IN THE FLORIDA SUPREME COURT

GEORGE W. BURCH,

Petitioner,

v. CASE NO. 66,498

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON JURISDICTION

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PETITIONER'S BRIEF ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner, GEORGE W. BURCH, was the defendant in the trial court, the appellant before the First District Court of Appeal, and will be referred to herein as petitioner. Respondent, the State of Florida, was the prosecution in the trial court, appellee on appeal, and will be referred to herein as respondent or the state.

All references will be to the appendix designated by the symbol "A" followed by the appropriate page number, in parentheses.

II STATEMENT OF THE CASE AND FACTS

The pertinent facts are taken from Burch v. State, __So.2d __ (Fla. 1st DCA 1985) (A 1-5).

Petitioner appealed his five year prison terms contending the trial court failed to articulate clear and convincing reasons for the departure from the presumptive guideline sentence of community control or twelve to thirty months' incarceration. (A-1). Among the reasons given for departure was that as stated by the trial judge:

> It appears to me by reviewing this Defendant's record, almost every option that is available under our penal system has been explored and sought to be used. And it's been unsuccessful. His probation history, he's had it revoked once.

(See A-2). On appeal, petitioner contended that his probation revocation history could not be utilized to justify the sentencing departure since his only revocation had occurred in 1978, (i.e., more than three years prior to his present conviction), when he was a juvenile. Relying upon Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), the District Court found this reason proper "since it is a factor which is not already built into the guidelines' calculations." (A-2).

Notice to invoke this Court's discretionary was timely filed on grounds of conflict with decisions from other District Courts of Appeal (A-6).

III ARGUMENT

ISSUE PRESENTED

THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIRST DISTRICT COURT OF APPEAL'S DECISION IN THIS CAUSE EXPRESSLY AND DIRECTLY CONFLICTS WITH HARVEY v. STATE, 450 So.2d 926 (FLA. 4th DCA 1984) AND SINCE UNDER JOLLIE v. STATE, 405 So.2d 418 (FLA. 1981), PRIMA FACIE EXPRESS CONFLICT EXISTS SINCE WEEMS v. STATE, 451 So.2d 1027 (FLA. 2d DCA 1984) IS CURRENTLY PENDING REVIEW IN THIS COURT, CASE NO. 65,593.

In Jollie v. State, 405 So.2d 418, 420 (Fla. 1981), this Court stated:

> [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.

This Court thus has jurisdiction of this cause since the District Court in its opinion below cited as controlling authority Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984), which is currently pending in this Court, Case No. 65,593.

Additionally, this Court should accept jurisdiction since the decision herein expressly and directly conflicts with Harvey v. State, 450 So.2d 926 (Fla. 4th DCA 1984). Rule 3.701(d)(5)(c), Florida Rules of Criminal Procedure provides:

> All prior juvenile dispositions which are the equivalent of convictions as defined in section d(2), occurring within three (3) years of the current conviction and which would have been criminal if committed by an adult shall be included in prior record.

The committee note to this rule notes that "each separate adjudication is discharged from consideration if three (3) years have passed between the date of disposition and the conviction for the instant offense." In Harvey, with respect to this rule as well as others, the Fourth District held that:

> [P]ast criminal conduct which cannot be considered in computing the scoresheet cannot be relied upon as justification for departure from the guidelines.

Harvey v. State, supra at 928. The District Court's rationale here directly conflicts with that expressed in Harvey. In Burch, the District Court stated:

> We find that the trial court's consideration of appellant's prior history of failed alternative treatment was proper since it is a factor which is not already built into the guidelines' calculation. See Weems v. State, 451 So.2d 1027 (Fla. 2d DCA 1984).

(A-2). Of course, this "factor" was not built into the guideline calculation since Rule 3.701(d)(5)(c) precluded its scoring.

Petitioner requests therefore that this Court grant review herein. Irrefragable conflict exists between Burch (and Weems) and Harvey. If guideline sentencing is to even approach any semblance of uniformity, as is one of its goals, the existing conflict on this issue cannot be left unresolved.

IV CONCLUSION

For the reasons stated, this Court should accept jurisdiction in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Petitioner's Brief on Jurisdiction has been furnished by hand delivery to Assistant Attorney General Gary L. Printy, The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to Petitioner, George W. Burch, #084025, L Dorm 108, Brevard Correctional Institution, Post Office Box 340, Sharpes, Florida 32959 on this 11th day of February, 1985.

GLENNA JOYCE REEVES