2, quotes Kyle v. Kyle, 139 So. 2d 885, 887 (FLA 1962), in an effort to bolster their opinion of McCall being the Ruling case. In doing so, the State has blatently Lied by misstating case law as set forth in the above cited case. I quote from Petitioner's brief, "... the later decision would have the effect of overruling the earlier decision." When in fact Kyle v. Kyle reads the exact opposite. Kyle v. Kyle, 139 So. 2d 886(3)(FLA 1962) states, "...the former would have effect of overruling latter." In this instance, Richardson v. State, 884 So. 2d 950(FLA 4th DCA 2003) is the former case, July 23, 2003. McCall v. State is dated December 3, 2003.

POINT 3

Numerous cases have been decided in accord with Richardson v. State, all have cited conflict with, and only with McCall v. State. Making McCall v. State the lone oposing opinion.

POINT 4

In defense of our position, and that of the 4th DCA. We reject the opinion of the 2nd DCA, that placing a person on probation serves as sentencing for purposes of the operation of § 775.084. Such a finding directly contradicts the plain language of the probation statute, see § 948.01(2) and Fla. R. Crim. P. 3.790(a), "A sentence and probation are distinct concepts. The court must stay and withold the imposition of sentence regardless of whether adjucation of guilt is witheld." In support, there is a plethora of precedent case law, see; State v. Summers, 642 So. 2d 742, 744 (Fla 1994), Villery v. Fla Parole and Probation Commission, 396 So. 2d 1107 (Fla 1980), Russell v. State, 676 So. 2d 1026 (Fla 3rd DCA 1996), Addison v. State, 452 So. 2d 955 (Fla 2nd DCA 1984), Loeb v. State, 387 So. 2d 433 (Fla 3rd 1980). Similarly, in deciding the same issue the 4th and 2nd DCA's have recently formed the same opinion of a sanction of probation not being a 'sentence' for the operation of § 775.084(5). see; Ford v. State, 814 So. 2d 1121 (Fla 4th DCA 2002), Edison v. State, 848 So. 2d 498 (Fla 2nd DCA 2003), May v. State, 713 So. 2d 1087 (Fla 2nd DCA 1998). Following with the opinions of these cases, and Landeverde v. State, 769 So. 2d 457, 462 (Fla 4th DCA 2000),

the Respondents' being placed on probation in his 1996 case does not qualify as a Sequential sentencing episode. Respondent was actually sentenced the 1st time on this case in 1998, in conjunction with, and at the same time as his sentence in his 1998 case.

CONCLUSION

Richardson v. State, 884 So. 2d 950 (Fla 4th DCA 2003), is the earlier decision, and rendered opinion. Following Kyle v. Kyle, 139 So. 2d 885, 887 (Fla 1962), affirms Richardson as the reliant case in the McCall v. State certified conflict.

Precedent case law contends the placing of an individual on probation is not a sentence for the purposes of the operation of §775.084(5). Thereby giving the Respondent only 1 prior sentencing episode, not the required 2 for the proper operation of the imposition of Habitual Offender under §775.084.

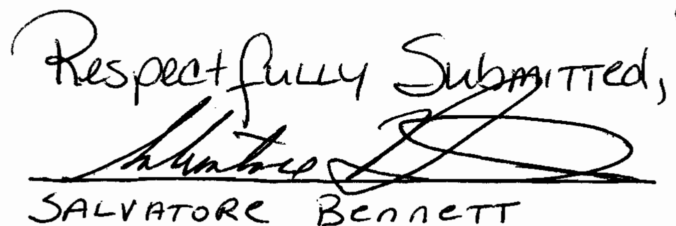
Respondent relies on the 4th DCA's holding in Wainer v. State, 798 So 2d 885, "Defendants 10 prior convictions in 10 separate cases, all entered on the same date, in the same sentencing proceeding, did not qualify as sequential prior convictions, for purposes of habitual felony offender qualification." As the Respondent has several prior charges, all sentences were imposed at one sentencing occurrance on March 25, 1998, making the "sequential sentencing" qualifier of §775.084(5) inoperable, and Habitual Offender status inapplicable, hence his 3.800(a) motion.

Finally, Respondent cites Perkins v. State, 576 So. 2d 1310, 1312 (1991), also §775.021, "The statute must be construed in the manner most favorable to the accused." Lending more creedence to the interpretation of caselaw cited herein in support of Richardson v. State, 884 So. 2d 950 (Fla 4th DCA 2003).

In rendering its' opinion in the present case, the 4th DCA was correct in its' reliance upon Richardson, it is the earlier of the McCall – Richardson conflict, and is found to be the most favorable to the accused.

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent prays that in this Honorable Court's discretionary review of the instant cause, The opinion rendered will be one reflecting Richardson v. State, 884 So. 2d 950 (Fla 4th DCA 2003), as the mandate case, which will affirm the opinion of the 4th DCA in the instant cause for remand and resentencing.

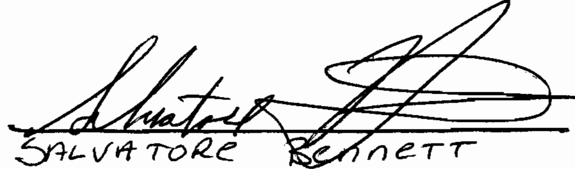
Respectfully Submitted,



SALVATORE BENNETT

CERTIFICATE OF SERVICE

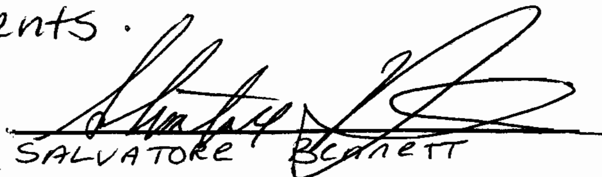
I Hereby Certify that a true and correct copy of the foregoing "Respondent's Answer Brief" has been furnished to: Myra J. Fried, Assistant Attorney General, 1515 North Flagler Drive, Ste 900, West Palm Beach, FL 33401, on this 23rd day of June 2005.



SALVATORE BENNETT

CERTIFICATE OF TYPE SIZE and Style

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been hand prepared, and invokes the authority of the United States Supreme Court in allowing pro-se prisoners greater latitude in the preperation of documents.



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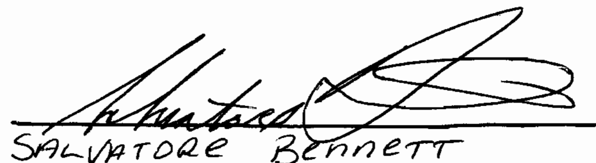
As a prisoner in a state corrections facility, I, the undersigned, am unable to comply with FLA Administrative Order 04-84 In the filing of an electronic submission of Documents.



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